Brooklyn Journal of International Law

Volume 41 | Issue 1 Article 1

2015

Unilateral Non-Colonial Secession and the Criteria for Statehood in International Law

Glen Anderson

UNILATERAL NON-COLONIAL SECESSION AND THE CRITERIA FOR STATEHOOD IN INTERNATIONAL LAW

Dr. Glen Anderson[*]

* BA (Hons) BA/LLB (Hons) PhD (Macq), Lecturer in Law, University of Newcastle, Australia.

INTRODUCTION

An examination of history reveals that the world's geopolitical map is in a constant state of flux. Since ancient times, empires have come and gone and new political units have emerged, only in turn to be superseded by others. This evolutionary process is an ongoing one. Indicative of this is that in the post-World War II era many states have been created directly and indirectly by unilateral non-colonial ("UNC") secession,[1] including Bangladesh (Pakistan), Eritrea (Ethiopia),[2]

1. The definition of "secession" is discussed in Part I of the present article. For immediate purposes, however, it is apposite to note that secession can be classified according to whether it is consensual, unilateral, colonial, or non-colonial. Unilateral non-colonial ("UNC") secession refers to the unilateral withdrawal of non-colonial territory from part of an existing state to create a new state. On the definition of secession, see generally Glen Anderson, *Secession in International Law and Relations: What Are We Talking About?*, 35 LOY. L.A. INT'L & COMP. L. REV. 343–88 (2013).

2. Although Eritrea's independence from Ethiopia was the result of a referendum in April 1993, this was preceded by a prolonged period of armed resistance by the Eritrean People's Liberation Front ("EPLF") and can therefore be substantively classified as unilateral in nature. *See generally* Minasse

Bosnia-Herzegovina, Croatia, Macedonia,[3] Slovenia,[4] Montenegro, Serbia, Kosovo (Yugoslavia), and South Sudan (Sudan).[5] Unsuccessful UNC secessions, such as the Turkish Republic of Northern Cyprus (Republic of Cyprus), Chechnya (Russia), Abkhazia (Georgia),[6] South Ossetia (Georgia),[7] and Transnistria

---

Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479 (1994); JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 402–03 (2d ed. 2006); Seifudein A. Hussein, *The Conflict in Eritrea Reconsidered*, 18 J. MUSLIM MINORITY AFF. 159 (1998).

3. Bosnia-Herzegovina, Croatia, and Macedonia are generally considered to have emerged to independence after the Socialist Federative Republic of Yugoslavia ("SFRY") had become extinct (post-1992). Nonetheless, the SFRY's extinction was facilitated by previous UNC secessions. *See* STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER COMMISSION: A CONTEXTUAL STUDY OF PEACEMAKING IN THE POST COLD-WAR WORLD 32 (2000); Mark Weller, *The International Response to the Dissolution of The Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L. L. 569 (1992).

4. Macedonia is also generally considered to have emerged to independence after the SFRY was extinct (post-1992) thereby ensuring that no existing parent state remained to challenge Macedonian independence. Nonetheless, the SFRY's extinction was facilitated by previous UNC secessions. *See* PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 194–95 (2002).

5. Although South Sudan achieved independence as the result of a referendum, this was preceded by "the longest civil conflict on the continent [of Africa]." Khalid Medani, *Strife and Secession in Sudan*, 22 J. DEMOCRACY 135, 135 (2011). As observed by Silva, "[t]he former unitary state of Sudan had been plagued by bitter internecine conflict for more than half a century, and as a result, an estimated 2.5 million people lost their lives and over five million were internally displaced." Mario Silva, *After Partition: The Perils of South Sudan*, 3 U. BALT. J. INT'L L. 63, 65 (2015). This means that substantively, South Sudan's secession could be regarded as unilateral in nature.

6. Abkhazia *may* eventually become a successful UNC secession, given that at the time of writing, Russia, Nicaragua, Venezuela, and Nauru, have extended recognition on August 26, 2008, September 5, 2008, September 10, 2009, December 15, 2009, and December 15, 2009 respectively. *But see* Jelena Radoman, *Future Kosovo Status – Precedent or Universal Solution*, 3 W. BALKANS SECURITY OBSERVER 14, 14 (2006). For discussion of the Abkhazia conflict, see generally CONFLICT RESOLUTION IN GEORGIA: A SYNTHESIS ANALYSIS WITH A LEGAL PERSPECTIVE 1–58 (Antje Herrberg ed., 2006) [hereinafter CONFLICT RESOLUTION IN GEORGIA].

7. South Ossetia *may* eventually become a successful UNC secession, given that Russia, Nicaragua, Venezuela, and Nauru have extended recognition on August 26, 2008, September 5, 2008, September 10, 2009, and December 15, 2009, respectively. For discussion of the South Ossetia Conflict, see generally CONFLICT RESOLUTION IN GEORGIA, *supra* note 6, at 1–58; Angelika Nußberger, *The War Between Russia and Georgia – Consequences and*

(Moldova), to name but a few, also highlight the importance of this method of state creation.

While existing legal scholarship tends to focus on whether particular UNC secessions are legal or illegal in international law,[8] the present article adopts a course of inquiry less familiar. It instead analyzes the interactions between UNC secession and the criteria for statehood in international law. In this respect a three point thesis is developed. *First*, it is argued that the law of self-determination has resulted in a less strict application of the criteria for statehood based on effectiveness, particularly the effective government criterion. This means that a state created by UNC secession pursuant to the law of self-determination will not have its statehood called into question if it lacks an effective government. *Second*, it is argued that the declaratory approach to recognition is more reflective of international practice than the constitutive, meaning that a state created by UNC secession can exist in international law without the recognition of other states provided that the criteria for statehood are satisfied. *Third*, in light of the preceding two points, it is argued that there are many examples of UNC secessionist "entities" that have been denied statehood by the international community. This is explicable by the fact that compliance with peremptory norms is now an integral aspect of state creation. This means that a state created by UNC secession must not violate, *inter alia*, the peremptory norms of the right of peoples to self-determination and the prohibition on the illegal use of force, or else it will languish as a stateless entity, subject to a legal obligation of nonrecognition.

Unresolved Questions, 1 GÖTTINGEN J. INT'L. L. 341, 341 (2009); Gerard Toal, *Russia's Kosovo: A Critical Geopolitics of the August 2008 War Over South Ossetia,* 49 EURASIAN GEOGRAPHY & ECON. 670, 670 (2009).

8. *See, e.g.*, ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995); THOMAS MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES (1997); M. Rafiqul Islam, *Secession Crisis in Papua New Guinea: The Proclaimed Republic of Bougainville in International Law*, 13 U. HAW. L. REV. 458 (1991); Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L.J. 479 (1994); Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981); M. G. Kaladharan Nayer, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L L.J. 337 (1975); Elysa L. Teric, Comment, *The Legality of Croatia's Right to Self-Determination*, 6 TEMP. INT'L & COMP. L.J. 403 (1992).

The article is divided into six principal Parts. Part I provides a brief introduction to the concept of secession. It demonstrates that "secession" is an encompassing method of state creation, which can be clarified according to whether it is consensual, unilateral, colonial, or non-colonial. Part II outlines the parameters of the right to UNC secession in international law. This Part demonstrates that the right is qualified (meaning it is not open ended) and is grounded in international customary law. More particularly, this Part shows that a right to UNC secession stems from a combination of declaratory General Assembly resolutions and state physical acts and omissions, especially acts of recognition in response to UNC secessionist disputes. Part III analyzes the criteria for statehood based on effectiveness, with particular attention as to how the law of self-determination has modified the effective government criterion. Broadly, this Part argues that a state created by UNC secession in conformity with the customary law of self-determination will no longer have to strictly satisfy to the effective government criterion. Part IV examines whether recognition is an additional criterion for statehood, finding in the negative. Principally, this flows from the fact that the declaratory recognition theory—despite its imperfections and imprecisions—is more reflective of state practice than the constitutive theory. Part V analyzes the criteria for statehood based on compliance with peremptory norms (*jus cogens*) and how these might interact with UNC secession. Generally, this Part propounds that self-determination is a peremptory norm, and that a UNC secessionist entity which is created contrary to this norm will be devoid of statehood. The conclusion synthesizes all aspects of the preceding discussion and establishes that a state created by UNC secession pursuant to the law of self-determination will not have to strictly satisfy the criteria for statehood based on effectiveness, particularly the effective government criterion, but will be required to comply with peremptory norms.

I. SECESSION

Secession can be defined as "the withdrawal of territory (colonial or non-colonial) from part of an existing state to create a new state."[9] This definition includes consensual,[10] unilateral,[11]

9. Anderson, *supra* note 1, at 344, 386–88.

colonial,[12] and non-colonial[13] secession.[14] Secession is thus a broad method of state creation; it is not confined to unilateralism[15] or situations where the secessionist group uses or threatens to use force.[16] The unifying element which ties all varieties of secession together is an endogenously motivated withdrawal.[17] This then begs the important question: what is it that is being withdrawn? The definition above supplies the answer: territory. However, the withdrawal of territory is not just a physical process; it is also a legal one. The concomitant of phys-

---

10. Consensual secession occurs with the existing state's consent. It can be conceptually subdivided into constitutional and politically negotiated secession.

11. Unilateral secession occurs without the existing state's consent. It may or may not involve the use or threat of force.

12. Secession can be validly said to occur in a colonial context, as any new assertion of sovereignty over a colonial territory involves a modification to the sovereignty of the metropolitan power. For examples of scholarship suggesting that secession can occur in the colonial (and non-colonial) context, see HANNA BOKOR-SZEGÖ, THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION 53 (1978); CRAWFORD, *supra* note 2, at 330, 375; INGRID DETTER DE LUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 15 n.4 (2d ed. 1987); MUSGRAVE, *supra* note 8, at 181; Christine Haverland, *Secession*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 354–55 (Rudolf Bernhardt ed., 2000); FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA 235 (2003); Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace*, 8 N.Y.L. SCH. J. HUM. RTS. 49, 103–04 (1990); Peter Radan, *Secession: A Word in Search of a Meaning*, *in* ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION 18 (Aleksandar Pavkovič & Peter Radan eds., 2008); Malcolm N. Shaw, *The Role of Recognition and Non-Recognition with Respect to Secession: Notes on Some Relevant Issues*, *in* SECESSION AND INTERNATIONAL LAW: CONFLICT AVOIDANCE – REGIONAL APPRAISALS 245 (Julie Dahlitz ed., 2003); Patrick Thornberry, *Self-Determination and Indigenous Peoples: Objection and Responses*, *in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 52, 54 (Pekka Aiko & Martin Scheinin eds., 2000).

13. As used in this article, non-colonial shall mean a territory that is part of an existing state and outside of the colonial context.

14. For a more comprehensive exploration of the definition of secession in international law and relations, see Anderson, *supra* note 1, at 343–88.

15. Unilateralism is mandated by Heraclides for example. *See* ALEXIS HERACLIDES, THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS 1 (1991).

16. The use or threat of force (along with a lack of consent from the existing state) is mandated by Crawford. *See* CRAWFORD, *supra* note 2, at 375.

17. Anderson, *supra* note 1, at 345–49.

ical, territorial withdrawal is the legal withdrawal of sovereignty. Secession is thus not simply concerned with the withdrawal of territory from an existing state to create a new state, but also the legal withdrawal of sovereignty asserted over this territory.[18]

II. THE RIGHT TO UNC SECESSION IN INTERNATIONAL LAW

The legal basis of the right to UNC secession in international law has several significant characteristics. First, this right is grounded in the law of self-determination. Unlike many other human rights, self-determination is applicable to groups, or "peoples" (defined as a nationally-based substate group) that are empowered to "freely determine their political status and freely pursue their economic, social and cultural development."[19] This means that should a people within an existing state be systematically and egregiously denied this right, then the prospect of UNC secession will become available.[20] Thus, should a people within an existing state be denied their right to internal self-determination, then a right to external self-determination, or UNC secession, will arise.

Second, the legal basis for a remedial right to UNC secession in international law is to be found within customary international law. No basis for UNC secession can be found within international treaty instruments, such as the United Nations Charter, International Covenant on Economic, Social and Cul-

---

18. *Id*. at 346–49.

19. International Covenant on Economic, Social and Cultural Rights, art. 1(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, art. 1(1), *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 1(1) (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 1(1) (Dec. 16, 1966); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), art. 2 (Dec. 14, 1960); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Principle 5, ¶ 1 (Oct. 24, 1970); United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3 (Sept. 13, 2007).

20. *See, e.g.*, Reference re Secession of Quebec, [1998] 2 SCR 217, paras. 126, 134–38; Loizidou v Turkey, 1996-VI Eur. Ct. H.R. 2216, 2241 (Wilhaber, J., concurring).

tural Rights (ICESCR) or International Covenant on Civil and Political Rights (ICCPR). The right to UNC secession in customary international law finds its genesis in Principle 5 paragraph 7 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations[21] ("Friendly Relations Declaration"), which provides:

> 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 color*.[22]

This text is repeated, *mutatis mutandis*, by Article 1 of the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations[23] which provides that the U.N. will, *inter alia*:

> [c]ontinue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right to self-determination. This shall not be construed as authorizing or encouraging any action that 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 and *thus possessed of a government representing the whole people belonging to the territory without distinction of any kind*.[24]

---

21. G.A. Res. 2625 (XXV) (Oct. 24, 1970).

22. *Id.*, principle 5, ¶ 7 (emphasis added).

23. G.A. Res. 50/6, art. 1 (Oct. 24, 1995). For an extended analysis of this Declaration and its legal effects, see Glen Anderson, *Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effect*s, 41 DENV. J. INT'L L. & POL'Y 345 (2013).

24. G.A. Res. 50/6, *supra* note 23, art. 1 (emphasis added).

When subjected to an *a contrario* reading, the foregoing indicates that only those states which represent their population "without distinction of any kind" are entitled to guarantees with respect to their "territorial integrity or political unity" and that accordingly, UNC secession will be permissible under certain strictly circumscribed circumstances.[25] Therefore any right to UNC secession must be qualified in nature.[26]

Third, the mere textual articulation of a qualified right to UNC secession in declaratory General Assembly resolutions, without other concomitant state practice, such as grants of recognition in response to UNC secessionist disputes, will not constitute a binding rule of customary international law. This is because the requisite element of *opinio juris* will not have been satisfied. In *Nicaragua v the United States of America*,[27] the International Court of Justice (ICJ), with reference to the principle of nonintervention, enumerated a two stage test for determining whether the requirement of *opinio juris* had been satisfied. According to stage one:

> *[O]pinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625(XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.[28]

The court later continued: "[a]s already observed, the adoption by States of this text [the Friendly Relations Declaration] affords an indication of their *opinio juris* as to customary international law on the question."[29] According to stage two:

---

25. *Id.*

26. Anderson, *supra* note 23, at 355–60, 371.

27. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 170 (June 27).

28. Nicar. v. U.S., 1986 I.C.J. ¶ 188.

29. Nicar. v. U.S., 1986 I.C.J. ¶ 191. Franck has opined that "[t]he effect of this enlarged concept of the lawmaking force of General Assembly resolutions" is that it "may well . . . caution states to vote against 'aspirational' in-

"[n]otwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions: first, what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law?"[30] This new species of *opinio juris*—tailored to the context of declaratory General Assembly Resolutions—would seem to contradict the more traditional formulation, as expressed in the *Lotus Case*[31] and *North Sea Continental Shelf Cases*,[32] which provided that *opinio juris* could only be established after a train of consistent state acts or omissions attended by the requisite psychological belief that such acts or omissions were rendered legally obligatory. As Schachter has noted, this new species of *opinio juris*:

> [W]as seen by some critics as standing custom[ary law] on its head. In place of a practice that began with the gradual accretion of acts and subsequently received the imprimatur of *opinio juris*, the Court reversed the process: an *opinio juris* expressed first as a declaration would become law if confirmed by general practice.[33]

---

struments if they do not intend to embrace them totally and at once, regardless of circumstance." Thomas M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116, 119 (1987). Whilst Franck's observation is valid, as Judge Schwebel pointed out in a 1972 Hague lecture, the Friendly Relations Declaration was "adopted by acclamation and accepted by the General Assembly as declaratory of international law." Stephen M. Schwebel, *Aggression, Intervention and Self-Defence,* 136 RECUEIL DES COURS 446, 452 n.11 (1972). Schwebel holds the same opinion regarding the Definition of Aggression, G.A. Res. 3314 (XXIX) (Dec. 14, 1974). *Id.* Supporting this view, Schachter remarks that "[m]ost states, including the United States, refer frequently to this resolution [the Friendly Relations Declaration] as an authoritative expression of the law of the Charter and related customary law." Oscar Schachter, *Just War and Human Rights*, 1 PACE Y.B. INT'L L. 1, 8 (1989).

30. Nicar. v. U.S., 1986 I.C.J. ¶ 205. The court also noted that "[t]he existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice." *Id.* ¶ 202.

31. S. S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7).

32. North Sea Continental Shelf (Ger. v. Den./Ger. v. Neth.), 1969 I.C.J 3, 44 (Feb. 20).

33. Oscar Schachter, *New Custom: Power, Opinio Juris and Contrary Practice*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 531, 531–32 (Jerzy Makarczyk ed., 1996); Rijpkema has similarly noted in the context of *Nicaragua* that

Accordingly, without congruity between declaratory General Assembly resolutions and state practice in terms of physical acts and omissions, a binding rule of customary international law cannot be formed.[34]

Fourth, state practice indicates that the right to UNC secession is only available in response to human rights abuses *in extremis* (ethnic cleansing, mass killings, and genocide) as opposed to *in moderato* (political, cultural, and racial discrimination). UNC secession case studies, such as Bangladesh, Croatia, Kosovo, the Turkish Republic of Northern Cyprus ("TRNC"), Chechnya, Abkhazia, South Ossetia, and Transnistria collectively bear this out.[35]

Fifth, there is a disparity between the textual content of declaratory General Assembly resolutions, such as Principle 5 paragraph 7 of the Friendly Relations Declaration and Article 1 of the Fiftieth Anniversary Declaration, both of which appear to articulate a qualified right to UNC secession in response to human rights abuses *in moderato* and *in extremis*, and state practice more generally. The latter, it would seem, only supports a right to UNC secession in response to human rights abuses *in extremis*.[36] From this it follows that the textual articulation of a qualified right to UNC secession in declaratory General Assembly resolutions must not be the litmus test for a customary international law right to UNC secession. Rather, a more nuanced approach is necessary which examines state

---

> [t]his term [*opinio juris*] which refers to the legal convention of States, is apparently given a broader meaning than usual in the *Nicaragua* case. It transpires that manifestations of States' legal conventions do not necessarily need to relate to acts of States which constitute a settled practice in order to be identified as statement of *opinio juris*.

Peter P. Rijpkema, *Customary Law in the Nicaragua Case*, 20 NETH. Y.B. INT'L L. 92, 92–93 (1989).

34. Anderson, *supra* note 23, at 394.

35. *See* discussion of case studies *infra*, Part III.C.2. and Part IV.B.2.

36. Although a broader right to UNC secessionist self-determination, justified on the grounds of human rights abuses *in moderato* and *in extremis* arguably forms *lex ferenda*, it would not currently appear to be reflected in state practice. This is regrettable, as UNC secessionist self-determination should not be confined only to human rigths abuses *in extremis*. *See* Anderson, *supra* note 23, at 394–95.

practice *in toto*, particularly grants of recognition in response to UNC secessionist disputes.[37]

The culmination of the foregoing characteristics is that any state created by UNC secession pursuant to the customary international law of self-determination must be in response to human rights abuses *in extremis*. This means that the right to UNC secession in international law is an *ultimum remedium*.[38]

III. UNC SECESSION AND THE CRITERIA FOR STATEHOOD BASED ON EFFECTIVENESS

Effectiveness is a principle applicable to many aspects of international law. Milano, for example, has suggested that the principle of effectiveness relates to state recognition, responsibility of substate actors, sovereignty, citizenship, and ethnicity.[39] Effectiveness thus alludes to the links between facts and law, ensuring that there is a tangible connection between the two.[40] This link is necessary if international law is to promote stability and security in international relations.[41]

---

37. Anderson, *supra* note 23, at 394; *see also* discussion of case studies *infra* Part III.C.2. and Part IV.B.2.

38. Anderson, *supra* note 23, at 394–95.

39. According to Milano,

> A state is recognized as such in international law because it is constituted by a stable and effective institutional machinery, an insurrectional movement is responsible under international law because it has effective control over a population and territory, sovereignty over a territory is often conditional on an effective display of jurisdiction, the citizenship of an individual may be recognized in international law insofar as it entails an underlying effective relationship ('genuine link') between the state and the individual, the membership to a minority or ethnic group may be determined under objective criteria of effective attachment.

ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY 22, 22–23 (2006).

40. This has led Wildeman to claim that effectiveness refers to the "special influence of facts on law." J. Wildeman, *The Philosophical Background of Effectiveness*, 24 NETH. INT'L L. REV. 337 (1977). Milano has similarly noted that "*[e]ffectiveness* is deployed here as a measure of the relationship and congruence between a rule or a legal situation and social reality. It mainly refers to the role of factual situations in respect to the application and creation of international law." MILANO, *supra* note 39, at 22.

41. GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA 180 (2004); H. Krüger, *Das Prinzip de Effektivität, oder: über die besondere Wirk-*

The criteria for statehood based on effectiveness have been enumerated in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which has been traditionally accepted as reflective of customary law: "[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."[42] An additional criterion—independence—has also been widely held as essential for effectiveness and statehood.[43] These criteria, and their contemporary application (or modification) in the context of UNC secession, are discussed below.

A. Permanent Population

A state created by UNC secession must possess a permanent population.[44] As indicated by the *Western Sahara Case*,[45] a permanent population does not need to be a constant one.[46] On the other hand, populations which only move into a territory for the purpose of gaining economic benefits, or to conduct scientific research, will not qualify.[47]

---

lichkeitsnähe des Völkerrechts, *in* GRUNDPROBLEME DES VÖLKERRECHTS [FUNDAMENTAL PROBLEMS IN INTERNATIONAL LAW] 265 (D. S. Constantopolous et al. eds., 1957).

42. These criteria antedated the adoption of the Montevideo Convention. Some scholars, however, have since examined the Montevideo Convention and proposed different criteria. Galloway has mooted *de facto* control of territory and government, public acquiescence in the authority of the government, and a willingness to comply with international obligations. *See* THOMAS L. GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS*:* THE PRACTICE OF THE UNITED STATES 5–7 (1978). For a historical and critical analysis of the Montevideo criteria, see Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403 (1999).

43. This criterion may arguably be subsumable within Article 1(d) of the Montevideo Convention. *See generally* CRAWFORD, *supra* note 2, at 52; DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 74 (2002).

44. *Id.* at 58; CRAWFORD, *supra* note 2, at 52.

45. Western Sahara, Advisory Opinion, 1975 I.C.J. 61 (Oct. 16).

46. Gino J. Naldi, *The Statehood of the Saharan Arab Democratic Republic*, 25 INDIAN J. INT'L L., 448, 452–53 (1985); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 119 (7th ed. 2013).

47. Antarctica, for example, which is populated by scientific personnel, is not a state. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 76 (7th ed. 1997); Bengt Broms, *States, in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 41, 44 (Mohammed Bedjaoui ed., 1991). Underwater claims will not qualify either. The Republic of Minerva, for example, was purportedly established throughout unclaimed

B. Defined Territory

A state created by UNC secession must possess a defined territory.[48] This does not mean, however, that there must be an absence of disputed frontiers.[49] A 1929 German-Polish Mixed Arbitral Tribunal emphasized this point:

> Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected the State in question cannot be considered as having any territory whatever . . . . In order to say that a State exists . . . it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.[50]

---

underwater reefs. The Republic was not at any time a state, however, because a permanent population could not dwell within the claimed territory. *See* Bengt Broms, *Subjects: Entitlement in the International Legal System*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 383–86 (R. St. J. Macdonald & D. M. Johnston eds., 1983); RAIČ, *supra* note 43, at 58–59.

48. There is no minimum territorial area necessary. Nor is territorial contiguity necessary. *See* CRAWFORD, *supra* note 2, at 47.

49. As Crawford has observed, "It is clear that the existence of fully defined frontiers is not required . . . ." JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 128 (8th ed. 2012). Shaw has noted that "there is no necessity in international law for defined and settled boundaries." MALCOM N. SHAW, INTERNATIONAL LAW 145 (7th ed. 2014). In another context, Shaw notes "statehood is inconceivable in the absence of a reasonably defined geographical base. The frontiers of such an entity need not be established beyond dispute . . . ." Malcom N. Shaw, *Territory in International Law*, 13 NETH. Y.B. INT'L L. 61, 61 (1982). Abi-Saab alludes to the 1924 Advisory Opinion of the Permanent Court of International Justice (PCIJ) in the case of *Monastery of Saint-Naoum (Albanian Frontier)* to support the notion that a state's territory does not need to be exactly and completely delimited. *See* Georges Abi-Saab, *Conclusion*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 471, 475 (Marcelo G. Kohen ed., 2012), *citing* Question of the Monastery of Saint-Naoum (Albanian Frontier), Advisory Opinion, 1924 P.C.I.J (ser. F) No. 9, at 5 (Sept. 4).

50. Deutsche Continental Gas-Gesellschaft v. Polish State, 5 I.L.R. 11 (Ger.-Pol. Mixed Arb. Trib. 1929). *See generally* CRAWFORD, *supra* note 2, at 49–50; RAIČ, *supra* note 43, at 61.

This general rule was later affirmed in the *North Sea Continental Shelf Cases*[51] and *Case Concerning the Territorial Dispute* (*Libyan Arab Jamahiriya v Chad*).[52]

On the other hand, a state created by UNC secession cannot claim territory in an *ad hoc* fashion. As Raič has observed, Serbian Krajina's attempted UNC secession from Croatia failed to satisfy the defined territory criterion, due to the constantly shifting nature of its external borders. It was unclear, for instance, which municipalities were included within Serbian Krajina and which were excluded.[53] A state created by UNC secession must therefore make clear to the international community which territory it has claimed and maintain fidelity to the claim's specific nature.

1. Application of the *Uti Possidetis* Principle in the Context of UNC Secession

A question that has emerged in recent decades is whether a state created by UNC secession must adhere to the former internal administrative boundaries of the existing state, especially where these boundaries possess a federal character. Of direct significance to this question is the *uti possidetis* principle, which enshrines respect for boundaries of an administrative nature in the context of colonial secession.[54] Shaw, for example, has observed that:

---

51. North Sea Continental Shelf, Judgment, 1969 I.C.J. 3, 32 (Feb. 20). *See generally* CRAWFORD, *supra* note 2, at 50.

52. Territorial Dispute (Libyun Aruh Jamuhiriyu/Chad), Judgment, 1994 I.C.J. 6, ¶¶ 44, 52.

53. According to one spokesman of Serbs within Croatia, the municipality of Petrinja, which had an ethnic composition of approximately 50 percent Croat and 50 percent Serbs, was included within Serbian Krajina. According to another spokesperson of Serbs within Croatia though, Petrinja was not included within Croatia. This imprecision naturally militated against the attainment of statehood for Serbian Krajina. RAIČ, *supra* note 43, at 62 n.49.

54. Raič, for example, has noted that

> [t]he principle of *uti possidetis* only operates in those situations where the parties agree on its applicability or, in the absence of such an agreement [such as unilateral secession which by its very nature is non-consensual], if no agreement with regard to a different method or principle has been reached.

RAIČ, *supra* note 43, at 305.

> In essence, the doctrine [*uti possidetis*] provides that new States will come to independence with the same borders that they had when they were administrative units within the territory or territories of one colonial power . . . . The principle . . . functions in the context of the transmission of sovereignty and the creation of a new independent State and conditions that process.[55]

The *uti possidetis* principle thus functions to ensure that where there is a withdrawal of sovereignty over an administrative territory, the territorial boundaries attached thereto are protected, final, and permanent. This is not to say that these boundaries cannot be subsequently modified; they of course can be, but this may only occur by peaceful means and by agreement between the relevant states parties.

The *uti possidetis* principle is descended from Roman law, which imposed a Praetor's interdict that forbade the disturbance of the existing state of possession over immovable property.[56] In effect, this meant that the possessor of land, in the absence of any established title thereto, had the right to be free from any disturbance by the adversary. The Praetor held that, "*[u]ti nunc aes aedas, quibus, de agitur, nec vi nec clam nec precario alter ab altero possidetis, quo minus ita possidetis, vim fieri veto*."[57] This extended Latin maxim was succinctly expressed as "*uti possidetis, ita possidetis*," or "as you possess, so you may possess."[58] Importantly, although the Praetor's interdict confirmed the right of the current possessor of immovable property, it would always give way to the rights of any person who could establish that they possessed legal title to the prop-

---

55. Malcolm N. Shaw, *The Heritage of States: The Principle of* Uti Possidetis Juris *Today*, 67 BRIT. Y.B. INT'L L.75, 97–98 (1996).

56. In ancient Rome, a Praetor was an elected magistrate, whose duties varied according to the historical period.

57. For an English translation, see John Basset More, *Memorandum on* Uti Possidetis*: Costa Rica-Panama Arbitration 1911*, *in* 3 THE COLLECTED PAPERS OF JOHN BASSETT MORE 329 (Edwin Borchard et. al. eds., 1944) ("As you possess the house in question, the one not having obtained it by force, clandestinely, or by permission from the other, I forbid force to be used to the end that you may not continue so to possess it."); *see also* RADAN, *supra* note 4, at 69 n.2.

58. *Id.* at 69; RAIČ, *supra* note 43, at 297.

erty. In a strict sense, therefore, the *uti possidetis* interdict was only of a provisional nature.[59]

In the early nineteenth century, the *uti possidetis* principle was applied in the context of decolonization throughout Central and South America when Spanish and Portuguese colonies achieved their independence.[60] The principle was employed to achieve two outcomes: first, and most importantly, to prevent a resurgence of European colonization based on the argument that some areas of the former Spanish and Portuguese colonies were *terra nullius* and thus open to occupation; and second, to ensure that boundary disputes did not erupt between the newly created states.[61] As Raič has noted, "[t]he preservation of the colonial administrative demarcations after the change of sovereignty implied the transformation of these boundaries into international boundaries. A corollary of the latter aspect was that *uti possidetis* constituted a method of demarcation of international boundaries."[62]

The *uti possidetis* principle was subsequently applied in the decolonization of Africa. Unlike Latin America, however, where the principle operated to exclude the application of *terra nullius* after European decolonization, in Africa, the principle's primary purpose was to ensure the continuity of colonial boundaries. In the *Case Concerning the Frontier Dispute (Burkina Faso and Mali)*,[63] the ICJ's Chamber explained the rationale informing the adoption of the principle as follows:

> [T]he principle is not a special rule which pertains only to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles following the withdrawal of the administering power.[64]

---

59. RADAN, *supra* note 4, at 69–70; Frank Wooldridge, Uti Possidetis *Doctrine*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1259, 1259 (Rudolf Bernhardt ed., 2000).

60. RAIČ, *supra* note 43, at 298; RADAN, *supra* note 4, at 245–46.

61. IAN BROWNLIE, AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPAEDIA 9–12 (1979); RAIČ, *supra* note 43, at 298.

62. RAIČ, *supra* note 43, at 298.

63. Frontier Dispute (Burkina Faso v. Mali), Judgment, 1986 I.C.J. 554 (Dec. 22).

64. *Id.* at 565.

The Chamber explained further:

> [T]he maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers.[65]

Respect for former colonial borders was especially important in Africa, as metropolitan powers[66] had divided the continent with little regard for the ethnic and tribal groups which dwelt therein, arbitrarily separating such groups, often between two or three territories. If borders were to be open to challenge, African independence could have become susceptible to interethnic conflict—secessionist or irredentist[67]—which metropolitan powers would have likely seized upon as justification for continued occupation.

The need for the continuity of borders was emphasized at the Organization of African Unity's ("OAU") inaugural summit conference, when the Prime Minister of Ethiopia declared, "it is in the interest of all Africans now to respect the frontiers drawn on the maps, whether they are good or bad, by the former colonizers."[68] This sentiment was repeated in the Cairo Declaration adopted in 1964 by the Heads of States of OAU governments. The Declaration provided that "all Member States (*vis-à-vis* each other) pledge themselves to respect the borders existing

---

65. *Id.* at 567.

66. A "metropolitan power" is defined within Resolution 1541, Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res 1541 (XV) (Dec. 15, 1960), so as to connote an administering power, which is "geographically separate" and "distinct ethnically and/or culturally" from the administered territory. In other words, a metropolitan power is a colonial administering power. *See* Anderson, *supra* note 1, at 374–75.

67. As to the meaning of "irrendentism," and its contrast with "secession," see Anderson, *supra* note 1, at 371–73.

68. Proceedings of the Summit Conference of Independent African States, May 1963, OAU Doc. CIAS/GEN/INF/43; *see also* A. C. McEwen, INTERNATIONAL BOUNDARIES OF EAST AFRICA 24 (1971); RAIČ, *supra* note 43, at 299.

on their achievement of the national independence."[69] This has been interpreted by the ICJ as directly referring to the *uti possidetis* principle.[70]

The *uti possidetis* principle has therefore been applied in the context of decolonization in Latin America and Africa. As Radan has noted, the principle was also applied in the context of Asia, although it was less prevalent.[71] It could therefore be strongly argued, with recourse to customary international law, that states born of unilateral colonial ("UC") secession must adopt borders that coincide with former colonial borders.

Considerable doubt however, has been expressed regarding the principle's application to states created by UNC secession.[72] As Radan has observed:

> To insist that, in cases of secession from a federal state, internal administrative borders should automatically become international borders is to create a new rule of international law. To justify the application of this rule as an application of the principle of *uti possidetis juris* amounts to an unprincipled extension of the principle that applies in cases of ascertaining international borders following decolonisation. Such a new rule has no connection with its alleged progenitor.[73]

Or as Lalonde has noted:

> [T]here appears to be no legal basis for the Arbitration Commission's characterization of *uti possidetis* as a general prin-

---

69. The text of the Declaration is reproduced in BROWNLIE, *supra* note 61, at 11. *See also* RAIČ, *supra* note 43, at 300.

70. Frontier Dispute (Burkina Faso v. Mali), Judgment, 1986 I.C.J. 554, 556 (Dec. 22); Kasikili/Sedudu Island (Botswana v. Namibia), Judgment, 1999 I.C.J. 1043, 1059–60 (Dec. 13).

71. Radan relies on the Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India v. Pakistan) (Feb. 19, 1968), 50 ILR 1, 2 (1968). The same scholar further notes that the other commonly cited case in the Asian context allegedly touching upon the principle of *uti possidetis* is the Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 1962 I.C.J. 6, 49–53 (June 15). Radan rejects the relevance of this case, however, instead asserting that it was "based on the interpretation of a treaty and had nothing to do with *uti possidetis*." RADAN, *supra* note 4, at 118 nn.2–3. In this respect, Radan is in conflict with Crawford and Shaw, who assert the Temple Case is of relevance to *uti possidetis*. *See* CRAWFORD, *supra* note 49, at 238–9; SHAW, *supra* note 49, at 377, 380–82.

72. *See* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 55 (1993).

73. RADAN, *supra* note 4, at 245–46.

> ciple of international law. Not only did the commission transpose a colonial principle of uncertain status to a radically different situation – the dissolution of a sovereign state – but it also radically transformed the principle. Whereas in the colonial context *uti possidetis* constitutes a delimitation principle, as applied by the Arbitration Commission it serves as an inconsistent rule for the identification of units of statehood. Furthermore, this new version of the *uti possidetis* principle is no longer founded on the consent or contracting-in of the parties involved but has become a binding solution that can be imposed upon unwilling participants.[74]

Although incisive from a normative perspective, these criticisms do not impact the question of whether the *uti possidetis* principle has mutated, by virtue of customary international law, to now apply in the context of UNC secession.

Examination of state practice surrounding the Yugoslav crisis—the primary example of state practice relevant to the extension of *uti possidetis* to the non-colonial context—reveals ambiguity and confusion on this point.[75] The European Union, for example, did not expressly endorse application of *uti possidetis* principle in official statements and discussions. Although the U.N. Security Council stressed the importance of respecting the existing federal borders of the various Yugoslav republics, this is hardly surprising given its primary function of maintaining international peace and security. Any resolutions suggesting respect for federal borders must therefore be interpreted with this function in mind. These considerations have led Lalonde to argue that:

> After reviewing the positions adopted by the various parties to the Yugoslav conflict and considering the EU pronouncements and Security Council Resolutions, it does not appear, despite claims to the contrary by distinguished jurists such as

---

74. SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF *UTI POSSIDETIS* 202–03 (2002).

75. Delcourt concludes, for example, that "it is possible to argue that the ambiguity of the positions, their fluctuating character and the confusion which surrounded the resolution of the conflict make it difficult to consider the Yugoslav case a precedent testifying to the extension of the *uti possidetis* rule outside the decolonization situations." Barbara Delcourt, *L'application de l'uti possidetis juris au démembrement de la Yougoslavie: règle coutumière ou imperative politique?, in* DÉMEMBREMENTS D'ÉTATS ET DELIMITATIONS TERRITORIALES: L'UTI POSSIDETIS EN QUESTION(S) 37 (Oliver Corton et al. eds., 1999), *translated in* LALONDE, supra note 74, at 194–95.

> Angelet, Nesi and Shaw, that state practice during the critical period satisfies the material and subjective elements of custom . . . . [I]n the *Nicaragua* case, the International Court of Justice, called upon to determine whether principles such as the non-use of force and non-intervention were customary norms, did not content itself with citing a few random treaties and international instruments.[76]

It would thus seem that the application of the *uti possidetis* principle to the internal administrative borders of federal states has not yet crystallized as a definitive rule of customary international law. Such a principle may be emerging *de lege ferenda*, but it is a step too far to categorize it as a *de lege lata* right. It follows that a state created by UNC secession does not, at this point in time, have a legal obligation to follow the existing state's internal administrative boundaries.

C. Effective Government

The effective government criterion, as traditionally understood, consists of two interrelated limbs: first, there should be a political, executive, and legal structure for the purpose of regulating the population; and second, this political, executive, and legal structure must be effective, which means that it must be able to project authority throughout the population.[77]

In the second half of the twentieth century, however, the effective government criterion has been modified by the law of self-determination. This modification—termed by Raič the "compensatory force principle"[78]—has ensured that a state cre-

---

76. LALONDE, *supra* note 74, at 202.

77. *See* Hans M. Blix, *Contemporary Aspects of Recognition*, *in* 130 RECUEIL DES COURS 587, 633 (1970). Blix has propounded the strict satisfaction of the effective government criterion, stating "[i]f . . . a [community] organization is missing, it is meaningless for the outside world to attribute rights and obligations to the population of a State. Accordingly, a State will not be considered to have come into being until there is an organization which can effectively shoulder these rights and obligations," *id.* at 633–34. Compare, however, with further comments in present section relating to the "compensatory force principle."

78. Raič has noted that

> the conclusion is inevitable that at least in cases where a colonial people is forcibly or in any other coercive manner prevented from realizing its right of self-determination, a State may come into existence under international law despite a substantial lack of effective governmental control by the authorities of the previously colonial

ated by UNC secession and in conformity with the right of peoples to self-determination will *not* be required to strictly satisfy the effective government criterion.[79] Conversely, contemporary international law indicates that a state created by UNC secession in violation of the right of peoples to self-determination will be simply unable to satisfy the effective government criterion. On this basis, it might be asserted that the effective government criterion has been reformulated as coextensive with the right of peoples to external self-determination.[80]

1. The Compensatory Force Principle in the Colonial Context

The origins of the compensatory force principle can be traced to the decolonization era, when new states were created pursuant to the law of self-determination without strictly satisfying the effective government criterion. Four case studies demonstrate the operation of the principle in the colonial context: the Republic of Congo, Algeria, Guinea-Bissau, and Angola. Of these case studies, Congo and Algeria arguably represent instances of consensual colonial ("CC") secession,[81] whilst Algeria

---

> territory over the relevant territory and its inhabitants. In such situations, the lack of effective government is compensated by an applicable right of external self-determination. This compensatory force of the right of external self-determination will be referred to in this study as the "compensatory force principle."

The same scholar continues later in his study,

> In chapter 5 it was shown that against the background of decolonization, the applicability of the right to external self-determination results in an exclusive right or title to govern the relevant territory and that this right may compensate for the lack of the exercise of effective governmental power (the "compensatory force principle"). The case of Bangladesh and in particular the case of Croatia clearly show that this principle is equally applicable beyond the context of decolonization.

RAIČ, *supra* note 43, at 104, 364.

79. Other scholars, including Crawford, Dugard, Shaw, and Kreijen, have alluded to this legal phenomenon, at least in the unilateral *colonial* secession context. *See* CRAWFORD, *supra* note 49, at 129; JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 78–79 (1987); MALCOLM N. SHAW, TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES 157 (1986); KREIJEN, *supra* note 41, at 142.

80. DUGARD, *supra* note 79, at 79.

81. Meaning secession that occurs in the colonial context with the metropolitan power's consent.

and Guinea-Bissau arguably represent instances of unilateral colonial ("UC") secession.[82] Importantly, all four case studies represent instances of peoples exercising a valid right to external self-determination.

a. The Republic of Congo—CC Secession

The Republic of Congo was established in 1960 after political parties within the Belgian colony expressed their desire for independence, pursuant to the law of self-determination. After some initial resistance to the request, Belgian authorities realized that the Congolese independence movement was unable to be suppressed without significant effort, and that even if such an effort were to be undertaken, it would render Belgium an international pariah. Belgium thus granted the Congo independence in a hasty fashion on June 30, 1960.[83] Upon receiving its independence, the former colony was entirely unprepared for its own governance. Prior to 1960, there was little formal education beyond the age of fourteen and indigenous Congolese held virtually no positions of executive responsibility.[84]

With such organizational inexperience, Congolese independence rapidly descended into political chaos. Civil order broke down as riots gripped the major urban centers; the armed forces mutinied, no longer under Brussels' central control. Remarkably, the Congolese government was even unable to assert control throughout the capital, which remained gripped in anarchy.[85] In response to the situation, on July 10, 1960, Belgian troops were deployed throughout the mineral-rich province of Katanga, the sovereign independence of which was proclaimed on the same day. Eventually, upon the request of the Congolese government, the U.N. became involved in the conflict.

---

82. Meaning secession that occurs in the colonial context without the metropolitan power's consent.

83. RAIČ, *supra* note 43, at 64.

84. *Id.*

85. *Id.*; CRAWFORD, *supra* note 2, at 56; SHAW, *supra* note 79, at 152; THOMAS R. KANZA, CONFLICT IN THE CONGO: THE RISE AND FALL OF LUMUMBA 190–92 (1972); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 162–64 (1963); ROBERT F. HOLLAND, EUROPEAN DECOLONIZATION, 1918-1981: AN INTRODUCTORY SURVEY 175–90 (1985); DUGARD, *supra* note 79, at 86–90; CATHERINE HOSKYNS, THE CONGO: A CHRONOLOGY OF EVENTS, JAN. 1960–DEC. 1961 (1962); LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 141–53 (1978).

The Republic of Congo was thus devoid of effective government in the initial period after June 30, 1960. Notwithstanding this fact, it is clear that the Republic was regarded as a sovereign state post-independence by the international community, enjoying widespread recognition and gaining admission to the U.N. General Assembly without dissent. The U.N. also authorized the deployment of military force to stymie foreign intervention in the Congo's affairs, including the suppression of the Katangese secession.[86]

Moreover, numerous Security Council resolutions reaffirmed the Congo's sovereignty and territorial integrity. Security Council Resolution 145, for example, requested that states "refrain from any action which might undermine the territorial integrity and the political independence of the Republic of Congo."[87] Security Council Resolution 169 enunciated that the U.N. operation's purpose was to "maintain the territorial integrity and political independence of the Congo."[88] Similarly, General Assembly Resolution 1474 emphasized the "unity, territorial integrity and political independence of the Congo."[89] These acts suggest that the Congo was regarded by the international community as a *bona fide* state, despite the obvious ineffectiveness of its government.[90]

It is apparent that the effective government criterion was *liberally* interpreted with respect to the Congo. There are two reasons which explain this turn of events. First, as Crawford has noted, government "has two aspects: the actual exercise of authority and the right or title to exercise that authority."[91] Thus, although the Congo did not strictly fulfill the requirement of actual exercise of authority throughout its territory, it did nonetheless possess the *right* or title to exercise such authority, by virtue of Belgium's consensual grant of sovereignty.[92] Second, and perhaps more importantly for present purposes, the

86. RAIČ, *supra* note 43, at 65.
87. S.C. Res. 145, ¶2 (July 22, 1960).
88. S.C. Res. 169, ¶4 (Nov. 24, 1961).
89. G.A. Res. 1474 (ES-IV), ¶4 (Sept. 16, 1960).
90. *See* RAIČ, *supra* note 43, at 65; CRAWFORD, *supra* note 2, at 56–57.
91. *Id.* at 57.
92. As Crawford has stated, "[i]t is to be presumed that a new State granted full independence by a former sovereign [consensual secession] has the international right to govern its territory – hence the United Nations action in support of that right." *Id.* at 58.

law of self-determination operated to ensure a more liberal interpretation of the effective government criterion. Raič, for example, has noted that:

> In the light of the increasing international pressure on colonial powers to acknowledge the existence of a right of self-determination of colonial peoples, there is no doubt that the right of self-determination of the inhabitants of the Congo was also taken into consideration by the international community in recognizing and supporting the statehood of the Congo, that is, in addition to the Belgian grant of sovereignty and the related existence of an exclusive right to govern the territory. Indeed . . . in cases where a right of (external) self-determination exists, the applicability of this right may compensate for a possible lack of effective government by the entity created as a result of the exercise of that right.[93]

A priori, the law of self-determination reduced the threshold of the effective government criterion.

b. Algeria—UC Secession

The example of Algeria also demonstrates the operation of the compensatory force principle. Algeria had been a French colony since its incorporation into the French empire in 1830.[94] In 1946, France adopted a constitutional structure (the French Fourth Republic), which was designed to facilitate the incorporation of former colonial territories into a greater union of France. Although most French territories were entitled to pursue external self-determination, this right was expressly denied to Algeria, which was considered a metropolitan territory of France.[95] In 1958, when France adopted a new constitutional order (the French Fifth Republic) Algeria's unique status remained unaltered. This unique status can be explained by two interrelated factors: first, the presence of a strong proindependence movement within Algeria; and second, the unusually

93. RAIČ, *supra* note 43, at 66–67.

94. *Id.* at 96; *see generally*, ALISTAIR HORNE, A SAVAGE WAR OF PEACE: ALGERIA 1954–1962 (Viking Press 1978) (1977); DOROTHY SHIPLEY WHITE, BLACK AFRICA AND DE GAULLE: FROM THE FRENCH EMPIRE TO INDEPENDENCE (1979); MOHAMMED BEDJAOUI, LAW AND THE ALGERIAN REVOLUTION (1961); Albert Bleckmann, *Decolonization: French Territories, in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 986, 986–90 (Rudolf Bernhardt ed., 1992).

95. RAIČ, *supra* note 43, at 96.

high concentration of French businesses and French citizens within the territory.[96]

The French position was not supported in international law[97] and by 1961 the General Assembly had formally declared Algeria to be a colonial territory entitled to external self-determination. This led to formation of the National Liberation Front or *Front de libération nationale*, an amalgamation of liberation movements, which had unilaterally declared Algeria's independence in September 1958. A government in exile was then established in Tunis, to receive a series of recognitions from Arab states, Asian countries and the OAU. By April 1961, twenty-five states had recognized Algeria.[98]

Saliently, at the time of these recognitions, Algeria was unable to strictly satisfy the effective government criterion. Various guerrilla groups operated throughout Algerian territory and the French had for some time been struggling to militarily impose order throughout the country. Furthermore, the purported government of Algeria was operating in exile from Tunis. Despite this situation, Algeria was held to satisfy the effective government criterion. As with the example of the Congo, this phenomenon can be explained by the compensatory force principle, which allows the right of peoples to external self-determination to predominate over the strict satisfaction of the effective government criterion.

c. Guinea-Bissau—UC Secession

A further example from the decolonization era which highlights the operation of the compensatory force principle is Guinea-Bissau.[99] From the 1960s onwards, the African Party for the Independence of Guinea and Cape Verde, also known as *Partido Africano da Independência da Guiné e Cabo Verde* ("PAIGC"), began to use military force against the authorities of Portugal, the metropolitan power, with the objective of

96. *Id.* at 97.

97. *See* Principles which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541 (XV), at annex, principle IV, V (Dec. 15, 1960); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV) (Dec. 14, 1960).

98. BEDJAOUI, *supra* note 94, at 112–38.

99. *See* RAIČ, *supra* note 43, at 98–99; CRAWFORD, *supra* note 2, at 386; SHAW, *supra* note 79, at 153–55; DUGARD, *supra* note 79, at 73–74.

achieving independence. By the early 1970s, the PAIGC's military campaign had achieved tangible results, with considerable tracts of territory wrested from Portuguese control. When a U.N. Special Mission visited the country in 1972, it confirmed that Lisbon had lost control of approximately two-thirds of Guinea-Bissau's territory, and that within these areas the PAIGC had assumed administrative responsibility. The Portuguese authorities did, however, maintain control over the urban centers and vital infrastructure.

Nonetheless, in September 1973, the PAIGC declared the independence of Guinea-Bissau. After over forty states extended Guinea-Bissau recognition,[100] the General Assembly adopted Resolution 3061, which welcomed "the recent accession to independence of the people of Guinea-Bissau" and demanded that "the government of Portugal desist forthwith from further violation of the sovereignty and territorial integrity of the Republic of Guinea-Bissau."[101] This was followed one month later by General Assembly Resolution 3181, which expressly declared that Guinea-Bissau was an independent state.[102]

Guinea-Bissau was thus held to constitute a state despite the fact that the PAIGC government could not strictly satisfy the effective government criterion. As Raič has noted, although the PAIGC controlled the majority of territory within the new state, it did not control the majority of the population, which was situated within Portuguese controlled urban areas.[103] This turn of events can be explained by the compensatory force principle, which allows a people's right to external self-determination to predominate over the strict satisfaction of the effective government criterion.

d. Angola—CC Secession

A final example from the decolonization era that demonstrates the operation of the compensatory force principle is An-

100. DUGARD, *supra* note 79, at 73.

101. G.A. Res. 3061 (XXVIII), ¶ 6 (Nov. 2, 1973).

102. G.A. Res. 3181 (XXVIII), ¶ 1 (Dec. 17, 1973); *see also* Gerald J. Bender, *Portugal and her Colonies Join the Twentieth Century: Causes and Initial Implications of the Military Coup*, 4 UFAHAMU 121, 122, 146 (1974); J. H. Moolman, *Portuguese Guinea: The Untenable War*, 12 AFR. INSTITUTE BULL. 243–60 (1974). *See generally* Stephanie Urdang, *Towards a Successful Revolution: The Struggle in Guinea-Bissau*, 6 OBJECTIVE: JUSTICE 11 (1975).

103. RAIČ, *supra* note 43, at 99.

gola.[104] In November 1975, after a violent and protracted war of liberation, Portugal agreed to allow Angola its independence.[105] Upon assuming independence, however, there was no single governmental authority. Rather, there were three political groups: the Popular Movement for the Liberation of Angola or *Movimento Popular de Libertação de Angola* ("MPLA"), the National Front for the Liberation of Angola or *Frente Nacional de Libertação de Angola* ("FNLA"), and the National Union for the Total Independence of Angola or *União Nacional para Independência Total de Angola* ("UNITA"). Each group was supported by various patron states: the MPLA by the Soviet Union and Cuba; the FNLA by Zaire, the United States, and South Africa; and UNITA by South Africa and Zambia. Not surprisingly, a civil war broke out between the three factions just prior to independence, which was in part facilitated by Lisbon allowing Soviet and Cuban support on the side of the MPLA. Angola was rapidly granted recognition by numerous states, and was admitted to the U.N. in April 1976, after the United States decided to remove its veto over Angola's application to join the organization.[106]

Critically, however, although Angola lacked any semblance of an effective government at the time of Portugal's withdrawal (not to mention for decades after), it was widely regarded as a state. This development can be explained by the compensatory force principle, which allows a people's right to external self-determination to predominate over the strict satisfaction of the effective government criterion.

---

104. *See id.* at 99–100; DUGARD, *supra* note 79, at 74–75; SHAW, *supra* note 79, at 155–56; Fausto de Quadros, *Decolonization: Portuguese Territories*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 991, 991–93 (Rudolf Bernhardt ed., 1992); *see generally* JOHN A. MARCUM, THE ANGOLAN REVOLUTION, EXILE POLITICS AND GUERILLA WARFARE (1962–1976) (1978); BRUCE D. PORTER, THE USSR IN THIRD WORLD CONFLICTS: SOVIET ARMS AND DIPLOMACY IN LOCAL WARS 1945–1980 (1984); ZAKI LAÏDI, THE SUPERPOWERS AND AFRICA: THE CONSTRAINTS OF A RIVALRY 1960–1990 (1989); John A. Marcum, *Lessons of Angola*, 54 FOREIGN AFF. 407 (1976).

105. This CC secession was made possible by actions of the Armed Forces Movement, which overthrew Marcello Caetano's regime. Portuguese military causalities in Africa totaled approximately eleven thousand dead and thirty thousand wounded or disabled. *See* MARCUM, *supra* note 104, at 241; GERALD J. BENDER, ANGOLA UNDER THE PORTUGUESE 235 (1978).

106. RAIČ, *supra* note 43, at 100.

e. Conclusion

The examples of the Congo, Algeria, Guinea-Bissau, and Angola all reveal that in the colonial context the law of self-determination has the effect of reducing the threshold of the effective government criterion. In this regard Raič has noted:

> It must therefore be concluded that, at least in the context of decolonization, a presumption exists in favor of the existence of a legal rule holding that a right of external self-determination gives rise to an exclusive right to exercise authority over the (former colonial) territory once the right of self-determination is exercised through a proclamation of independence issued by a governmental authority deemed to be representative of the inhabitants of the territory. In turn, this right or title to exercise authority compensates for a possible lack of effective governmental power, certainly if such a lack of effectiveness is a result of unlawful conduct by the parent State, that is to say, the colonial power.[107]

This development is hardly surprising if one considers the implications for colonial peoples if this were *not* the case: in effect, metropolitan powers would be able, through the illegal use of force, to prevent colonial peoples from realizing their right to external self-determination.

2. The Compensatory Force Principle in the Non-Colonial Context

It has been demonstrated that the law of self-determination ensures that the strict satisfaction of the effective government criterion is no longer necessary in the colonial context. However the law of self-determination will also exert an analogous effect in the context of UNC secession.[108] As indicated in Part III, the law of self-determination allows peoples who are subjected to deliberate, sustained, and systematic discrimination *in extremis* to pursue UNC secession as an *ultimum remedium*. History reveals that states created in conformity with this

---

107. *Id.* at 102; s*ee also supra* text accompanying note 79.

108. RAIČ, *supra* note 43, at 364. *But see* SHAW, *supra* note 79, at 158. Shaw argues that "[a]lthough the criterion of effective government control has been modified by the principle of self-determination, it still exists as regards other situations. For example, it is submitted that the rule remains intact as far as [unilateral non-colonial] secessionist attempts are concerned, and, indeed, with respect to divided States." *Id.*

right, such as Bangladesh, Croatia, and Kosovo, have not been denied statehood even though they could not satisfy the effective government criterion. Conversely, attempts at UNC secession contrary to this right, such as the TRNC, Chechnya, Abkhazia, South Ossetia, and Transnistria have simply failed to attain statehood.[109]

a. Bangladesh—UNC Secession

Upon Britain's granting of independence to Pakistan in 1947, East Pakistan endured an uneasy relationship with West Pakistan. The initial issue dividing East and West Pakistan was language. Urdu, a language almost universally unknown in East Pakistan, and even a minority language in West Pakistan, was named as the only official Pakistani language. In the mid-1950s, following a succession of "language riots" throughout Dacca, common sense prevailed, and Bengali was proclaimed an official language alongside Urdu, temporarily alleviating some of the tension between the two regions.[110]

As the Pakistani polity matured, however, it became clear that not only were Bengalis underrepresented politically, but that they were also denied access to important leadership positions, especially in key areas such as administration and the armed forces. Bengali representation in all Pakistani government services, for example, was estimated to be only 15 percent, while Bengalis comprised only ten percent of the officer corps. Of the fifty senior officers promoted to the rank of major general or higher since 1947, only one was Bengali. Until 1956—some nineteen years after Pakistani independence—the position of East Pakistani Governor was held exclusively by West Pakistanis.[111] Only one Bengali Cabinet minister was ap-

109. *See* discussion of case studies *infra* Part III.C.2. and Part IV.B.2.

110. RICHARD SISSON & LEO E. ROSE, WAR AND SECESSION: PAKISTAN, INDIA AND THE CREATION OF BANGLADESH 9 (1990); Philip Oldenburg, *A Place Insufficiently Imagined: Language Belief and the Pakistan Crisis of 1971*, 44 J. ASIAN STUD. 712, 715 (1985); J.N. SAXENA, SELF-DETERMINATION: FROM BIAFRA TO BANGLA DESH 51 (1978); HERACLIDES, *supra* note 15, at 149; G.W. Choudhury, *Bangladesh: Why it Happened*, 48 INT'L AFF. 242, 247 (1972); CRAIG BAXTER, BANGLADESH: FROM A NATION TO A STATE 62–63 (1998).

111. BAXTER, supra note 110, at 63–65; BUCHHEIT, *supra* note 85, at 201; Ved P. Nanda, *Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect*, 1 HOUS. J. INT'L L. 71, 75–76 (1978); SAXENA, *supra* note 110 at 51.

pointed in the fifteen years prior to Bangladeshi independence, and this appointment lasted only four days.[112]

East Pakistan was also economically neglected, and by 1960 had a per capita income 30—36 percent less than the West.[113] East Pakistan's main crop, jute, was sold almost exclusively to West Pakistan at discount prices, thereby depriving the agricultural sector of its rightful earnings. A similarly exploitative arrangement existed with East Pakistani imports: West Pakistan offloaded manufactured goods to Dacca at inflated prices.[114]

Against an ongoing backdrop of tensions between East and West Pakistan, on March 25, 1970, General Tikka Khan—the then East Pakistani Governor—ordered his forces to leave their barracks and embark on a systematic program of killing and destruction, directed mainly towards East Pakistan's civilian population. Justice A. S. Chowdhury, Vice Chancellor of the University of Dacca and the Pakistani member of the U.N. Human Rights Commission, described the military operation as an "atrocit[y] unparalleled in history."[115] When addressing the Royal Commonwealth Society of London on June 8, 1971, he remarked, "[i]n East Bengal today, I feel, there is no semblance of civilization . . . . Under what authority of law did these killings take place?" A British member of parliament who visited Pakistan and India in July as a member of a British parliamentary delegation claimed that:

> [e]verywhere [in East Pakistan] we saw symptoms of a country in the grip of fear . . . . [N]ot only had the army committed wide-spread killing and violence in the March April period, but it still continued. Murder, torture, rape and the burning of homes were still going on.[116]

On March 26, 1971, Bangladesh declared its independence from Pakistan, making the proclamation official two weeks later on April 10.[117] Bangladeshi militia forces, the Mukti Bahini, struggled unsuccessfully to repel the West Pakistani onslaught

---

112. Ved P. Nanda, *Self-Determination and International Law: The Tragic Tale of Two Cities-Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321, 328 (1972).

113. HERACLIDES, *supra* note 15, at 150.

114. *Id.* at 149; BAXTER, supra note 110, at 67.

115. Nanda, *supra* note 112, at 331–32.

116. *Id.* at 333.

117. HERACLIDES, *supra* note 15, at 152.

but nonetheless prevented a quick and decisive victory. Central to this resistance was Indian assistance, which allowed the Mukti Bahini to use Indian territory as a base, and provided arms, advice, training, and supplies. This assistance precipitated border skirmishes between Pakistani and Indian forces, which culminated in open warfare between the two countries on December 3, 1971, when Pakistani warplanes carried out a preemptive strike on Indian airfields.[118] On December 6, the Indian Prime Minister, Indira Gandhi, responded by mounting a full-scale military operation and announcing India's recognition of Bangladesh as a sovereign state.[119] By mid-December, India had thoroughly routed Pakistani forces and presented the world with a *fait accompli*.[120]

For present purposes, it is important to note that Bangladesh, at the time of its independence, was not self-sustaining. Rather, it was dependent upon Indian military intervention in order to maintain internal order. Despite this situation, it was granted widespread recognition by early 1972.[121] These recognitions were forthcoming because Bangladesh satisfied the customary right to UNC secession in international law, namely, it was subjected to human rights violations *in extremis* by the existing state, Pakistan. Bangladesh's statehood was thus explicable by the compensatory force principle, which allows for the effective government criterion to be liberally interpreted in the context of UNC secession pursuant to the law of self-determination.

b. Croatia—UNC Secession

In the wake of Croatian elections in which the liberal reformist politician, Dr. Franjo Tudjman, and the Croatian Democrat-

118. MUSGRAVE, *supra* note 8, at 190–91 (1997); RAIČ, *supra* note 43, at 339; BUCHHEIT, *supra* note 85, at 207.

119. *Id.* at 207; SAXENA, *supra* note 110, at 58.

120. CRAWFORD, *supra* note 2, at 141; CHRIS N. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW 147–48 (1974); BUCHHEIT, *supra* note 85, at 211; HERACLIDES, *supra* note 15, at 157; JOYTI SEN GUPTA, HISTORY OF FREEDOM MOVEMENT IN BANGLADESH, 1943–1973: SOME INVOLVEMENT 305, 360–64 (1974); MERWIN CRAWFORD YOUNG, THE POLITICS OF CULTURAL PLURALISM 82, 489 (1976); FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 246 (3d ed. 2005).

121. By February 1972, Bangladesh had been recognized by forty-seven states. *See* Nanda, *supra* note 112, at 336.

ic Union ("HDZ") were elected, a new Croatian Constitution was enacted on December 22, 1990, which relegated Serbs and other nationalities within Croatia to the status of minorities. Serb leaders in Serbian Krajina responded by repudiating the jurisdiction of the Croatian Department of Internal Affairs, and began to acquire arms, declaring autonomy and unity with Serbia.[122]

Tensions between Croatia and Serbia increased further when on May 15, 1991, Serbia and its allies blocked the installation of the Croatian Presidential candidate, Stipe Mesic, thereby creating a constitutional crisis. This action not only created legal problems, but it also left the National Yugoslav Army ("JNA") without a Commander-in-Chief, which left open the possibility for partisan military officials to pursue unauthorized operations with impunity. On May 19, Croatia acted decisively by conducting a referendum on Croatian independence, which was supported by an overwhelming majority of Croatians.[123] On June 25, the Croatian Parliament proclaimed its independence from the Socialist Federative Republic of Yugoslavia ("SFRY").

The SFRY legislature reacted by labelling Croatia's independence illegal, and calling for the federal army to preserve the SFRY's territorial integrity and political unity. Battles soon broke out between Croatian government forces and the Serbs within Serbian Krajina. The JNA intervened under the pretense of neutrality, but the federal army's partiality soon became clear: the JNA secured Serbian held positions and did not prevent the expansion of Serbian paramilitary forces into Croatian held territory.[124]

At this point the international community—alarmed at the increasing violence and the potential for Yugoslav implosion—became more involved, with the European Community ("EC") dispatching mediators to the conflict. After the EC Ministers "agreed not to recognize the Slovene and Croat secessions" on June 27, 1991, the Foreign Ministers of Luxembourg, Italy, and

---

122. RAIČ, *supra* note 43, at 339.

123. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 570 (1992); RAIČ, *supra* note 43, at 350; Teric, *supra* note 8, at 418.

124. RAVI K. WADHAWAN, DISINTEGRATION OF STATES 121 (1997); RAIČ, *supra* note 43, at 351; Svetozar Stojanovic, *The Destruction of Yugoslavia*, 19 FORDHAM INT'L L.J. 337, 350–51 (1995).

the Netherlands met with Croatian and SFRY government representatives, negotiating a cease-fire agreement, which mandated that in exchange for the withdrawal of JNA troops from Croatian territory, Croatian leaders would agree to a three-month moratorium on Croatian independence.[125] This agreement was formalized on July 7, 1991, at Brioni, and was subsequently known as the "Brioni Accord."[126] However, it soon became clear that the agreement was a Pyrrhic victory, with Serbian forces, supplied with weapons and logistical support from the JNA and Serbia, continuing their military activities against Croatian forces throughout Serbian Krajina. When Ratko Mladic was appointed head of JNA forces in Knin, federal troops began to openly fight alongside Serb paramilitaries.[127] By August, the Serb paramilitaries and JNA were utilizing mortars, tanks, and fighter-jets to suppress Croatia's independence.

The campaign undertook a more sinister turn when Serbian forces flagrantly and repeatedly violated the fundamental human rights of Croatian civilians in Serb occupied territory. Religious and cultural objects were desecrated or destroyed, and the "ethnic cleansing" of Croats and other nationalities inhabiting the areas of Croatia in which Serbs constituted a majority, or were tightly clustered, also took place.[128] During September, the Croatian cities of Vujovar,[129] Vinkovci, and Osijek were at-

---

125. Alan Hanson, *Croatian Independence From Yugoslavia, 1991–1992*, *in* WORDS OVER WAR, MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT 85 (Melanie C. Greenberg, John H. Barton, & Margaret E. McGuinness eds., 2000).

126. RAIČ, *supra* note 43, at 351.

127. Hanson, *supra* note 125, at 86; RAIČ, *supra* note 43, at 352.

128. Areas included Banija, Kordon, eastern Slavonia, eastern Lika, and northern Dalmatia. *See id.* at 352 n.159; Robert M. Hayden, *Imagined Communities and Real Victims: Self-Determination and Ethnic Cleansing in Yugoslavia*, 23 AM. ETHNOLOGIST 783, 795–97 (1996). *See generally* Drazen Petrovic, *Ethnic Cleansing – An Attempt at Methodology*, 5 EUR. J. INT'L L. 342 (1994).

129. Ignatieff claims,

> While the responsibility for the destruction of Vu[j]ovar lies squarely with the tanks and artillery of the Yugoslav National Army who lobbed 150,000 shells into the place, the Croatians also appear to have dynamited parts of it as they withdrew, so that Serbs would gain nothing but rubble for their pains. The pulverization of Vu[j]ovar made no military sense.

tacked, with no distinction between military and civilian targets, the former being almost completely destroyed. In October, Serb forces attacked the city of Dubrovnik, which had practically no defenses.[130] By November 1991 the human tragedy of events in Croatia was apparent for all to see: six hundred thousand refugees were registered in Croatia, and approximately ten thousand people, the majority of whom were Croats, had been killed.[131]

On October 3, 1991, against a backdrop of ongoing hostilities between Serbs and Croatians, Serbian leaders seized control of the SFRY government announcing that the collective presidency would henceforth take over responsibilities that constitutionally fell within the competence of Federal Parliament. This development, known as the "rump presidency," was condemned by the European Community and the Conference on Security and Cooperation in Europe ("CSCE").[132] European governments condemned the JNA, noting that it had "resorted to disproportionate and indiscriminate use of force" and had "shown it was no longer a neutral and disciplined institution."[133] In light of

---

MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM 44–45 (1993). He further notes,

> It didn't even seem to bother the largely Serb commanders that a significant percentage of the population being bombed [in Vujovar], perhaps as many as 20 percent, were ethnic Serbs. Now many of them lie on the city's outskirts beneath one of the bare, nameless crosses in a mass grave.

Id.

130. Hanson, *supra* note 125, at 77–78; RAIČ, *supra* note 43, at 353.

131. RAIČ, *supra* note 43, at 353; ALEKSANDAR PAVKOVIČ, THE FRAGMENTATION OF YUGOSLAVIA: NATIONALISM AND WAR IN THE BALKANS 146 (2d ed. 2000). Udovički has noted that any previous human rights violations by Croatia towards Serbs living in Croatia "faded next to the brutality of the war crimes being committed by the Serbian forces under arms." Jasminka Udovički, *Nationalism, Ethnic Conflict, and Self-Determination in the Former Yugoslavia, in* THE NATIONAL QUESTION: NATIONALISM, ETHNIC CONFLICT, AND SELF-DETERMINATION IN THE 20TH CENTURY 280, 302 (B. Berberoglu ed., 1995).

132. RAIČ, *supra* note 43, at 354; Stojanovic, *supra* note 124, at 352.

133. *European Community Declaration on the Situation in Yugoslavia,* Oct. 6, 1991, *reprinted in* YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION 351–52 (Snežana Trifunovska ed., 1994); *see also* Stojanovic, *supra* note 124, at 352–53; GIDON GOTTLIEB, NATION AGAINST STATE: A NEW APPROACH TO ETHNIC CONFLICTS AND THE DECLINE OF SOVEREIGNTY 69–70 (1993).

Serbian hostilities conducted against Croatia, including human rights violations *in extremis*, on October 8, the day after the expiration of the Brioni Accord, Croatia declared its independence from the SFRY.[134]

Croatia's international recognition was formally delayed until 1992, due to complications associated with the secession of member republics of the former Soviet Union, but on January 15, 1992, the European Community and its member states extended recognition. Soon thereafter, a further seventy-six states extended recognition, and Croatia was admitted to the U.N. on May 22, 1992.[135] These recognitions were extended, despite the fact that Croatia could not control up to one third of its territory—i.e., the territory held by Serbs and constituting Serbian Krajina. This was made possible by the compensatory force principle, as Croatia's UNC secession was concomitant with the right of peoples to external self-determination.[136]

c. Kosovo—UNC Secession

A final example demonstrating the operation of the compensatory force principle in the non-colonial context is Kosovo. Throughout the late-1990s Kosovar Albanians and Serbs engaged in armed resistance which resulted in civilian causalities. Although both sides suffered heavy losses, Serbian military and paramilitary units "committed atrocities on a massive and systematic scale" against Kosovar Albanians.[137] Killings and violence continued with massacres and extrajudicial executions by both sides being widely documented.[138] The turning

134. RAIČ, *supra* note 43, at 354.

135. *Id.* at 356; MUSGRAVE, *supra* note 8, at 120; Weller, *supra* note 123, at 593.

136. For a discussion of the right of peoples to self-determination and UNC secession, see *supra* Part II.

137. Alex J. Bellamy, *Human Wrongs in Kosovo, 1974-99*, *in* THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS 105, 120 (Ken Booth ed., 2001). Hannum notes that "[b]eginning in 1998, when the Kosovo Liberation Army (KLA) began its guerilla war against Serbian (Yugoslav) authorities, killing on both sides increased; most of the victims were ethnic Albanians." Hurst Hannum, *Book Review*, 11 INT'L J. ON MINORITY & GROUP RTS. 433, 438 (2004).

138. The Serbian MUP forces, for example, are thought to have killed approximately forty people in an attempt to arrest Adem Jashari, a member of the KLA. *See* Bellamy, *supra* note 137, at 120. Human Rights Watch has claimed that the Serbian MUP and JP in 1998 had "attacked a string of

point in the violence was the January 1999 Račak massacre, when Serbian paramilitaries killed and mutilated the bodies of approximately forty-five Albanian civilians. Western press and ceasefire monitors from the Organization for the Security and Cooperation in Europe ("OSCE") graphically revealed the brutality of the massacre to the world.[139]

The massacre led to NATO's decision that the conflict could only be resolved by large-scale military intervention, which in turn facilitated the scheduling of the NATO-sponsored Rambouillet Conference in February 1999 at the Château de Rambouillet on the outskirts of Paris.[140] The final document, known as the Rambouillet Accords, provided for NATO's administration of Kosovo as an autonomous province within Yugoslavia, which would be achieved by the deployment of approximately thirty thousand NATO troops.[141] The document and its contents were consistently rejected by Serbia's political leader-

---

towns and villages," concluding that "the majority of those killed and injured have been civilians." HUMAN RIGHTS WATCH, HUMANITARIAN LAW VIOLATIONS IN KOSOVO 5 (1998). The Special Rapporteur to the United Nations, Jiri Dienstbier, in 1999 alluded to

> mass expulsion and ethnic cleansing of hundreds of thousands of Kosovo Albanians; killings of as-yet-untold numbers of civilians as new mass graves continue to be discovered in Kosovo; arrest and arbitrary detention of several thousand Kosovo Albanians now in prison in Serbia; systematic destruction of whole villages, neighbourhoods, means of livelihood and the homes of selected individuals; rape as an instrument of terror; use of landmines and depleted uranium . . . and ethnic cleansing of nearly 200,000 non-Albanians from Kosovo.

Jiri Dienstbier (Special Rapporteur of the Commission on Human Rights), *Situation of Human Rights in Bosnia and Herzegovina, The Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, ¶ 91, U.N. Doc. A/54/396-S/1999/1000 (Sept. 24, 1999); Tesón, *supra* note 120, at 376–77.

139. PAVKOVIČ, *supra* note 131, at 193; Bellamy, *supra* note 137, at 121.

140. Marc Weller, *The Rambouillet Conference on Kosovo*, 75 INT'L AFFS. 211, 222–23 (1999).

141. Jure Vidmar, *Kosovo: Unilateral Secession and Multilateral State-Making*, *in* KOSOVO: A PRECEDENT? 146–47 (James Summers ed., 2011); Sean Murphy, *Reflections on the ICJ Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999)*, *in* THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 141–44 (Marko Milanovič & Michael Wood eds., 2015).

ship.[142] NATO responded by commencing high altitude airstrikes on March 24, 1999, which in turn prompted the Serbian forces within Kosovo to commence a program of ethnic cleansing, resulting in over three hundred thousand Kosovar Albanians seeking refuge in Albania and Macedonia, with thousands more leaving their homes to hide in the countryside. By April 1999, the U.N. estimated that 850,000 people, the majority of whom were Albanians, had been forced from or had fled their homes.[143]

The violence ended on June 12, when Serbian President Slobodan Miloševič, increasingly aware of NATO's resolve and Russia's unwillingness to intervene, agreed to a military presence in Kosovo incorporating NATO troops but under U.N. headship. Shortly thereafter, the U.N. Security Council adopted resolution 1244,[144] which established a new status for Kosovo. According to this resolution, Kosovo would technically remain within Yugoslavia, but would be under completely separate administrative, political, and security arrangements, making it akin to an independent state in all but name.

On February 17, 2008, after nearly fifteen years of fighting and civil disorder, the Kosovo Assembly adopted a declaration of independence, severing its links with Yugoslavia.[145] Over the following days numerous states recognized Kosovo's independence, including the United States, Albania, Turkey, Austria, Germany, Italy, France, Britain, and Australia. As of writing,

---

142. Serbian President Slobodan Miloševič reputedly slammed the Rambouillet Accords, describing them as a "Clinton administration *diktat*," which paved the way for Kosovo's eventual unilateral secession from Serbia. Lenard J. Cohen, *Kosovo: "Nobody's Country",* 99 CURRENT HIST. 117, 117 (2000); JOHN R. LAMPE, YUGOSLAVIA AS HISTORY: TWICE THERE WAS A COUNTRY 414 (2000); Saarilouma notes that "[t]he Yugoslav/Serbian party was clearly responsible for the failure of the negotiation process." KATARIINA SAARILUOMA, OPERATION ALLIED FORCE: A CASE OF HUMANITARIAN INTERVENTION? 24 (2004).

143. The U.N. Human Rights Commission ("UNHRC") estimated that approximately 1,500,000 Kosovar Albanians had been forcibly displaced. *See* Bellamy, *supra* note 137, at 121. Pavkovič puts the figure at seven hundred thousand. PAVKOVIČ, *supra* note 131, at 195. Whitman puts the figure at eight hundred thousand. Jim Whitman, *The Kosovo Refugee Crisis: NATO's Humanitarianism versus Human Rights*, *in* THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS 164, 171 (2001). Tesón suggests a figure of approximately one million. TESON, *supra* note 120, at 378.

144. S.C. Res. 1244 (June 10, 1999).

145. *Kosovo MPs Proclaim Independence*, BBC NEWS (Feb. 17, 2008, 10:45 PM), http://news.bbc.co.uk/2/hi/europe/7249034.stm.

108 states have extended recognition. China has expressed concern over the declaration of independence, whilst Russia has condemned Kosovo's statehood as illegal.[146]

By the time of Kosovo's 2008 declaration of independence, it was apparent that in addition to political and cultural discrimination Kosovar Albanians had experienced human rights abuses *in extremis*, including widespread displacement and death. Indeed some commentators have alleged genocide by Serbs against Kosovar Albanians.[147] The fact that Kosovar Albanians were subject to human rights abuses *in extremis* accounts for why Kosovo's failure in 2008 to strictly satisfy the effective government did not prevent its attainment of statehood. Ultimately, Kosovo was constituted pursuant to the right of peoples to self-determination, and was therefore able to avail itself of the protection afforded by the compensatory force principle.

d. Conclusion

The aforementioned case studies collectively generate two general conclusions: first, states created by UNC secession pursuant to the law of self-determination do not have to strictly satisfy the effective government criterion;[148] and second, that in

---

146. Luke Harding, *Kosovo Breakaway Illegal Says Putin*, GUARDIAN (Feb. 15, 2008 06.54 AM) http://news.bbc.co.uk/2/hi/europe/7249034.stm.

147. Bellamy, *supra* note 137, at 105; Hilaire McCoubrey, *Kosovo, NATO and International Law*, 15 INT'L REL. 42 (1999); Juliane Kokott, *Human Rights Situation in Kosovo 1989-1999*, *in* KOSOVO AND THE INTERNATIONAL COMMUNITY 1, 27 (Christian Tomuschat ed., 2002); Johan Vetlesen, *The Logic of Genocide and the Prospects of Reconciliation*, *in* KOSOVO BETWEEN WAR AND PEACE: NATIONALISM, PEACEBUILDING AND INTERNATIONAL TRUSTEESHIP 37 (Tonny Brems Knudsen & Cartsen Bagge Laustsen eds., 2006).

148. Several other scholars similarly hold this interpretation. *See, e.g.*, RAIČ, *supra* note 43, at 411 ("[T]he cases of Bangladesh, Croatia, Georgia, and Moldova cannot but lead to the conclusion that the compensatory force principle also applies *beyond* decolonization.") (emphasis added); KREIJEN, *supra* note 41, at 163–64. Kreijen concluded,

> State practice shows that juridical statehood stretches beyond decolonization. This is one of the important conclusions that Raič reached in a recent and comprehensive study of statehood and the law of self-determination. On the basis of an extensive analysis of relevant [non-colonial] cases, Raič established that ". . . the *compensatory force principle* also applies beyond decolonization."

Id.

contemporary times new states can only be created pursuant to the law of self-determination.

Having elaborated these general findings, it is apposite to note that one case of UNC secession from the break-up of the Socialist Federative Republic of Yugoslavia, Bosnia-Herzegovina, cannot be explained by the operation of the law of self-determination and the compensatory force principle.[149] On October 14, 1991, the Bosnia-Herzegovinan parliament announced its UNC secession from the SFRY, but this was repudiated by Bosnia's Serb and Croat minorities. Bosnia's Serb minority expressed their intention to stay within the SFRY and created the Assembly of the Serb People in Bosnia-Herzegovina, which on January 9, 1992 announced the formation of the Serb Republic of Bosnia-Herzegovina (*Republika Srpska*).[150] At approximately the same time, Bosnia's Croat minority expressed the intention to secede from Bosnia-Herzegovina, but in the meantime established the autonomous (but not sovereign) Croat Community of Herceg-Bonsnia in November 1991.[151]

Bosnia-Herzegovina reasserted its independence on December 24, 1991, requesting recognition from the European Community ("EC"). This was however, denied, as according to Opinion No. 4 of the Arbitration Commission of the Peace Confer-

149. Other secessions related to the break-up of Yugoslavia, which occurred after 1992—the date at which the SFRY is generally accepted to have entered a state of dissolution and thus extinction—need not be explained by the law of self-determination and the compensatory force principle. The secession of Slovenia could perhaps be described as quasi-consensual. Slovenia declared its independence on June 25, 1991, and the Yugoslav National Army ("JNA") substantially under the control of the Serb-dominated federal Secretariat for National Defence, occupied strategic points in Slovenia. After a few days of strong resistance by Slovenian militia forces, a ceasefire was agreed, known as the Brioni Accord. Soon thereafter the federal presidency ordered the JNA to withdraw from Slovenia. In October 1991 Slovenia again declared its independence, and this time the JNA made no response, thereby indicating acquiescence with Slovene independence. See Weller, *supra* note 123, at 569; TERRETT, *supra* note 3, at 32. Macedonia's secession formally occurred once the SFRY was dissolved, thereby ensuring that no existing (parent) state remained to challenge Macedonian independence. *See* RADAN, *supra* note 4, at 194–95.

150. The name "*Repulblika Srpska*" was adopted by the Serb Republic of Bosnia-Herzegovina on August 12, 1992. *See* RADAN, *supra* note 4, at 189.

151. RAIČ, *supra* note 43, at 414; RADAN, *supra* note 4, at 187–93.

ence on Yugoslavia[152] "the will of the peoples of Bosnia-Herzegovina to constitute [the Republic] as a sovereign and independent State cannot be held to have been fully established."[153] In the wake of a referendum on independence (boycotted by Bosnia's Serb minority) in which 99.4 percent of votes were in favor of independence, fighting erupted between Bosnian Muslims and Bosnian-Serb irregulars and between the JNA and Bosnian-Croat irregulars.[154] Aware of these developments, EC-member states and the United States extended recognition to Bosnia-Herzegovina on April 6 and 7, 1992, respectively.[155] At this point, the fighting between the various groups within Bosnia-Herzegovina intensified.[156]

For present purposes, it is important to note that at the time of its independence, Bosnia-Herzegovina did not strictly satisfy the effective government criterion. Various parts of the Republic's territory were not under the Bosnian-Herzegovinian government's control. Moreover, it was uncertain whether Bosnia-Herzegovina was established pursuant to the right of peoples to self-determination, which permits UNC secession in the context of sustained and systematic human rights abuses *in extremis*. As Raič has noted: "the [Bosnian Muslims] were exposed to serious and widespread violations of their human rights only *after* the proclamation of independence."[157] It would seem, therefore, that in the case of Bosnia-Herzegovina, the operation of the compensatory force principle was difficult to discern.

It might be argued, however, that the recognition of Bosnia-Herzegovina in April 1992 was made to safeguard Bosnian Muslims in light of recent human rights abuses in Croatia, and the Serbian posture towards Kosovo since the late-1980s.[158] As such, Bosnia-Herzegovina's UNC secession, which was initially rejected by EC-member states, was subsequently approved to avoid further human rights abuses. In any event, as Raič has noted, Bosnia-Herzegovina's UNC secession is difficult to fit squarely within the established law of self-determination and

152. *Opinion No. 4*, 31 I.L.M. 1501–1503 (1992).
153. *Id.* at 1503; *see also* RAIČ, *supra* note 43, at 414.
154. RADAN, supra note 4, at 187.
155. *Id.*
156. RAIČ, *supra* note 43, at 414.
157. *Id.* at 415–16.
158. *Id.* at 416.

the concomitant compensatory force principle.[159] It may be best classified as *sui generis*.[160]

3. For How Long Might Ineffective Government Persist in the Context of UNC Secession Pursuant to the Law of Self-determination?

States created by UNC secession pursuant to the law of self-determination do not have to strictly satisfy the effective government criterion, as the examples of the Congo, Algeria, Guinea-Bissau, Angola, Bangladesh, Croatia, and Kosovo collectively indicate. However, it must be asked if these states can persist indefinitely in such a condition? Guidance on this question is somewhat scant, although some general indicators can be gleaned from the examples of the Congo, Angola, and Kosovo.

The facts pertaining to the Congo and Angola have been previously related. For present purposes, it is sufficient to note that both states were created in the decolonization context pursuant to the law of self-determination. Furthermore, both the Congo and Angola, although unable to strictly satisfy the effective government criterion, were held to possess statehood. The Congo experienced civil disorder for a period of approximately five years, until the ascendancy of Joseph-Désiré Mobuto in 1965. In Angola, ineffective government persisted for an extraordinary twenty-seven years (1975–2002) as various factions and guerrilla groups fought for supremacy. These two examples indicate that a considerable length of time would be required before a lack of effective government could jeopardize statehood. By analogy, it can be reasoned that states created by UNC secession pursuant to the law of self-determination might also remain without an effective government for a considerable length of time.

In the case of Kosovo, doubts arose as to whether Pristina could satisfy the effective government criterion. For this reason, an international military presence (Kosovo Force or KFOR), led by NATO was maintained within Kosovo to ensure that law and order did not deteriorate and destabilize the region. It is, moreover, uncertain when this force will be completely removed and Kosovo will be able to ensure its own secu-

159. *Id.* at 418.
160. *Id.*

rity. Yet, despite this situation, Kosovo has, at the time of writing, been recognized by 108 states. Although it is difficult to draw any precise conclusions from this example, it does indicate that states created by UNC secession pursuant to the law of self-determination might potentially persist for many years.

At some temporal point, however, a state created by UNC secession pursuant to the law of self-determination and without an effective government may have its statehood called into question. Precisely how long this might take is an unresolved legal question, although extrapolation with respect to Angola would suggest a longer time than might intuitively be assumed.

C. Capacity to Enter Relations with Other States

A state created by UNC secession must have the ability to enter relations with other states. This requires that it must politically and legally represent itself to other states and within international fora.[161] Furthermore, a state created by UNC secession cannot rely on any other state to enter relations or accept international responsibilities on its behalf. As Crawford has noted, however, the criterion represents a conflation of the effective government and independence criterions, the latter of which is examined below.[162]

D. Independence

A state created by UNC secession must be independent.[163] This means that its decision-making functions and other as-

---

161. Note though, that it does not require that a state *must* represent itself to other states and international forums. *See id.* at 73.

162. CRAWFORD, *supra* note 2, at 62.

163. The independence criterion has been famously discussed by Judge Huber in the *Islands of Palmas Case*:

> Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

Island of Palmas Case, 2 REP. OF INT'L ARBITRAL AWARDS 829, 838 (Apr. 4, 1928). *See also* CRAWFORD, *supra* note 2, at 62; CRAWFORD, *supra* note 49, at

pects of governmental organization must be exercised without external interference by other states. Most scholars agree that the independence criterion possesses two aspects: formal and actual independence.[164]

1. Formal Independence

A state created by UNC secession is required to exhibit formal independence, meaning that its powers of government are derived from domestic law. A state created by UNC secession must therefore be self-governing and free of both external interference and control. Some indicator is typically required to ascertain formal independence, such as the adoption of a constitution, formation of a provisional government, declaration of independence, or establishment of a sovereign legislature.

2. Actual Independence

A state created by UNC secession must also be able to demonstrate actual independence, meaning that its decisions and actions must be its own. This requirement ensures that statehood is *bona fide*, and "not a mere fiction."[165] Thus, a state purportedly created by UNC secession will not exist if it routinely acquiesces to the directives of another state. Similarly, a state purportedly created by UNC secession will not exist if legal decisions and legislation promulgated in another state are applicable throughout its territory and it does not voluntarily accede to such decisions and legislation.

A state purportedly created by UNC secession under belligerent occupation will also fail the test of actual independence. An example of the foregoing is provided by Manchukuo, a puppet state created by the Japanese military in 1931 throughout the Chinese province of Manchuria. A fact-finding body established by the League of Nations, known as the Lytton Commission, found that "[t]he independence movement, which had never been heard of in Manchuria before September 1931, was only made possible by the presence of Japanese troops and for this

---

129–30; KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 161–90 (1954).

164. MAREK, *supra* note 163, at 165–80; RAIČ, *supra* note 43, at 75; JORRI DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES 122 (1996).

165. MAREK, *supra* note 163, at 169.

reason cannot be considered to have been called into existence by a genuine and spontaneous independence movement."[166] This report further stated:

> A group of Japanese civil and military official conceived . . . the Manchurian independence movement as a solution to the situation in Manchuria as it existed after the events of September 18, and, with this object, made use of the names and actions of certain Chinese individuals and took advantage of certain minorities and native communities that had grievances against the Chinese administration. This movement, which rapidly received assistance and direction from the Japanese general staff, could only be carried through owing to the presence of the Japanese troops. It cannot be considered as a spontaneous and genuine independence movement. The main political and administrative power in the "Government" of "Manchukuo" . . . rests in the hands of Japanese officials and advisors, who are in a position actually to direct and control the administration in general. The Chinese in Manchuria, who . . . form the vast majority of the population do not support this "Government" and regard it as an instrument of the Japanese.[167]

It follows that a state created by UNC secession, designed to conceal the sovereign control of another state, will not satisfy the test of actual independence.[168] In such cases, the sovereignty of the occupied existing state purportedly rendered extinct—whether in part or whole—will remain intact throughout the territory concerned and be exercisable with the cessation of belligerent occupation. This is a logical extension of the continuity doctrine, which assumes a state's juridical existence even if it has been purportedly rendered extinct.[169]

---

166. Appeal by the Chinese Government: Report of the Commission of Enquiry, League of Nations Doc. C.663.M.320.1932.VII (1932).

167. *Id.*

168. Marek has described a puppet state as, "an entity which, while preserving all the external paraphernalia of independence, is in fact utterly lacking such independence . . . and is in reality . . . a mere organ of the State which has set it up, whose . . . satellite it is." MAREK, *supra* note 163, at 170. Crawford has defined the term thus: "[t]he term 'puppet State' is used to describe nominal sovereigns under effective foreign control, especially in cases where the establishment of the puppet State is intended as a cloak for illegality." CRAWFORD, *supra* note 2, at 78.

169. *Id.* at 169–70; RAIČ, *supra* note 43, at 78; Josef L. Kunz, *Identity of States Under International Law*, 49 AM. J. INT'L L. 68, 70 n.8 (1955).

A more recent example of a state purportedly created by UNC secession but lacking actual independence is Serbian Krajina. During June 1991, the Yugoslav National Army ("JNA") intervened in Croatia as a result of hostilities between the Croatian police forces and Serbian militants, which erupted after the Croatian declaration of independence on June 25, 1991. Although the JNA claimed to be taking a neutral position, preventing both sides from fighting each other, the federal army actually prevented the reestablishment of Croatian control over territory forming Serbian Krajina. In effect, Serbian Krajina was created by the JNA, which was controlled by Serbian leadership.[170]

Coupled with this, Serbian Krajina appeared to be politically under the influence of Serbia, as evidenced by its vacillating position regarding the establishment of U.N. Protected Areas ("UNPAs") under the Vance peace-plan.[171] Although the leadership of Serbian Krajina initially opposed the establishment of UNPAs, which were formally described as "areas in Croatia," such leaders subsequently reversed course after Serbian President Slobodan Miloševič approved their creation. To a certain extent then, Serbian Krajina appeared to be under Serbia's political control.[172] As Crawford has observed, actual independence cannot be achieved where there is "foreign *control* overbearing the decision-making of [an] entity . . . on a wide range of matters . . . ."[173]

Another example from the break-up of Yugoslavia of a state purportedly created by UNC secession and lacking formal independence is the Serb Republic of Bosnia-Herzegovina (*Republika Srpska*). The Republic was declared on April 7, 1992 throughout various territorial enclaves now forming part of

---

170. The former President of Serban Krajina, Milan Babić, testified to the International Criminal Tribunal for the former Yugoslavia that Serbian Krajina was under the political and economic control of Serbian President, Slobodan Milošević. This included the JNA. *See* JUDITH ARMATTA, TWILIGHT OF IMPUNITY: THE WAR CRIMES TRIAL OF SLOBODAN MILOSEVIC 160–63 (2010).

171. RAIČ, *supra* note 43, at 79–80. For information on the Vance peace-plan, which is named after Cyrus Vance, see generally Amy Lou King, *Bosnia-Herzengovina-Vance-Owen Agenda for a Peaceful Settlement: Did the UN Do Too Little, Too Late, to Support This Endeavor?*, 23 GA. J. INT'L & COMP. L. 347 (1993).

172. RAIČ, *supra* note 43, at 80.

173. CRAWFORD, *supra* note 49, at 130.

Bosnia-Herzegovina. In *The Prosecutor v. Dusko Tadić*,[174] the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") alluded to the failure of the Serb Republic of Bosnia-Herzegovina to exercise actual independence, noting:

> [T]he fact that it was the FRY that had the final say regarding the undertaking of international commitments by the *Republika Srpska*, and in addition pledged, at the end of the conflict, to ensure respect for those international commitments by the *Republika Srpska*, confirms that (i) during the armed conflict the FRY exercised control over that entity, and (ii) such control persisted until the end of the conflict.[175]

The Serb Republic of Bosnia Herzegovina thus lacked actual independence, as its armed forces and political commitments were under Belgrade's direct control. This necessarily prevented the Republic from attaining statehood.

A final example of a state purportedly created by UNC secession, but lacking actual independence, is Crimea. Towards the end of 2013, mass protests occurred in Ukraine in response to Ukrainian President Viktor Yanukovych's decision to postpone the Ukraine-European Union Association Agreement. This postponement was brought about by political inducements from Russia, with offers from Russian President Vladamir Putin to sell discounted gas to Ukraine, and also purchase $15 billion in Ukrainian bonds.[176] These moves were designed to prevent closer integration between Ukraine and Europe, which Putin and other Russian elites feared would lead to closer military integration, most notably, Ukraine's accession to NATO.[177]

---

174. Prosecutor v. Tadić, Case IT-94-1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

175. RAIČ, *supra* note 43, at 81–82 (quoting Prosecutor v. Tadić, Case IT-94-1-A, Judgment, ¶¶ 145, 147, 154, 160 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999)).

176. *Russia Offers Ukraine Major Economic Assistance*, BBC NEWS (Dec. 17, 2013), http://www.bbc.com/news/world-europe-25411118; Christopher R. Rossi, Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, *and the Elusive Search for Equilibrium After Ukraine*, 24 TUL. J. INT'L & COMP. L. 143, 143–44 (2015).

177. David M. Herszenhorn, *Facing Russian Threat, Ukraine Halts Plans for Deals with E.U.*, N.Y. TIMES (Nov. 21, 2013), http://nyti.ms/1AXKwQw; Neil MacFarquhar, *Early Memo Urged Moscow to Annex Crimea, Report Says*, N.Y. TIMES (Feb. 25, 2015), http://nyti.ms/18kQOPy; John Mearsheimer, *Why the Ukraine Crisis is the West's Fault: The Liberal Delusions that*

Ukraine's popular voice, however, was in favor of closer ties with Europe. Discontent towards Yanukovych's pro-Russian policies culminated in the deaths of antigovernment protesters in January—February 2014. On February 22, Yanukovych fled Kiev amidst allegations of corruption and complicity in the killing of antigovernment protesters.[178] A political power vacuum ensued, and Russian special forces moved into Crimea to take up strategic positions and organize local resistance.[179] Russian forces massed on the Ukrainian border, conducting military exercises and preparing for the possibility of a full-scale invasion. Crimea's UNC secession was proclaimed, but considerable doubt exists over the lack of actual control exerted by Crimean authorities during this period.

A referendum, unrecognized by all but a handful of states, was instituted to legitimize the preceding military activities.[180] Rather ominously, Russian military forces remained within Crimea during the referendum.[181] These measures paved the

---

Provoked Putin, FOREIGN AFF., Sept.–Oct. 2014, at 79; Adam Twardowski, *Return of* Novorossiya*: Why Russia's Intervention in Ukraine Exposes the Weakness of International Law*, 25 MINN. J. INT'L L. 351, 356–59 (2015).

178. William Booth & Will Englund, *Ukraine's Yanukovych Missing as Protesters Take Control of Presidential Residence in Kiev,* WASH. POST (Feb. 22, 2014), http://wpo.st/EEr-1.

179. Lawrence Freedman, *Ukraine and the Art of Crisis Management*, 56 SURVIVAL: GLOBAL POL. & STRATEGY 9, 21–22, 30 (2014).

180. The referendum failed to provide a *status quo* option for voters, instead only offering integration with Russia or remaining with Ukraine. *See* Stephen Tierney, *Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies*, 16 GERMAN L.J. 523, 534–35 (2015); Adam Šućur, *Observing the Question of Secession in the Wake of Recent Events in Kosovo, Abkhazia, South Ossetia and Crimea*, 3 ZAGREBAČKA PRAVNA REVIJA 273, 296 (2015); Christian Marxsen, *The Crimea Crisis: An International Law Perspective*, 74 HEIDELBERG J. INT'L L. 367, 380–83 (2014); Peter Hilpold, *Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History*, 14 CHINESE J. INT'L L. 237, 258–62 (2015).

181. David M. Herszenhorn, *Crimea Votes to Secede From Ukraine as Russian Troops Keep Watch*, N.Y. TIMES (Mar. 16, 2014), http://nyti.ms/1fAThkg; Tierney, *supra* note 180, at 528–29; Brad Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention*, 16 GERMAN L.J. 384, 390 (2015); Amandine Catala, *Secession and Annexation: The Case of Crimea*, 16 GERMAN L.J. 581, 602 (2015). For acknowledgement of the close historical ties between Crimea and Russia, see Henry A. Kissinger, *To Settle the Ukraine Crisis, Start at the End*, WASH. POST (Mar. 5, 2014), http://wpo.st/gNT81.

way for Crimea's integration into Russia on March 18, 2014.[182] Allegations of direct Russian military aggression have continued, most notably with the downing of Malaysia Airlines flight MH 17 by Russian made Buk missiles on July 17, 2014.[183] Russian military involvement thus suggests that Crimea was not a case of UNC secession followed by integration with Russia, but rather a case of belligerent occupation and annexation. Crimea thus lacked actual independence.

E. Summation of Criteria for Statehood Based on Effectiveness

In relation to the defined territory criterion, a state created by UNC secession must claim a specific territory and maintain allegiance to that claim's specific nature. Furthermore, such a state will *not* necessarily be required to follow the existing state's internal administrative boundaries. *A priori*, the application of the *uti possidetis* principle beyond the decolonization context has not yet crystallized into a definitive rule of international law.

A state created by UNC secession pursuant to the law of self-determination will *not*, by virtue of the compensatory force principle, be required to strictly satisfy the effective government criterion.[184] In the state creation context, therefore, the effective government criterion has been reformulated as equivalent to the right of peoples to external self-determination.[185]

In relation to the independence criterion, a state created by UNC secession must demonstrate formal and actual independence. The former requires that the state created manifests the formal hallmarks of independence, while the latter requires the absence of political control by other states.

It remains to be ascertained, however, whether a state created by UNC secession must satisfy another criterion, namely, recognition.

---

182. Steven Myers & Peter Baker, *Putin Recognizes Crimea Secession, Defying the West*, N.Y. TIMES (Mar. 17, 2014), http://nyti.ms/1gF8TEj.

183. Thomas Gibbons-Neff, *What Would it Take to Shoot Down MH17?*, WASH. POST (July 17, 2014), http://wpo.st/2x501; *Malaysia Airlines MH17: Missile Expert Arrested Near Border, Ukraine Government Says*, ABC NEWS ONLINE (July 18, 2014, 6:04 PM), http://www.abc.net.au/news/2014-07-19/ukraine-government-says-missile-expert-arrested-near-border/5608744.

184. RAIČ, *supra* note 43, at 104, 364; CRAWFORD, *supra* note 49, at 129; SHAW, *supra* note 49, at 149; DUGARD, *supra* note 79, at 78–79.

185. *Id.* at 79.

IV. RECOGNITION AND UNC SECESSION: AN ADDITIONAL CRITERION FOR STATEHOOD?

The legal interrelationship between recognition and UNC secession varies according to the particular recognition theory preferred. The *declaratory* recognition theory postulates that when one state recognizes another, this is merely an acknowledgement of a preexisting factual situation (recognition does not confer statehood, but merely acknowledges it). The *constitutive* recognition theory postulates that when one state recognizes another, this acknowledgement actually confers statehood (a state cannot exist without the conferral of recognition). The *constitutive-collective* recognition theory suggests that admission to the U.N. represents the collective conferral of statehood (a state cannot exist until it is admitted to the U.N.).[186]

According to the declaratory theory, the process of UNC secession will be completed prior to any subsequent grant of recognition. The constitutive theory, by contrast, holds that the process of UNC secession can only be completed by the conferral of recognition itself. The constitutive-collective theory suggests that the process of UNC secession can only be completed by admission to the U.N.

However, before commencing a detailed analysis of the relative strengths and weaknesses of the declaratory, constitutive, and constitutive-collective recognition theories, it is first necessary to briefly consider whether any special rules apply to the recognition of states created by UNC secession as opposed to already existing states.

A. A Lex Specialis for Recognition in the Context of UNC Secession?

Pufendorf maintained that the existing state's recognition was necessary for a secessionist entity to obtain statehood.[187] *A priori*, an entity created by consensual or unilateral secession must enjoy the existing state's recognition before statehood could be legally conferred. Other early scholars, however, such

186. This has also been termed the constitutive-cum-collective recognition theory. *See* Johan D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 20–21 (1991).

187. *See* CRAWFORD, *supra* note 2, at 376.

as Vattel, took a different view, arguing that the existing state's recognition was unnecessary.[188]

The debate between these two positions was resolved in the context of the independence of the former Spanish colonies in South America. From 1809 onwards, various Spanish colonies declared their independence from Madrid and functioned without any effective Spanish opposition for over a decade. Madrid, despite its lack of effective opposition, maintained a policy of refusing to extend recognition to its purported South American territories. In June 1822, contrary to Spanish desires, U.S. President James Monroe extended recognition to Colombia. Similarly, the British extended recognition to Argentina in February 1825, Colombia in April 1825, and Mexico in December 1826.[189] These recognitions occurred without Madrid's consent and thus established that in cases of UC secession, the existing state's recognition is unnecessary.

State practice from the twentieth century also indicates that in context of UC secession the existing state's recognition is unnecessary, namely, Algeria's recognition prior to French recognition, Guinea-Bissau's recognition prior to Portuguese recognition, and Indonesia's recognition prior to Dutch recognition.[190]

State practice from the twentieth century analogously indicates that in context of *UNC secession*, the existing state's recognition is unnecessary, namely, Bangladesh's recognition prior to Pakistani recognition, the recognition of Slovenia, Croatia, Bosnia-Herzegovina and Macedonia prior to Yugoslav recognition, and Kosovo's recognition prior to Serbian recognition.[191]

Thus, once an entity created by UNC secession has satisfied the criteria for statehood based on effectiveness, it is unnecessary that the existing state *also* confers recognition.[192] As Raič has noted, "under modern international law a new territorial entity, created by secession, may acquire full international personality originally and independently, that is, without the necessity of a transfer of sovereignty by the predecessor State."[193]

---

188. *Id.*
189. *Id.* at 377.
190. RAIČ, *supra* note 43, at 93–94.
191. *Id.*
192. CRAWFORD, *supra* note 2, at 382.
193. RAIČ, *supra* note 43, at 94.

It follows that there is no *lex specialis* for recognition in the context of UNC secession.

B. Evaluation of Recognition Theories

It is now well settled in scholarly discourse that the declaratory theory, rather than the constitutive, is the more correct approach to recognition. This position is borne out by consideration of treaty law, customary law, judicial decisions, and scholarly opinion.

With respect to treaty law, the Montevideo Convention, signed at Montevideo, Uruguay, on December 26, 1933, in Article 3 enumerates that:

> The political existence of the State is independent of recognition by the other States. Even before recognition, the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

A priori, recognition does not confirm statehood, as propounded by the constitutive school, but instead statehood antedates recognition.[194]

The Charter of the Organization of American States ("OAS") similarly suggests that the declaratory theory is correct, with Article 13 affirming that "[t]he political existence of the State is independent of recognition by other States." Article 14 supplements this position, declaring that "[r]ecognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States." Both treaties thus support the declaratory view, and this approach is, by virtue of the quasicontractual nature of treaty law, binding upon signatory states.[195]

No treaty law can be marshalled to support the constitutive recognition theory. It has been suggested, however, that Arti-

194. *See* P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES 13 (1994).

195. *Id*. at 14; Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). The content of Article 26 is also reflective of customary international law. *See* Pulp Mills on the River Uraguay (Arg. v Uru.), Judgment, 2010 I.C.J. 67, ¶ 145 (Apr. 20).

cles 4(1) and 4(2) of the U.N. Charter might provide support for the constitutive-collective recognition theory, if read so as to mean that admission to the U.N. is coterminous with the conferral of statehood by collective means. However, this argument cannot be sustained as the Charter's *travaux préparatoires* reveals that a Norwegian proposal to provide the U.N. with the ability to recommend collective recognition of statehood was rejected.[196] As observed by Aufricht: "it was the intention of the authors of the Charter not to interpret admission to membership as equivalent to collective recognition of States or governments."[197]

With respect to customary law, state practice indicates the correctness of the declaratory approach. In December 1974 the General Assembly adopted the nonbinding Definition of Aggression,[198] Article 1 of which provided that "[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State," where "the term 'State' . . . [i]s used without prejudice to questions of recognition or to whether a State is a member of the United Nations." Article 1 thus suggests that states can exist regardless of whether they enjoy recognition from other states, or are members of the U.N. *A priori*, the Definition of Aggression, which was adopted by consensus, comports with the fundamental tenets of the declaratory recognition theory.

Other incidents of state practice also suggest that nonrecognized states are not to be necessarily regarded as stateless entities.[199] When Israeli fighter jets shot down British aircraft

196. United Nations Conference on International Organization, Amendments and Observations on the Dumbarton Oaks Proposal, Submitted by the Norwegian Delegation, U.N. Doc. 2 G/7(n)(1) (May 3, 1945), *in* 3 DOC. U.N. CONF. INT'L ORG. 366 (1945).

197. Hans Ausfricht, *Principles and Practice of Recognition by International Organizations*, 43 AM. J. INT'L L. 691, 691 (1949).

198. G.A. Res. 3314 (XXIX), U.N. Doc. A/9631 (Dec. 14, 1974).

199. *See* Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 117 (2002). Crawford asserts that

> [t]he question is whether the denial of recognition to an entity otherwise qualifying as a State entitles the non-recognizing State to act as if it was not a State – to ignore its nationality, to intervene in its affairs, generally to deny the exercise of State rights under international law. The answer must be no, and the categorical constitutive position, which implies a different answer, is unacceptable.

over Egypt in January 1949, for example, the British government demanded compensation from Israel, despite not having granted the latter recognition. Accordingly, the British government regarded the state of Israel as an incontrovertible reality, and did not take the view that recognition was constitutive of statehood.[200] Similarly, many Arab states repeatedly claimed that Israel had violated the U.N. Charter, and attempted to make claims against the Israeli government, despite withholding recognition. Similar disputes have historically occurred between North and South Korea, both of which, for a time, refused to recognize the other.[201] These examples strongly suggest that recognition is declaratory of statehood.

More recently, the breakup of the SFRY has provided further support for the declaratory recognition theory. With respect to the former Yugoslav Republic of Macedonia, on May 2, 1992, EC member states declared that, "[t]hey are willing to recognize that *State* as a sovereign and independent State, within its existing borders, and under a name that can be accepted by all parties concerned."[202] From this statement, it emerges that EC member states regarded the Republic of Macedonia as a state —not a "territorial entity" or "putative state"—prior to receiving the recognition of EC member states. A similar situation occurred with respect to the Federal Republic of Yugoslavia (Serbia and Montenegro), which was established in 1992, but only granted recognition in 1996. During the four years prior to receiving recognition, it was clear from various diplomatic statements that the Federal Republic of Yugoslavia was "regarded as a state under international law."[203]

Support for the declaratory recognition theory can be found within various judicial decisions. The Badinter Arbitration Commission (BAC), established to advise the European Peace

---

CRAWFORD, *supra* note 2, at 27.

200. RAIČ, *supra* note 43, at 36 n.73.

201. DIXON, *supra* note 46, at 133.

202. RAIČ, *supra* note at 43, at 36 n.73 (alteration in original) (quoting Declaration on the Former Yugoslav Republic of Macedonia, U.N. Doc. S/23880 (May 2, 1992)).

203. *See, e.g.*, Committee of Senior Officials of the CSCE, *Declaration concerning the Need for Undertaking Urgent and Immediate Steps With Respect to Yugoslavia, in* YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION 577–78 (Snežana Trifunovska ed., 1994); Resolution 1/6-Ex on the Situation in Bosnia and Herzegovina, U.N. Doc. A/47/765 – S/24930 Annex III (Dec. 10, 1992); RAIČ, *supra* note 43, at 36–37, n.73.

Conference on Yugoslavia, in its Opinion No. 1,[204] delivered on November 29, 1991, stated that "the effects of recognition by other states are purely *declaratory*."[205] This position was echoed by the BAC's Opinion No. 8,[206] delivered on July 4, 1992, which provided that "recognition of a State by other States has only *declarative* value . . . . "[207] In the BAC's Opinion No. 10,[208] also delivered on July 4, 1992, this view was reaffirmed: "recognition is not a prerequisite for the foundation of a State and is purely *declaratory* in its impact."[209] The BAC thus held that statehood is crystallized irrespective of any acts of recognition.

Further judicial support for the declaratory recognition theory can be found within the Canadian Supreme Court advisory opinion, *Reference re Secession of Quebec*:[210]

> Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a "legal" right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession.[211]

Although the court noted that recognitions would be politically beneficial for a newly seceded Quebec, it refrained from asserting that these were a *sine qua non* for statehood. The court therefore held that the declaratory recognition theory was to be preferred to the constitutive.[212]

---

204. *Arbitration Comm'n Opinion No. 1*, 31 I.L.M. 1494–1495 (1992).
205. *Id.* at 1495 (emphasis added); *see* CRAWFORD, *supra* note 2, at 24.
206. *Arbitration Comm'n Opinion No. 8*, 31 I.L.M. 1521–1523 (1992).
207. *Id.* at 1521 (emphasis added); *see* CRAWFORD, *supra* note 2, at 399.
208. *Arbitration Comm'n Opinion No. 10*, 31 I.L.M. 1525–1526 (1992).
209. *Id.* at 1526; *see* RAIČ, *supra* note 43, at 37, n.74.
210. Reference re Secession of Quebec, [1998] 2 SCR 217.
211. *Id.* ¶142.
212. Raič claims that "[t]he Canadian Supreme Court rejected the constitutive theory in Reference re Secession of Quebec." RAIČ, *supra* note 43, at 37 n.77.

The *Bosnian Genocide Case*[213] provides further support for the declaratory theory. In that case it was argued by the Federal Republic of Yugoslavia ("FRY") that the ICJ was unable to adjudicate claims on the Genocide Convention, because the FRY and Bosnia-Herzegovina had not recognized each other at the time legal proceedings were initiated. This argument was rejected on the grounds that mutual recognition had subsequently been granted in the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Accord"),[214] and that any chronological defects could be rectified by refiling the claim after this time.[215] This reasoning suggests that the rights of Bosnia-Herzegovina were counterposed to those of the FRY from the time the former became a state in fact, despite the lack of recognition between the two parties.[216] It follows that the ICJ rejected the constitutive recognition theory and endorsed the declaratory position that statehood can crystallize irrespective of recognition.[217]

Considerable support for the declaratory recognition theory can also be found within scholarly opinion. Chen, for example, has argued that "whenever a State in fact exists, it is at once subject to international law, independently of the wills or actions of other States."[218] Crawford has similarly observed:

> [The Declaratory] position has the merit of avoiding the logical and practical difficulties involved in the constitutive theory, while still accepting a role for recognition as a matter of practice. It has the further, essential, merit of consistency with that of practice, and is supported by a substantial body of opinion.[219]

Crawford later continues that "States do not in practice regard unrecognized States as exempt from international law; indeed failure to comply with international law is sometimes cited as a

---

213. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (Bosnia and Herzegovina v. Yugoslavia), Judgment, 1996 I.C.J. 595 (July 11).

214. The Agreement was finalized on December 14, 1995.

215. Bosnia and Herzegovina v. Yugoslavia, I.C.J. 1996 at 612–14.

216. CRAWFORD, *supra* note 2, at 25.

217. *Id*.

218. TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIFIC REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES 14 (1951).

219. CRAWFORD, *supra* note 2, at 22–23.

justification for non-recognition . . . . Recognition is usually intended as an act, if not of political approval, at least of political accommodation."[220] Cassese also supports the declaratory recognition theory, criticizing the constitutive position on three grounds, namely, its conflict with the international legal principle of effectiveness, its deleterious implications for the sovereign equality of states, and the potential for a state to simultaneously be both existent and nonexistent:

> Many jurists, chiefly in the past, have advocated the view that recognition entails "constitutive" effects, namely, that it creates the legal personality of States. This view is, however, fallacious because it is in strident contradiction with the principle of effectiveness whereby "effective" situations are fully legitimized by international law (according to the theory of constitutive recognition a State would not possess legal personality if not recognized, even where it possessed effectiveness). Furthermore it is inconsistent with the principle of the sovereign equality of States, for existing States would be authorized to decide when a new entity exhibiting all the hallmarks of a State may or may not be admitted to membership of the world community. The theory is also logically unsound, for it implies that a certain entity is an international subject in relation to those states which have recognized it, while it lacks legal personality as far as other States are concerned; thus the international personality would be split quite artificially, in defiance of reality.[221]

Numerous other scholars have propounded analogous views.[222]

---

220. *Id*. at 26.

221. ANTONIO CASSESE, INTERNATIONAL LAW 73–75 (2d ed. 2005).

222. DIXON, *supra* note 46, at 133–36; MALANCZUK, *supra* note 47, at 84; John Fischer Williams, *Some Thoughts on the Doctrine of Recognition in International Law*, 47 HARV. L. REV. 776, 778–79 (1934); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 372–73 (Vaughan Lowe ed., 2006); LOUIS L. JAFFÉ, JUDICIAL ASPECTS OF FOREIGN RELATIONS; IN PARTICULAR OF THE RECOGNITION OF FOREIGN POWERS 97–98 (Johnson Reprint Corp., 1968) (1933); Edwin M. Borchard, *Recognition and Non-recognition,* 36 AM. J. INT'L L. 108 (1942); Rafael W. Erich, *La naissance et la reconnaissance des états*, 13 RECUEIL DES COURS 427, 461 (1926); *see* Hersch Lauterpacht, *Recognition of States in International Law,* 53 YALE L.J., June 1944, at 385, 424; ALEXANDRE MÉRIGNHAC, TRAITÉ DE DROIT PUBLIC INTERNATIONAL 328 (F. Pinchon & Durand-Auzias eds., 1905); ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 147–148 (1986); Karl Doehring, *State*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 600, 604 (Rudolf Bernhardt, ed. 2000); Philip Marshall Brown, *The Effects of*

C. Conclusion

The declaratory recognition theory is superior to the constitutive. Accordingly, statehood can *antedate* recognition, and is *prima facie* achieved by compliance with the criteria for statehood based on effectiveness, namely, a permanent population, a defined territory, an effective government (as modified by the law of self-determination), the capacity to enter into relations with other states, and independence.[223]

As a result of this determination, it can be argued that *prima facie*, the process of UNC secession is lawfully accomplished when the criteria for statehood based on effectiveness manifest in fact. A state created by UNC secession does not, therefore, require recognition—either from the existing state or other states—to be distinguished from a mere secessionist movement.

This is not, of course, to deny the obvious political salience of recognition. Radan, for example, has noted that "[h]istorically, international recognition of statehood has been the major foreign policy goal of any secessionist movement."[224] States thus enhance their status by attaining recognition, opening the possibility of reciprocal diplomatic relations and political alliances

---

Recognition, 36 AM. J. OF INT'L L. 106, 107 (1942); Josef L. Kunz, *Critical Remarks on Lauterpacht's "Recognition in International Law,"* 44 AM. J. INT'L L. 713 (1950); MAREK, *supra* note 163, at 130–61; M. Lachs, *Recognition and Modern Methods of International Co-operation*, BRIT. Y.B. INT'L L. 252, 258 (1959); HIGGINS, *supra* note 85, at 135–36; D.P. O'CONNELL, INTERNATIONAL LAW 81, 128–34 (2d ed. 1970); J. E. S. Fawcett, THE LAW OF NATIONS 49, 55 (2d ed. 1971); J. S. Davidson, *Beyond Recognition*, 32 NORTHERN IRELAND LEGAL Q. 22, 22–23 (1981); MENON, *supra* note 194, at 13; Donald A. Heydt, Note, *Non-recognition and the Independence of Transkei*, 10 CASE W. RES. J. INT'L L. 167, 184–85 (1978); Colin Warbrick, *Recognition of States: Recent European Practice, in* ASPECTS OF STATEHOOD AND INSTITUTIONALISM IN CONTEMPORARY EUROPE 9 (Malcolm Evans ed., 1997); Jure Vidmar, *Conceptualizing Declarations of Independence and International Law*, 32 OXFORD J. LEGAL STUD. 153, 159–60 (2011).

223. CRAWFORD, *supra* note 2, at 38–93. Crawford states in this regard, "[R]ecognition is not a condition for statehood in international law . . . . Rights under international law are not contingent upon the acceptance of the right-holder by individual others. An entity is not a State because it is recognized; it is recognized because it is a State." *Id.* at 93. Raič has similarly observed "the declaratory theory best reflects customary international law." RAIČ, *supra* note 43, at 37 n.77.

224. RADAN, *supra* note 4, at 22.

with other recognized, well-established, and often powerful states.[225]

An example of the practical importance of recognition is provided by Biafra, a state created by UNC secession pursuant to the law of self-determination. Biafra was ultimately unable to secure the recognition of powerful states, particularly Britain and France, in order to effectively guarantee its future independence. Without the recognition of powerful states, Biafra entered into a legal "grey" zone, arguably possessing nascent statehood, only to be gradually reabsorbed back into Nigeria by a process of ongoing warfare.

Recognition is therefore politically and practically important to any state created by UNC secession, although, in terms of strict legal doctrine, it is not a *sine qua non* for statehood.[226] In particular, one type of recognition has unparalleled practical benefits, namely, where the existing state grants recognition. This special type of recognition expressly signals to other states that recognition of the state created by UNC secession is without adverse diplomatic or political consequences, thereby serving to buttress the secessionist state's practical viability.[227]

Given that the declaratory theory is accepted as correct, it thus becomes necessary to consider the modern criteria for statehood based on compliance with peremptory norms, as there are various examples of UNC secessionist entities which have not been considered by the international community to possess statehood. Some of these examples include the TRNC, Abkhazia, South Ossetia, and Transnistria which will be accounted for below.

IV. UNC SECESSION AND THE CRITERIA FOR STATEHOOD BASED ON COMPLIANCE WITH PEREMPTORY NORMS

Before assessing the precise impact of peremptory norms on states created by UNC secession, it is first necessary to briefly discuss the nature of such norms and their applicability to territorial situations.

225. CRAWFORD, *supra* note 2, at 27.
226. *Id*. at 93.
227. RAIČ, s*upra* note 43, at 93–94.

A. Peremptory Norms and their Applicability to Territorial Situations

Peremptory norms (*jus cogens*) can be characterized as "compelling law" and can be juxtaposed with *jus dispositivum*, meaning law "subject to the dispensation of the parties."[228] Peremptory norms are therefore immutable legal rules, meaning that it is impossible for states to exclude their operation, or to derogate from their requirements. After controversy during the mid-twentieth century as to whether peremptory norms existed in international law, Article 53 of the 1969 Vienna Convention on the Law of Treaties stipulated:

> A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[229]

Article 53 thus provided that peremptory norms existed *de lege lata*, and that such norms were nonderogable legal rules that could not be violated by treaty law.[230] Article 53 did not, how-

---

228. Orakhelashvili has observed that "rules of *jus cogens* have to apply whatever the will and attitude of States, while the applicability of the rules of *jus dispositivum* can be excluded or modified in accordance with the duly expressed will of States." ORAKHELASHVILI, *supra*, note 222, at 8–9.

229. Article 53 was repeated *ad literatim* by Article 53 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 1155 U.N.T.S. 331. *See* Gennady M. Danilenko, *International Jus Cogens: Issues of Law Making*, 2 EUR. J. INT'L L. 42, 42 (1991).

230. There are two overlapping schools of thought as to the content or scope of peremptory norms. According to the "substantive" school, peremptory norms are substantive rules of international law from which no derogation is permitted. According to this view, structural rules, such as *pacta sunt servanda* and *pacta tertiis*, which operate in the context of treaty law, are excluded. The "systemic" school, by contrast, defines peremptory norms as including substantive norms from which no derogation is permitted *and* structural rules. For proponents of the substantive school, see, *inter alia*, Orakhelashvili, who has argued "structural norms cannot be peremptory . . . ." ORAKHELASHVILI, *supra* note 222, at 45. Crawford has propounded, "[I]n discussing the problem of peremptory norms we are concerned only with what may be called substantive, not with structural rules." CRAWFORD, *supra* note 2, at 100. *See also* RAIČ, *supra* note 43, at 142–43; Hubert Thierry,

ever, provide assistance on the categorization of peremptory norms, nor the applicability of such norms outside the treaty law context. In relation to the former, although there is some variance among scholars on the categorization of peremptory norms,[231] there is widespread agreement that certain norms

---

L'évolution du droit international—Cours général de droit international public, 222 RECUEIL DES COURS 9, 66–70 (1990); Alfred Verdross, Jus Dispositivum *and* Jus Cogens *in International Law*, 60 AM. J. INT'L L. 55, 59 (1966); Jochen A. Frowein, *Ius Cogens*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 6 (Rudiger Wolfrum ed., 2013); Ulrich Scheuner, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law and Its Consequences*, 28 ZEITSCHRIFT FÜR AUSLÄNDICHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 520, 527 (1967); ANDRÉ DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 45 (1996); CASSESE, *supra* note 221, at 202–03; R. St. J. Macdonald, *Fundamental Norms in Contemporary International Law*, 25 CAN. Y.B. INT'L L. I 1987, at 115, 133 (1987); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 223 (1993); Bruno Simma, *From Bilateralism to Community Interest*, 250 RECUEIL DES COURS 228 (1994). Mosler criticizes the systemic school. Hermann Mosler, *Ius Cogens im Völkerrecht*, 35 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 9, 30–33 (1968). For proponents of the systemic school, see, *inter alia*, ROBERT KOLB, THEORIE DE JUS COGENS INTERNATIONAL: ESSAI DE RELECTURE DU CONCEPT 115–20, 171–87 (2001); Georges Abi-Saab, *The Uses of Article 19*, 10 EUR. J. INT'L L. 339, 349 (1999); Georges Abi-Saab, *Cours general de droit international public*, 207 RECUEIL DES COURS 9, 259 (1987); Georg Schwarzenberger, *The Fundamental Principles of International Law*, 87 RECUEIL DES COURS 191, 288 (1955); JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL 'NATIONAL' IDENTITY 101 (2000). This article favors the substantive approach, and will henceforth be the interpretation assumed, although it does not discount the utility or logic of the systemic school either. It should be noted that the substantive approach has been explicitly affirmed by the International Law Commission, which has defined peremptory norms as "those *substantive rules* of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values." Int'l Law Comm'n Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 283 (2001) (emphasis added).

231. Sztucki, for example, has listed thirty-nine peremptory norms which were proposed by jurists before the final drafting of the Vienna Convention on the Law of Treaties, JERZY SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL 81–84 (1974), whilst Whiteman has a suggested list of twenty peremptory norms, Majorie M. Whiteman, Jus Cogens *in International law, with a Projected list*, 7 GA. J. INT'L & COMP. L. 609, 625–26 (1977).

are peremptory such as, *inter alia*, the prohibition on the illegal use of force, the prohibition on slavery, the prohibition on genocide, the prohibition on apartheid, the prohibition on racial discrimination, the prohibition on torture, and the right of peoples to self-determination.[232] Article 53 can therefore be reasonably interpreted as stipulating that no derogation is permitted by states from such norms, particularly by way of treaty. With respect to the failure of Article 53 to specify whether peremptory norms are applicable outside the treaty law context, it should be observed that various ICJ cases[233] have confirmed the opera-

---

232. *See, e.g.*, ORAKHELASHVILI, *supra* note 222, at 50–60; CASSESE, *supra* note 221, at 202–03; CRAWFORD, *supra* note 2, at 101; CRAWFORD, *supra* note 49, at 594–96; RAIČ, s*upra* note 43, at 141–49; GILLIAN D. TRIGGS, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES 459 (2006). There is particularly stong agreement that the prohibition on the illegal use of force is a peremptory norm. *See* RAIČ, s*upra* note 43, at 144; CRAWFORD, *supra* note 2, at 131; Frowein, *supra* note 230, ¶ 9; Carin Kahgan, Jus Cogens *and the Inherent Right to Self-Defense,* 3 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 767, 778 (1997). The International Law Commission has also enumerated the prohibition of the illegal use of force as "a conspicuous example" of a peremptory norm. Int'l Law Comm'n Rep. on the Second Part of Its Seventeenth Session and on Its Eighteenth Session Including Reports of the Commission to the General Assembly*,* U.N. Doc. A/6309/Rev. (1966), *reprinted in* 2 Y.B. INT'L L. COMM'N 1, 247–49 (1966). This view has been supported by the International Court of Justice. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 91, ¶ 190 (June 27); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6); Iran v. U.S., 2003 I.C.J. 167, ¶ 9 (separate opinion by Simma, J.); Iran v. U.S., 2003 I.C.J. 89, ¶ 46 (Nov. 6) (separate opinion by Kooijmans, J.); Iran v. U.S., 2003 I.C.J. 161, at 290, ¶ 1.1 (dissenting opinion by Elaraby, J); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 246, 254 (July 9) (separate opinion by Elaraby, J.). Even those scholars who are skeptical, such as Sztucki and Sinclair, accept that the prohibition of the illegal use of force is of a peremptory character. *See* SZTUCKI*, supra* note 231, at 120; Ian M. Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47, 66 (1970).

233. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 1970 I.C.J. 3, 32 ¶¶ 33–34 (Feb. 5). Here the court noted that

> [a]n essential distinction should be made between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligation *erga omnes*.

tion of nonderogable rules beyond the treaty law context using the related, although not synonymous expression,[234] "*erga omnes* obligations."[235] Further, the ICJ has implicitly referred to the operation of peremptory norms beyond the treaty law context in the *Case Concerning Reservations to the Genocide Convention (Advisory Opinion)*,[236] and the *Nuclear Weapons Advisory Opinion*.[237] The same court has explicitly confirmed the

---

The court continued that "[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules governing the basic rights of the human person including protection from slavery and racial discrimination." Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (Bosnia and Herzegovina v. Yugoslavia), Judgment, 1996 I.C.J. 595, 616 (July 11); *see* East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90, 102 ¶ 29 (June 30).

234. Byers, for example, defines the two terms in a similar yet distinct fashion:

> *Jus cogens* rules, otherwise known as "peremptory rules," are nonderogable rules of international "public policy." They render void other, non-peremptory rules which are in conflict with them. *Erga omnes* rules, on the other hand, are rules which, if violated, give rise to a general right of standing – amongst all States subject to those rules – to make claims.

Michael Byers, *Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT'L L., 211, 211–12 (1997). The same author later continues that "*jus cogens* rules are necessarily *erga omnes* rules, but that *erga omnes* rules could exist which are not of a *jus cogens* character." *Id.* Tams has noted that "[i]t seems beyond doubt that there is, at the very least, considerable overlap between obligations *erga omnes* and norms of *jus cogens*." CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 140 (2005). *See generally id.* at 139–46.

235. Crawford notes that the ICJ "has been wary of using the term [peremptory norm], employing virtual synonyms (such as the concept of obligations *erga omnes*)." CRAWFORD, *supra* note 2, at 101.

236. Reservations to the Convention On the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28). Here, the court noted that any reservation to that Convention made by a state was illegal, declaring that the crime of genocide was "contrary to moral law and to the spirit of the United Nations." Further, the court concluded that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." *Id.*; *see also* Whiteman, *supra* note 231, at 609.

237. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 258 ¶ 83 (July 8). Here, after raising the concept of *jus cogens*, the court determined that "[t]here is . . . no need for the Court to pronounce on this matter." *Id.*

operation of peremptory norms beyond the treaty law context in *Nicaragua v the United States of America*,[238] *Case Concerning Oil Platforms (Islamic Republic of Iran v. the United States of America)*,[239] and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*.[240] Preponderant scholarly opinion has indicated the same.[241]

---

238. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment. 1986 I.C.J. 91, ¶ 190 (June 27).

239. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6); Iran v. U.S., 2003 I.C.J. 167, ¶ 9 (separate opinion by Simma, J.); Iran v. U.S., 2003 I.C.J. 89, ¶ 46 (Nov. 6) (separate opinion by Kooijmans, J.); Iran v. U.S., 2003 I.C.J. 161, at 290, ¶ 1.1 (dissenting opinion by Elaraby, J).

240. Judge Elaraby has stated that "[t]he prohibition of the use of force, as enshrined in Article 2, paragraph 4, of the Charter, is no doubt the most important principle that emerged in the twentieth century. It is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 246, 254 (July 9).

241. CRAWFORD, *supra* note 2, at 102; *see also* DUGARD, *supra* note 79, at 142; RAIČ, s*upra* note 43, at 142–43; LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 7 (1998); Van der Vyver, *supra* note 186, at 67; Milenko Kreća, *Some General Reflections on Main Features of Ius Cogens as Notion of International Public Law*, *in* NEW DIRECTIONS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF WOLFGANG ABENDROTH 27–40 (Rafael Gutiérrez et al. eds., 1982); VERA GOWLAND-DEBBAS, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA 248 (1990); Byers, *supra* note 234, at 212; DE HOOGH, *supra* note 230, at 47; MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* 47 (2000); Macdonald, *supra* note 230, at 136; Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 286, 288 (1994); Whiteman, *supra* note 231, at 625; Danilenko, *supra* note 229, at 42; Gordon A. Christenson, Jus Cogens*: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 585 n.1 (1988). For the opposing and outmoded view, see, for example, Sztucki who argues that the extension of jus cogens to unilateral acts fails to distinguish clearly between the notions of "violation" and "derogation":

> The superiority of supposed jus cogens norms does not consist in that they may not be lawfully violated as against others, because this is true of all legal norms – imperative as well as dispositive; but in that they may not be lawfully derogated from even by an agreement, and as between the consenting parties only. Any other construction of jus cogens would amount to the degraduation and reduction of the whole body of law to peremptory norms as the only ones which may not be violated."

It follows that peremptory norms are applicable beyond the treaty law context, and by implication, must therefore bear upon territorial situations such as UNC secession.[242] In broadstroke, this means that an entity created by UNC secession will fail to attain statehood if it breaches peremptory norms during its formative process.[243]

The foregoing should not be interpreted, however, as suggesting that *any* breach of a peremptory norm will invalidate the statehood of an entity created by UNC secession. It may be, for example, that during the process of UNC secession, the erstwhile secessionist movement might violate, in an isolated event, the peremptory norm prohibiting torture.[244] However disgraceful such an event would be, it would seem unlikely that without further peremptory breaches statehood could be called into question. On the other hand, where, for example, an entity is created by UNC secession and institutes constitutionally based racial discrimination or apartheid, statehood would not be forthcoming.

The difference between the two situations might be described as unsystematic and systematic peremptory breaches. In the case of the unsystematic peremptory breach, statehood will not be automatically invalidated, whereas the opposite conclusion will flow from a systematic peremptory breach.[245] Care must therefore be taken to assess the nature of peremptory norm

---

SZTUCKI, *supra* note 231, at 68; *see also* Christos Rosenstein-Rozakis, The Peremptory Norms of General International Law (Jus Cogens) Under the Vienna Convention on the Law of Treaties 50–58 (1973) (unpublished JSD thesis, University of Illinois) (on file with New York University Law School Library).

242. Crawford notes that "norms that are non-derogable and peremptory cannot be violated by State-creation any more than they can by treaty-making." CRAWFORD, *supra* note 2, at 107. Dugard has suggested that "[a]n act in violation of a norm having the character of jus cogens is illegal . . . this applies to the creation of States." DUGARD, *supra* note 79, at 135.

243. RAIČ, s*upra* note 43, at 149.

244. CRAWFORD, *supra* note 2, at 102.

245. *Id*. at 102–05. This is reflected in Article 41 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts which imposes a duty of nonrecognition on states in the context of serious breaches of peremptory norms, defined in Article 40(2) of the same Articles as "gross and systematic failure by the responsible State to fulfil the obligation." Int'l Law Comm'n Rep. on the Work of Its Fifty-Third Session, *supra* note 230, at 286, 282.

breaches in the context of UNC secession in order to determine whether statehood has in fact failed to crystallize.

B. Precise Effect of a Breach of Peremptory Norms During the Process of UNC Secession

Having established the applicability of peremptory norms beyond the treaty law context, the following question may now be considered: does a breach of peremptory norms during the process of UNC secession result in statehood "without legal effect,"[246] or instead prevent the attainment of statehood altogether?

This question has not been thoroughly addressed by scholars. Yet, the question is of some significance.[247] If a breach of peremptory norms during the process of UNC secession results in statehood without legal effect, then technically speaking, compliance with peremptory norms is *not* a *sine qua non* for UNC secession. In other words, a state created by UNC secession may exist in violation of peremptory norms, but simply be prevented from attaining legal effect and the concomitant legal *imprimatur* indicated by recognition. On the other hand, if a breach of peremptory norms during the process of UNC secession prevents the attainment of statehood altogether, there is simply no state to be recognized. This would mean that compliance with peremptory norms *is* a *sine qua non* for UNC secession. These alternative propositions are considered below.

---

246. DUGARD, *supra* note 79, at 131.

247. Raič seems inclined not to overstate the practical significance of the two alternative viewpoints, stating,

> The discussion is, it is submitted, academic, because, as was stated above, whether the violation of a fundamental norm is a criterion which leads to the non-existence of an entity as a State from its inception, or leads to a State which is null and void *ab initio*, both situations lead to the existence of a situation which is ultimately legally non-existence and, in principle, without legal effect under international law.

RAIČ, s*upra* note 43, at 153. Whilst this is true, it is nevertheless important to determine, *in concreto*, when statehood does or does not exist in a legal sense in the context of peremptory norms.

1. Compliance with Peremptory Norms is Not a *Sine Qua Non* for UNC Secession

Scholars such as Dugard and Devine have indicated that compliance with peremptory norms is not a *sine qua non* for UNC secession. Rather, they have argued that a failure to comply with peremptory norms only imposes a duty of non-recognition *vis-à-vis* third states. Dugard, for example, has observed that: "[i]nternational law distinguishes between non-existent (*inexistent*) acts and acts which are null and void *ab initio* by reason of their illegality. Although neither of these acts has legal effect the distinction should be maintained if only for the purpose of jurisprudential clarity."[248] The same author continues by quoting Guggenheim:

> In the case of the non-existent act "l'absence de certains éléments est considérée comme si grave qu'elle n'entraîne pas la nullité de l'acte mais son inexistence." On the other hand, the act which is void by reason of its illegality fulfils the requirements of a particular legal act but loses its validity because it violates a rule of law in the process. Thus a treaty may fulfil all the requirements of a valid treaty but be void, not because it lacks an essential ingredient of a valid treaty but because it offends against a general rule belonging to *jus cogens*.[249]

Dugard then applies the foregoing reasoning to the context of territorial situations, suggesting that statehood is achieved by compliance with the criteria based on effectiveness, but that this statehood can be rendered "without legal effect"[250] if the state concerned is established in violation of peremptory norms.[251]

---

248. DUGARD, *supra* note 79, at 130.

249. *Id.* at 130–31 (quoting Paul Guggenheim, *La validite et law nullite des actes juridiques internationaux*, 74 RECUIL DES COURS 191, 204 (1949)).

250. *Id.* at 131.

251. Dugard has noted,

> Resolutions of both the Security Council and the General Assembly condemn the non-recognized "States" as "null and void", invalid and illegal which strongly suggests that they are *without legal effect as States*, not because they fail to meet the essential requirements of statehood but because their existence violates a peremptory rule of international law.

Id. (emphasis added).

Several critical points can be made in relation to Dugard's position. First, it is conceptually problematic to hold that a state created by UNC secession can exist in international law upon fulfilment of the criteria for statehood based on effectiveness, but that this can somehow be subsequently rendered "without legal effect"[252] by the violation of peremptory norms during the state's formative process. This is because such a line of reasoning seems to imply the existence of two state-types: first, those that exist in international law and *have* legal effect; and second, those that exist in international law and *do not* have legal effect. Conceptually this is a curious proposition[253] and draws little—if any—support from state practice.

For example, during the purported UNC secession of the Turkish Republic of Northern Cyprus, which was generally regarded as violating the interconnected peremptory norms of the right of peoples to self-determination and the prohibition on the illegal use of force, Security Council Resolutions used the terms "Turkish Cypriot authorities,"[254] "the Turkish Cypriot leadership,"[255] and "the purported State of the Turkish Republic of Northern Cyprus."[256] The declaration by the Commonwealth Heads of Government labelled the Turkish Republic as an "illegal secessionist entity,"[257] with Britain expressly declar-

252. *Id.* at 131.

253. Crawford, for example, has reflected that "[a] State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices." CRAWFORD, *supra* note 2, at 5.

254. S.C. Res. 541, at 15 (Nov. 18, 1983).

255. S.C. Res. 550, ¶ 2 (May 11, 1984).

256. *Id.* ¶ 3.

257. Loizidou v. Turkey, Judgment, 1996-VI Eur. Ct. H.R. 2216, 2224–25 (quoting Press Release, Republic of Cyprus, Commonwealth Heads of Gov't Meeting, New Delhi, India (November 15, 1983)). The press release remarked that

> [t]he Heads of Government condemned the declaration by the Turkish Cypriot authorities issued on 15 November 1983 to create a secessionist state in northern Cyprus, in the area under foreign occupation. Fully endorsing Security Council Resolution 541, they denounced the declaration as legally invalid, and reiterated the call for its non-recognition and immediate withdrawal. They further call upon all states not to facilitate or in any way assist the illegal secessionist entity. They regarded this illegal act as a challenge to the international community and demanded the implementation of the relevant UN Resolution on Cyprus.

ing "[w]e do not recognise the area under de facto Turkish Cypriot administration as forming in any sense a separate sovereign state."[258] The foregoing statements do not suggest that in modern times, states may be established in violation of peremptory norms "without legal effect."[259] This necessarily casts serious doubt over Dugard's conceptual approach, particularly his proclivity to designate two state types.

Devine similarly indicates that compliance with peremptory norms is not a *sine qua non* for UNC secession, although his process of reasoning is substantially different. Unlike Dugard, Devine generally denies the salience of peremptory norms, instead preferring to restrict statehood to the satisfaction of the criteria for statehood based on effectiveness. Devine argues that additional criteria for statehood based on compliance with peremptory norms are essentially a mechanism invented by proponents of the declaratory recognition theory to solve recognition aberrations, namely, the international community's refusal to recognize effective territorial entities.[260]

Devine's conclusions, although reminiscent of constitutive scholars such as Oppenheim,[261] Kelsen,[262] and Schwarzenberger,[263] do not draw support from modern treaty law, state practice, or the majority of scholars. Furthermore, his position entirely discounts the evolution of peremptory norms in contemporary international law. As demonstrated above,[264] the validity of peremptory norms has been affirmed in numerous cases before the ICJ.[265] Furthermore, since the promulgation of

---

Id. See also RAIČ, *supra* note 43, at 156 n.298.

258. Eur. Parl. Deb. (June 24, 1992) (remarks of Mr. Garel-Jones), *cited in* Geoffrey Marston, *United Kingdom Materials on International Law*, 63 BRITISH Y.B. INT'L L. 647 (1992). *See also* RAIČ, *supra* note 43, at 156 n.298.

259. DUGARD, *supra* note 79, at 131.

260. Derry J. Devine, *The Requirements of Statehood Re-Examined*, 34 MODERN L. REV. 410, 416 (1971). For virtually identical comments, see Derry J. Devine, *Rhodesia since the Unilateral Declaration of Independence*, 1 ACTA JURIDICA 1, 86 (1973).

261. LASSA F. L. OPPENHEIM, INTERNATIONAL LAW 125–26 (Hersch Lauterpacht ed., 8th ed. 1955).

262. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 608 (1941).

263. GEORG SCHWARZENBERGER, 1 INTERNATIONAL LAW 134 (3d ed. 1957).

264. *See* discussion *supra* Part IV.A.

265. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 1970 I.C.J. 3, 32 ¶¶ 33–34 (Feb. 5); Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Pre-

the Vienna Convention on the Law of Treaties, the preponderance of scholarly opinion has also supported the *de lege lata* status of peremptory norms.[266] To conclude, therefore, as Devine does, that such norms are a mere mechanism to overcome alleged deficiencies inherent in the declaratory recognition theory is highly questionable. *A priori*, to conclude that states created by UNC secession may violate peremptory norms is also highly questionable.

2. Compliance with Peremptory Norms is a *Sine Qua Non* for UNC Secession

The view that compliance with peremptory norms—in contemporary times—is a *sine qua non* for UNC secession draws support from state practice. Due to space limitations, five relatively contemporary case studies will be selected: the TRNC, Chechnya, Abkhazia, South Ossetia, and Transnistria. None of these "entities" have been regarded as states by the international community. It is presently argued that this is because each breached one or more peremptory norms during their

---

liminary Objections (Bosnia and Herzegovina v. Yugoslavia), Judgment, 1996 I.C.J. 595, 616 (July 11); East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90, 102 ¶ 29 (June 30); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 91, ¶ 190 (June 27); Reservations to the Convention On the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 258 ¶ 83 (July 8); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6); Iran v. U.S., 2003 I.C.J. 167, ¶ 9 (separate opinion by Simma, J.); Iran v. U.S., 2003 I.C.J. 89, ¶ 46 (Nov. 6) (separate opinion by Kooijmans, J.); Iran v. U.S., 2003 I.C.J. 161, 290, ¶ 1.1 (Elaraby, J., dissenting); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 246, 254 (July 9) (separate opinion by Elaraby, J.).

266. *See, e.g.*, CRAWFORD, *supra* note 2, at 101; Hannikainen, *supra* note 241, at 317; ORAKHELASHVILI, *supra,* note 222, at 50–66; Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 64–65 (1978); Scheuner, *supra* note 230, at 527; L. A. Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 RECUEIL DES COURS 220, 262–63 (1981); Takeshi Minagawa, Jus Cogens *in Public International Law*, 6 HITOTSUBASHI J.L. & POL. 16, 24 (1968); Vladimir Paul, *The Legal Consequences of Conflict Between a Treaty and an Imperative Norm of General International Law (*Jus Cogens*)*, 21 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 19, 35–36 (1971); HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 139 (1980).

formative process. The most common peremptory norms to be breached during the process of UNC secession are the right of peoples to self-determination and the prohibition on the illegal use of force. Both of these peremptory norms are systematic in character and therefore decisively bear upon the attainment of statehood.

a. The TRNC—Attempted UNC Secession

In 1878, after more than three hundred years of Ottoman rule, Turkey agreed to assign control of Cyprus (but not sovereignty) to Britain, in exchange for Britain's decision to join Turkey in a defensive alliance against Russia. When Turkey joined with Germany in World War I, however, Britain annexed the island and it henceforth became a British colony. On July 24, 1923, pursuant to the Lausanne Treaty, Turkey officially recognized the British annexation.[267]

During Britain's rule, tensions between the island's two main ethnic groups—Greeks and Turks—were high. In 1950 a plebiscite was conducted by the Greek Orthodox Church throughout Cyprus in which 95.7 percent of the Greek Cypriot population voted for unification with Greece. This led to Greek Cypriots submitting a proposal to the British for *enosis* (unification with Greece). Not surprisingly, London rejected the proposal, and Greece then sought to bring the matter before the U.N., only to have the General Assembly refrain from comment.[268] In response to these rebuffs, in 1955 the *Ethniki Organosis Kyprion Agoniston*, or the National Organization of Cypriot Fighters ("EOKA"), was formed with the aim of militarily achieving *enosis* with Greece. This objective entailed attacks against British targets and Turkish Cypriot interests. In counter-response, in 1958 the *Türk Mukavemet Teşkilâti,* or Turkish Resistance Organization ("TMT"), was formed, which initiated attacks on

267. ZIAM M. NECATIGIL, THE CYPRUS QUESTION AND THE TURKISH POSITION IN INTERNATIONAL LAW 1–4 (1989); David Wippman, *International Law and Ethnic Conflict on Cyprus*, 31 TEX. INT'L L.J. 141, 144 (1996); S. Kwaw Nyameke Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, 10 AUSTL. Y.B. INT'L L. 67, 68–69 (1987); Marios L. Evriviades, *The Legal Dimension of the Cyprus Conflict*, 10 TEX. INT'L L.J. 227, 228–29 (1975).

268. *See generally* Stephen G. Xydis, *The UN General Assembly as an Instrument of Greek Policy: Cyprus, 1954-1958*, 12 J. CONFLICT RESOL. 141, 141–58 (1968).

Greek Cypriot property and campaigned for *taksim* (partition of Cyprus).[269]

Against this backdrop of deteriorating ethnic relations, on February 11, 1959, Greece, Turkey, and Britain reached an agreement on Cyprus' future, which entailed independent statehood. The agreement was promptly accepted by the Greek Cypriot and Turkish Cypriot communities and paved the way for the island's independence. Pursuant to the agreement, the Constitution of Cyprus was signed on April 6, 1960 and on the same day Cyprus became an independent state.

Throughout the early 1960s, relations between the Greek Cypriot and Turkish Cypriot communities steadily deteriorated, with a series of violent confrontations between the two groups. Fighting reputedly took place throughout various locations on the island during 1964.[270] The result was that Greek Cypriots gained control of almost all the island, whilst the Turkish Cypriot population formed enclaves and avoided interaction with the Greeks. As tensions increased, the Greek government, still committed to *enosis*, militarily aided the Greek Cypriot community, whilst the Turkish Government militarily aided the Turkish Cypriot community. Although Britain—with the assistance of the United States—attempted to mediate the ethnic tensions, it was ultimately unsuccessful, with both communities increasingly preferring separation to integration.[271]

Against a backdrop of ongoing ethnic tensions and unsuccessful negotiations, on November 15, 1983, the Turkish north, with the direct support of the Turkish military, declared its sovereign independence as the Turkish Republic of Northern

---

269. NECATIGIL, *supra* note 267, at 5–7; DAVID CARMENT ET. AL, WHO INTERVENES? ETHNIC CONFLICT AND INTERSTATE CRISIS 182 (2006); Thomas Ehrlich, *Cyprus, The "Warlike Isle": Origins and Elements of the Current Crisis*, 18 STAN. L. REV. 1021, 1030 (1966).

270. One event in particular seems to have galvanized the Greek Cypriot and Turkish Cypriot communities against each other, namely, the searching of a Turkish car by a Greek police patrol, which resulted in several Turks allegedly being killed and one police officer seriously injured. Soon thereafter, intercommunal fighting broke out. *See* NECATIGIL, *supra* note 267, at 29; CHARLES FOLEY, LEGACY OF STRIFE: CYPRUS FROM REBELLION TO CIVIL WAR 168 (1964); Ehrlich, *supra* note 269, at 1044; Wippman, *supra* note 267, at 146.

271. CARMENT ET. AL, *supra* note 269, at 187.

Cyprus.[272] Almost immediately, the declaration was condemned by the world community, with only one state—Turkey—providing immediate recognition. Paralleling this, the TRNC was characterized as a non-state entity by various international fora.[273] This was despite the fact that the TRNC satisfied the criteria for statehood based on effectiveness.

When considering the TRNC's attempted UNC secession from Cyprus, two key factors must be borne in mind. First, the TRNC was not established pursuant to the customary law right to external self-determination.[274] This is because although there was evidence of human rights abuses against Turkish Cypriots by Greek Cypriots (and *vice versa*) in northern Cyprus, there was a complete absence of human rights abuses *in extremis*, such as ethnic cleansing, mass killings, or genocide.

Second, the establishment of the TRNC from the Republic of Cyprus was primarily facilitated by the direct intervention of Turkish troops. Without this intervention the TRNC could not have existed.[275] This intervention, however, was not made under the auspices of a valid right to external self-determination as was the case, for example, with India's direct intervention in

---

272. Adamantia Pollis, *Cyprus: Nationalism vs. Human Rights*, 1 UNIVERSAL HUM. RTS. 89, 95 (1979); Suzanne Palmer, *The Turkish Republic of Northern Cyprus: Should the United States Recognize it as an Independent State?*, 4 B.U. INT'L L.J. 423, 442 (1986).

273. S.C. Res. 541, *supra* note 254, pmbl. (describing the TRNC as "Turkish Cypriot authorities"); S.C. Res. 550, *supra* note 255, ¶¶ 2–3 (referring to the TRNC as "the Turkish Cypriot leadership," and "the purported State of the Turkish Republic of Northern Cyprus"); Loizidou v. Turkey, Judgment, 1996-VI Eur. Ct. H.R. 2216, 2224–25 (quoting Press Release, Republic of Cyprus, Commonwealth Heads of Gov't Meeting, New Delhi, India (November 15, 1983) (calling the TRNC an "illegal secessionist entity")). *See also* RAIČ, s*upra* note 43, at 156 n.298.

274. *See* discussion *supra* Part II.

275. Raič, for example, has noted that

> it is difficult to believe that the TRNC could have been established unilaterally, that is, without outside intervention by Turkey. Instead, the establishment of the TNRC is a direct result of the Turkish occupation of the northern part of the island. Through the continued presence of 30,000 Turkish troops there, Turkey in fact secures and supports the de facto partition of Cyprus.

RAIČ, s*upra* note 43, at 126; *see also* VIVA ONA BARTKUS, THE DYNAMIC OF SECESSION 162 (1999); David Souter, *The Cyprus Conundrum: The Challenge of the Intercommunal Talks*, 11 THIRD WORLD Q. 76, 78 (1989).

Bangladesh. A further factor arguably solidifying the TRNC's breach of the peremptory norm prohibiting the illegal use of force is that Turkey, since 1983, has permanently occupied the territory. Unlike India's direct intervention in Bangladesh, no obvious humanitarian disaster prompted Turkey's direct intervention, and furthermore, Turkish forces permanently remained within northern Cyprus after this direct intervention.[276]

The breaches of the interconnected peremptory norms of the right of peoples to self-determination and the prohibition on the illegal use of force thus worked to deny the TRNC statehood.[277] This view is sustained by the fact that Turkey is the only state that recognizes the TRNC.[278]

b. Chechnya—Attempted UNC Secession

The territory known as present day Chechnya was conquered by imperial Russia in 1864, after a long and bloody struggle lasting over one hundred years. Although militarily defeated, Chechens never accepted Russian rule, continuing to harbor independence ambitions throughout the late nineteenth and early twentieth centuries.[279] These ambitions were mobilized after the 1917 Bolshevik revolution, when Chechnya and the

---

276. Glen Anderson, *Unilateral Non-Colonial Secssion and the Use of Force: Effect on Claims to Statehood in International Law*, 28 CONN. J. INT'L L. 197, 235–37 (2013).

277. *See* Loizidou v. Turkey, Judgment, 1996-VI Eur. Ct. H.R. 2216, 2224–25; RAIČ, *supra* note 43, at 125. For a discussion of various General Assembly and Security Council resolutions condemning the TRNC and denying its attainment of statehood, see van der Vyver, *supra* note 186, at 42–44 (discussing various General Assembly and Security Council resolutions condemning the TRNC and denying its attainment of statehood). *See generally* DUGARD, *supra* note 79, at 108–11; CRAWFORD, *supra* note 2, at 143–47.

278. van der Vyver, *supra* note 186, at 43; *see also* text accompanying note 277.

279. Christopher Panico, *Conflict in the Caucasus: Russia's War in Chechnya*, *in* BEYOND THE SOVIET UNION: THE FRAGMENTATION OF POWER 256–57 (Max Beloff ed., 1997); Wendy Turnoff Atrokhov, *The Khasavyurt Accords: Maintaining the Rule of Law and the Legitimacy of Democracy in the Russian Federation Amidst the Chechen Crisis*, 32 CORNELL INT'L L.J. 367, 369–70 (1999). Enmity between Russians and Chechens has deep historical roots. In 1818, for instance, General Ermolov, governor of the Caucasus, when referring to security problems in the region informed Tsar Alexander I that he "could find no peace until not a single Chechen remained alive." Marie Bennigsen Broxup, *The Chechens*, 26 FREEDOM REV. 5, 6 (1995).

other Russian mini-mountain-states of Kabardinoo-Balkaria, Karatchay-Cherkess, Ingushetia, and Ossetia attempted to secede and form a federation in the Caucasus region.[280] After extensive fighting, the region was reconquered by the Soviet state in 1921, after which thousands of Chechens were forcibly deported to concentration camps.[281] Forced relocations and mass detention continued intermittently for the next two decades, culminating in Joseph Stalin's brutal crackdown during World War II, justified on the groundless charge of Nazi-Chechen cooperation.[282] Needless to say, these activities only further embittered Russian-Chechen relations.

In 1991, amid the chaos and confusion of the Soviet Union's dissolution, Chechens again sensed an opportunity to regain their independence. In August of that year Dzhokar Dudaev, a retired Soviet Air Force General, led a *coup d'état* against the communist government in Grozny.[283] In presidential elections

---

280. Trent N. Tappe, *Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims*, 34 COLUM. J. TRANSNAT'L L., 255, 274, 274 n.88 (1995); Atrokhov, *supra* note 279, at 370–71.

281. Before being reconquered, the Caucasus Federation was recognized by many governments, including Turkey, Germany, Austro-Hungary and Britain. *See* Broxup, *supra* note 279, at 6.

282. Tappe claims that in 1995 it was "impossible to find any person over 50 who did not grow up in a concentration camp." *See* Tappe, *supra* note 280, at 274–75. Bowker claims that "almost 500,000 Chechens and Ingush were herded into cattle trucks and deported to Central Asia for their alleged support of the Nazis." Mike Bowker, *Russia and Chechnya: The Issue of Secession*, 10 NATIONS & NATIONALISM 461, 466 (2004). For an almost identical account, see ANATOL LIEVEN, CHECHNYA: THE TOMBSTONE OF RUSSIAN POWER 319 (1998). Avtorkhanov has written that "Stalin faithfully executed the orders of Nicholas I to exterminate the Mountaineers, albeit after a delay of more than a century." Abdurakhman Avtorkhanov, *The Chechens and Ingush During the Soviet Period and Its Antecedents, in* THE NORTH CAUCUSUS BARRIER 184 (Marie Bennigsen Broxup ed., 1992); *see also* JOHN B. DUNLOP, RUSSIA CONFRONTS CHECHNYA: ROOTS OF A SEPARATIST CONFLICT 40–84 (1998); Broxup, *supra* note 279, at 7; VALERY TISHKOV, CHECHNYA: LIFE IN A WAR-TORN SOCIETY 16–32 (2004) (detailing disturbing first-hand historical accounts of Soviet deportations); Panico, *supra* note 279, at 257–58; Luke P. Bellocchi, *Recent Developments: Self-Determination in the Case of Chechnya*, 2 BUFF. J. INT'L L. 183, 188–89 (1995); Enders S. Wimbush, *Russia's Strategic Failure*, 26 FREEDOM REV. 8, 8–9 (1995); Gail W. Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23 INT'L SECURITY 5, 8–9 (1998).

283. Dudaev was a pragmatic and incongruous politician. He openly espoused anti-Russian rhetoric, yet his whole career was devoted to the Rus-

held in October (which were quite possibly fraudulent), Dudaev secured the Chechen Presidency, and shortly thereafter, on November 1, unilaterally proclaimed the independence of the Chechen Republic.[284]

Chechnya's attempted UNC secession from Russia was punctuated by two major outbreaks of hostilities. The first of these occurred in December 1994 when the Russian government decided to launch a full-scale invasion to retake Chechen-held territory. As the war dragged on, Russian forces began to apply ever increasing force, frustrated by the Chechen's guerrilla tactics and their increasing use of civilian targets as shields. The price of military victory, however, was high: upwards of twenty to thirty thousand innocent civilians were killed during the fighting.[285]

---

sian military and he was married to a Russian. He claimed to be the savior of the Chechen people, but had reputedly not been to Chechnya before arriving to overthrow the government of Duko Zavgaev (formally living in Estonia). He also espoused support for Islam as a unifying force within Chechnya, but did not even know how many times a day a Muslim should pray. *See* VANORA BENNET, CRYING WOLF: THE RETURN OF A WAR TO CHECHNYA 244 (2001); Bowker, *supra* note 282, at 466–67. Tishlov paints an assessment of Dudaev as deeply suspicious and paranoid:

> In 1993, when an explosion twenty kilometres from Grozny killed the Chechen interior minister and his driver, Dudayev claimed that it was an attempt on his own life. He attacked the local prefect and ordered the State Security Department to arrest him. The prefect's relatives defended him at gunpoint, and the order was not carried out. But the next day, the Security Department abducted R. B. Ezerkhanov, head of the administration of Alhhan-Kala (a village six kilometres from the site of the assassination), whom Dudayev suspected of complicity because he had been seen to glance at his watch fifteen minutes before the explosion. A warrant was issued for the arrest of Ch. R. Vakhidov, an Interior Ministry department head, on suspicion of his involvement because he had gone on holiday a week earlier.

TISHKOV, *supra* note 282, at 78–79.

284. *Id.*; *see also* RAIČ, *supra* note 43, at 373; Dunlop, *supra* note 282, at 113–15; Tappe, *supra* note 280, at 275; Bellocchi, *supra* note 282, at 186–87; Panico, *supra* note 279, at 258–59, 261; Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo, and East Timor*, 34 VAND. J. TRANSNAT'L L. 455, 462 (2001); Ib Faurby, *International Law, Human Rights and the War in Chechnya*, 2002 BALTIC DEFENCE REV., no. 1, at 103.

285. Panico, *supra* note 279, at 270–71; Charney, *supra* note 284, at 463; RAIČ, *supra* note 43, at 374 n.233.

In the years that followed, negotiations continued between the Russian and Chechen governments, with Moscow again offering Grozny substantial autonomy. In the end, however, the negotiations were unsuccessful, with the Chechen government unwilling to abandon its core goal of independence.[286]

Relations further deteriorated between the two sides in 1996, when Russians resident in Chechnya were forced to flee the territory as the result of discrimination and assaults. It was widely reported that throughout this time Chechnya failed to evidence stable and effective government and "respect for the rule of law."[287] Chechen terrorist attacks in Moscow in late August and early September 1999 destroyed relations entirely.[288]

The second Russian-Chechen war began in October 1999, and ended in February 2000, when large parts of Chechnya, including Grozny, were conquered by Russian forces. The quick victory was facilitated by the use of overwhelming military force, which not only destroyed the Republic's vital infrastructure, but also killed many innocent civilians. The ferocity of the Russian onslaught was condemned by many sections of the international community, appalled by the killing of innocent civilians and the use of disproportionate force.[289] With the exception of Afghanistan's Taliban regime,[290] no country recognized Chechnya's right to independence, with many states—mindful of not offending Moscow—preferring to characterize the conflict as an "internal matter" and emphasizing Russia's right to defend its sovereignty and territorial integrity.[291]

---

286. *Id.* at 375.

287. Lord Judd, Rapporteur, Council of Europe, Parliamentary Assembly, *The Conflict in Chechnya*, Parl. Ass. Doc. 8630, ¶ 29 (Jan. 2000) (indicating a lack of effective and stable government); *see also* RAIČ, s*upra* note 43, at 375.

288. JAMES M. GOLDGEIER & MICHAEL MCFAUL, POWER AND PURPOSE: US POLICY TOWARD RUSSIA AFTER THE COLD WAR 267–68 (2003); *see also* RAIČ, *supra* note 43, at 375.

289. Comm'n on Human Rights Res. 2000/58, U.N. Doc. E/CN.4/Res/2000/58.25 (Apr. 2000); *see also* RAIČ, s*upra* note 43, at 375 n.241. *See generally* GOLDGEIER & MCFAUL, *supra* note 288, at 268–69; Bowker, *supra* note 282, at 471; Faurby, *supra* note 284, at 105–10.

290. Thomas D. Grant, *Current Development: Afghanistan Recognizes Chechnya*, 15 AM. U. INT'L L. REV. 869, 869–882 (2000).

291. U.S. President Bill Clinton, for instance, in a speech made at Istanbul on November 19, 1999, stated, "about the situation in Chechnya . . . . [w]e want to see Russia a stable, prosperous, strong democracy, with secure borders, strong defences and a leading voice in world affairs." RAIČ, s*upra* note 43, at 378 n.249. America's Deputy Secretary of State, Strobe Talbott, testi-

It is clear then that Chechnya was not regarded by the international community as a state. This can be explained by the fact that Chechnya's UNC secession was not in accordance with the customary law right to external self-determination.[292] At the time of Chechnya's declaration of independence in 1991, Chechens were not denied the right to internal self-determination within the Soviet Union. In immediately previous decades Chechens had been free to participate in government, civil administration, and the Soviet armed forces. Although systematic human rights abuses had occurred under Joseph Stalin, since Nikita Kruschev's Premiership, no widespread human rights violations were perpetrated against the Chechen people. In fact if anything, steps seem to have been taken by Moscow to ameliorate past injustices.[293] Therefore, Chechnya's UNC secession was not declared out of an imminent need for survival, or as an escape from sustained and systematic human rights abuses *in extremis*. *A priori*, it did not conform with the peremptory norm of the right of peoples to self-determination. Moreover, the Chechen government consistently refused Russia's offers of negotiation and autonomy, thereby indicating that UNC secession was not an *ultimum remedium*. This ensured that Chechnya's statehood did not crystallize.

---

fied to the House International Relations Committee, on October 19, 1999 that

> Chechnya, Dagestan, Ingushetia – these are all republics of the territory of the Russian Federation. We recognize Russia's international boundaries and its obligation to protect all of its citizens against separatism and attacks on lawful authorities. We also acknowledge the current outbreak of violence began when insurgents, based in Chechnya, launched an offensive in Dagestan. Russia also has been rocked by lethal bombings of apartment buildings deep in the Russian heartland, including Moscow itself.

GOLDGEIER & MCFAUL, *supra* note 288, at 272. *See generally* GNANAPALAWELHENGAMA, MINORITIES' CLAIMS: FROM AUTONOMY TO SECESSION, INTERNATIONAL LAW AND STATE PRACTICE 301 (2001); Svante E. Cornell, *International Reactions to Massive Human Rights Violations: The Case of Chechnya*, 51 EUROPE-ASIA STUD. 85, 91 (1999); Richard Sakwa, *Chechnya: A Just War Fought Unjustly?*, *in* CONTEXTUALIZING SECESSION: NORMATIVE STUDIES IN COMPARATIVE PERSPECTIVE 157 (Bruno Coppieters & Richard Sakwa eds., 2003).

292. *See* discussion *supra* Part II.

293. Atrokhov, *supra* note 279, at 372; RAIČ, *supra* note 43, at 373.

c. Abkhazia—Attempted UNC Secession

The outbreak of hostilities between Abkhazia and Georgia can only be understood against the backdrop of "Georgianization" which took place during the 1930s, 1940s, and early 1950s. During this time, the Abkhazian language was banned and the Abkhazian alphabet was changed to a Georgian base. Coupled with this, large numbers of Georgians and Russians were settled into Abkhazia, ensuring that Abkhazians were a numerical minority in their traditional homeland. After Stalin's death, this policy was reversed and Abkhazians were over represented in the Supreme Soviet of Abkhazia.[294] However, subsequent calls by Abkhazia to break away from Georgia and become a separate republic within the Union of Soviet Socialist Republics were flatly rejected by Moscow.

In the wake of the Soviet Union's collapse in 1991, tensions between Georgians and Abkhazians reintensified. In December of that year, a new parliament was elected in Abkhazia, which quickly became divided along ethnic lines: Georgian deputies repeatedly rejected the decisions of the majority, comprised principally of Abkhazian deputies.[295]

A period of uncertainty commenced whereby Georgia sought a restoration of political conditions from 1918, which required that Abkhazia's autonomous status would be revoked. On the other side, Abkhazia proposed a draft treaty to the Georgian State Council which would have provided for federative relations between Georgia and Abkhazia. The Abkhazian proposal was ignored, thereby causing the Abkhazian Supreme Soviet to declare Abkhazian sovereignty and to reinstate the Constitution of 1925, which enshrined Abkhazia's republican status but with treaty ties to Georgia. This in turn prompted Georgia, in August 1992, to dispatch the National Guard to Abkhazia to suppress the growing Abkhazian independence movement. Military skirmishes ensued, with Georgian troops eventually expelled from Abkhazia by late September 1993.[296]

A ceasefire was brokered on December 1, 1993. Negotiations continued intermittently until 1995, when Russia proposed a federative arrangement, which was accepted by Georgia, only to be rejected by Abkhazia. The Security Council in 1996 voiced

294. RAIČ, *supra* note 43, at 379–80.
295. *Id.* at 380.
296. *Id.* at 381.

its "commitment to the sovereignty and territorial integrity of Georgia."[297] Relations were further soured in 1997, when approximately thirty thousand returning Georgian refugees were expelled by Abkhazian authorities, a move which was condemned internationally as an act of "ethnic cleansing."

On October 12, 1999, Abkhazia declared its independence from Georgia. However at the time of writing, only Russia, Venezuela, Nicaragua, and Naru, have extended recognition. This lack of recognition stems from the fact that Abkhazia's UNC secession did not conform with the customary law right of peoples to external self-determination.[298] In the period prior to the declaration of independence, Abkhazian citizens were not subject to deliberate, sustained, and systematic human rights abuses *in extremis* at the hands of Georgia.[299] As such, Abkhazia's UNC secession violated the peremptory norm of the right of peoples to self-determination, which in turn ensured that Abkhazia's statehood failed to crystallize.[300]

d. South Ossetia—Attempted UNC Secession

South Ossetia's attempted UNC secession finds its roots in the early days of the Russian Revolution. When Georgia declared its independence in 1918, a civil war erupted between the Bolshevik South Ossetians and the Menshevik Georgians. The consequences of this civil war were catastrophic for the South Ossetians who were said to experience genocide. When the Red Army recaptured Georgia, South Ossetia was declared to be part of the Georgian Soviet Republic. South Ossetia did, however, enjoy the status of an "autonomous region."[301] Unsurprisingly, perhaps, latent ethnic tensions remained between Georgians and South Ossetians.

---

297. S.C. Res. 1065 (July 12, 1996).

298. *See* discussion *supra* Part II.

299. RAIČ, *supra* note 43, at 385; Levan Alexidze, *Kosovo and South Ossetia: Similar or Different? Consequences for International Law*, BALTIC Y.B. INT'L L. 75, 83–85 (2012).

300. Nußberger, *supra* note 7, at 363 ("[Abkhazia's statehood] does not have any basis in international law.").

301. *Id.* at 351; Noelle Higgins & Kiernan O'Reilly, *The Use of Force, Wars of National Liberation and the Right to Self-Determination in the South Ossetian Conflict*, 9 INT'L CRIM. L. REV. 567, 569 (2009).

With the collapse of the Soviet Union in 1991, these tensions reemerged.[302] In the wake of civil war with Georgia, on December 21, 1991, South Ossetia declared its independence. This declaration was later complimented by a referendum on January 19, 1992, which indicated support for South Ossetia's independence and reunification with Russia.[303]

In the period between 1992 and 2007, the conflict between Georgia and South Ossetia remained unresolved. Persons displaced by the civil war were unable to return to their homes, and Georgia refused to acknowledge South Ossetia's declaration of independence. Small-scale military skirmishes occasionally occurred between the two sides, but no concerted military engagements took place.

On April 26, 2007, the South Ossetian parliament adopted a "Declaration on the genocide of the South Ossetians in the period between 1989 and 1992." This declaration emphasized that events between 1989 and 1993 were a reaction to Georgian "national chauvinism and separatism" resulting from Georgian "aggression based on an imperialist and fascist ideology."[304] Moreover, the declaration characterized Georgia's actions during this period as "genocide." Whilst nationalist sentiments were certainly stoked by the Georgian President Gamzachurdia, who had discussed initiatives such as ethnic minorities being denied Georgian citizenship, it was unlikely that South Ossetians, during 1989—1991, were the victims of genocide.[305]

Indeed, post-1991, particularly once Gamzachurdia was deposed in a *coup d'état*, and replaced by the more conciliatory and moderate President Shewardnadze, it appeared as though a political solution might be brokered.[306] This more conciliatory stance was evidenced by the adoption on June 24, 1992, of a ceasefire agreement between Georgia and South Ossetia, overseen by Russia. A joint peacekeeping operation, comprising Os-

302. MILENA STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW 145 (2013); Christian Axobe Nielsen, *The Kosovo Precedent and the Rhetorical Deployment of former Yugoslav Analogies in the Cases of Abkhazia and South Ossetia*, 9 SOUTHEAST EUR. & BLACK SEA STUD. 171, 175 (2009). *See also* Nicolas Lemay-Hebert, *Zone of Conflict: Clash of Paradigms in South Ossetia*, 2 USAK Y.B. INT'L POL. & L. 251, 255 (2009).

303. *See* Angelika Nußberger, *South Ossetia, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 11 (2013).

304. Nußberger, *supra* note 7, at 357.

305. *Id.*

306. *Id.* at 358.

setians, Russians, and Georgians was implemented, ensuring a cessation of hostilities and the possibility of political compromise.

Following the Rose Revolution of November 2003,[307] Shewardnadze was forced to resign as Georgian President and was replaced by Mikheil Saakashvili, who had vowed to regain control over disputed Georgian territory. This represented a shift to a more divisive approach to Georgian and South Ossetian relations, typified by reports of Georgian television running advertisements for army recruits supported by the Nazi inspired slogan that lost territory could only be regained "through the force of weapons."[308]

Events took a more decisive turn after the "five day war" between Russia and Georgia during August 2008.[309] Although it is difficult to determine precisely how the war started, it is clear that Georgia initiated a military operation against South Ossetia of significant size, and that this was repelled by the intervention of Russian troops. Thousands were killed on either side, and the Russian President, Dmitry Medvedev, recognized South Ossetia's independence, stating that "[it was] not an easy choice to make, but it represents the only possibility to save human lives."[310]

Whilst it is obvious that Georgians and South Ossetians experienced a prolonged breakdown of relations and intermittent hostilities during the period 1989-2008, it must be asked whether South Ossetia's UNC secession conformed with the customary law right of peoples to external self-determination.[311] More pointedly, it must be asked whether South Ossetians experienced sustained and systematic human

---

307. *See generally* Stephen F. Jones, *The Rose Revolution: A Revolution Without Revolutionaries?*, 19 CAMBRIDGE REV. INT'L AFF. 33 (2006).

308. *Road to War in Georgia: The Chronicle of a Caucasian Tragedy*, DER SPEIGEL (Aug. 25, 2008), http://www.spiegel.de/international/world/road-to-war-in-georgia-the-chronicle-of-a-caucasian-tragedy-a-574812.html.

309. *See* T. L. Thomas, *The Bear Went Through the Mountain: Russia Appraises its Five-Day War in South Ossetia*, 22 J. SLAVIC MIL. STUD. 31, 38–39 (2009); Higgins & O'Reilly, *supra* note 301, at 571–73. *See generally* Charles King, *The Five-Day War: Managing Moscow After the Georgia Crisis,* FOREIGN AFF., Nov.–Dec. 2008, at 2; Michael Toomey, *August 2008 Battle of South Ossetia: Does Russia Have a Legal Argument for Intervention?*, 23 TEMP. INT'L & COMP. L.J. 443 (2009).

310. Nußberger, *supra* note 7, at 359.

311. *See* discussion *supra* Part II.

rights abuses *in extremis* at the hands of Georgians, with no prospect for peaceful resolution of the conflict. It would seem most likely that the answer is no, as prospects for a political solution stopping short of UNC secession were possible, particularly under Shewardnadze's more moderate influence.[312] This determination is reflected by the international community of states, as at the time of writing, only Russia, Nicaragua, Venezuela, and Naru have extended recognition. It would seem then that South Ossetia's statehood has failed to crystallize, owing principally to the fact that its UNC secession was not in conformity with the peremptory norm of the right of peoples to self-determination.

A separate yet related matter is whether Russia's direct military intervention in the five day war, which resulted in military strikes by Russia against Georgian military infrastructure and precipitated South Ossetia's UNC secession, was a breach of the peremptory norm prohibiting the illegal use of force. The answer would seem to be in the affirmative, a fact bolstered by the continuing Russian military presence in the region. Parallels can therefore be drawn between Russia's involvement in South Ossetia and Turkey's military intervention, and ongoing military presence, in the TRNC.

e. Transnistria—Attempted UNC Secession

Transnistria's attempted UNC secession finds its roots in Moldolva's complex history. Following the Russo-Turkish war of 1806-1812, the area between Prut and the Dniester rivers was annexed by Russia, taking the name Bessarabia.[313] This region enjoyed autonomy within the Russian Empire and was initially composed mostly of ethnic, Romanian-speaking Moldovans. Over time, however, Russia began to exert increasing influence throughout Bessarabia, replacing the Romanian language with Russian, and removing local political control. Coupled with this, large numbers of other ethnic groups entered Bessarabia, especially Russians. These actions ensured that the percentage of Moldovans resident in Bessarabia fell from

312. Nußberger, *supra* note 7, at 359–60; Alexidze, *supra* note 299, at 85–87.

313. W. Alejandro Sanchez, *The "Frozen" Southeast: How the Moldova-Transnistria Question has Become a European Geo-Security Issue*, 22 J. SLAVIC MIL. STUD. 153, 155 (2009).

86 percent in the beginning of the nineteenth century, to 48 percent by the beginning of the twentieth century.[314]

In response to these demographic changes, pan-Romanian nationalists began to espouse desires for integration with Romania. In the wake of the Russian Revolution of 1917, a national assembly was created—the Sfatul Tarii—which voted in favor of establishing the Moldovan Democratic Republic of Bessarabia. Importantly, the borders of this newly declared republic did not include the stretch of land now known as Transnistria. On March 28, 1918, the Sfatul Tarii voted in favor of unification with Romania, and by the end of 1918, the areas of Bukovina and Transylvania had also joined, thereby creating "Greater Romania."[315]

In 1944, the Red Army captured Bessarabia. Shortly thereafter, Bessarabia was added to the territory which had formed the Moldovan Autonomous Soviet Socialist Republic, and the Soviet Socialist Republic of Moldova was formed. This move ensured that Moldova inherited a large ethnic Russian community, which tended to be disproportionately represented in professional positions, whilst Moldovans remained mostly in agricultural roles.[316] During this period of postwar assimilation, a concerted attempt was made to propagate a distinct Moldovan national identity, a project which was for the most part successful, as indicated by the fact that modern Moldovans do not consider themselves ethnically Romanian.[317]

With the loosening of Moscow's political grip under the policies of *Perestroika* and *glasnost*, calls for greater linguistic and cultural freedom were made throughout Moldova. Chief among such voices were the Popular Front, an opposition group which challenged policies of "Russification" and unreformed communism. In August 1989, the Moldovan parliament, the Supreme Soviet, made Moldovan the state language, instituting the Latin rather than Cyrillic alphabet. Culturally, moves were made in the direction of pan-Romanianism, which triggered an adverse response from Slavic elites, particularly those in Transnistria. In effect, political power began to shift away from

---

314. Michael F. Hamm, *Kishinev: The Character and Development of a Tsatrist Frontier Town*, 26 NATIONALITY PAPERS 19, 19, 25 (1998).

315. Steven D. Roper, *Regionalism in Moldova: The Case of Transnistria and Gagauzia*, 11 REGIONAL & FED. STUD. 101, 102 (2001).

316. *Id.* at 103.

317. *Id.*

ethnic Russians to Romanian speakers. This culminated in the election of a Moldovan Parliament dominated by the Popular Front and ethnic Moldovans. Perhaps more worrying for Slavic elites, the newly elected Prime Minister, Mircea Druc, was an avid pan-Romanian.

Transnistria responded to these developments by declaring its independence from Moldova on September 2, 1990.[318] The Moldovan government viewed Transnistria's independence declaration as illegitimate, akin to treachery or terrorism. Throughout late 1991 and 1992, military clashes occurred between Moldovan and Transnistrian paramilitary groups along the Dniester River, resulting in over one-hundred deaths. During this time, Transnistrian forces were fortified by a transfer of soldiers and arms from the Russian 14th Army. Indeed, by December 1991, the 14th Army's commander, General Gennadii Yakovlev, took up the position of Transnistrian Defence Minister.[319] In effect, Transnistria's calls for independence became a focal point for Russian desires to "protect and defend" the "old ways" throughout the now defunct Soviet Union. This desire was personified when the Russian Vice President, Alexander Rutskoi, visited Transnistria as a show of solidarity.

The decisive turning point in the violence seems to have been Transnistria's capture of the strategically important town of Bender on June 20—21, 1992. After this date, Moldovan authorities realized that so long as Transnistria enjoyed the support of the Russian 14th Army, there was no prospect of a militarily resolution. A ceasefire agreement was signed on July 21, 1992, and Transnistria has remained beyond Moldovan control until the present day. Although various attempts at political resolution have been made, they have, thus far, been unsuccessful. In March 2014, in the wake of Crimea's accession to Russia, the Transnistrian Parliament also pressed for accession, but the situation remains unresolved.[320]

---

318. *Trans-Dniester Profile*, BBC NEWS (Mar. 17, 2015), http://www.bbc.com/news/world-europe-18284837; Andreas Johansson, *The Transnistrian Conflict After the 2005 Moldovan Parliamentary Elections*, 22 J. COMMUNIST STUD. & TRANSITION POL. 507 (2006).

319. Roper, *supra* note 315, at 107; Christopher J. Borgen, *Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts,"* 9 OR. REV. INT'L L. 477, 498–99 (2007).

320. *Moldova's Trans-Dniester Region Pleads to Join Russia*, BBC NEWS (Mar. 18, 2014), http://www.bbc.com/news/world-europe-26627236.

Transnistria has enjoyed both a stable and effective government throughout its period of political estrangement from Moldova. Yet, Transnistria has not received recognition from any U.N. member state. This strongly indicates that Transnistria has failed to achieve statehood. The principal reason is that its independence was not concomitant with the right of peoples to external self-determination.[321] In other words, Transnistria's population was not subject to sustained and systematic human right abuses *in extremis*, prior to declaring independence. On the contrary, Transnistria is a traditionally privileged part of Moldovan territory.

Compounding Transnistria's failure to comply with the peremptory norm of self-determination is the ongoing involvement of Russian troops on Transnistrian soil. Ostensibly, Russian troops have remained in Transnistria for the purposes of peacekeeping. This direct and open-ended involvement, however, has ensured that the peremptory norm prohibiting the illegal use of force has been violated, a fact that strongly militates against Transnistria's statehood.

f. Scholarly Opinion

The view that UNC secession requires compliance with peremptory norms is heavily supported by scholarly opinion. Crawford, for example, has observed:

> No doubt the principle of effectiveness remains a major consideration; it was noted in connection with the spate of State-creation in the early 1990s. Practice, however, does not support the conclusion that it is the only element, and the development of the concept of peremptory norms in the Vienna Convention confirms this conclusion: norms that are non-derogable and peremptory cannot be violated by State-creation any more than they can be by treaty making.[322]

Raič has similarly noted:

> [O]n the basis of the practice of explicit non-recognition of claims to statehood it must be concluded, that for the emergence of a State in the sense of, and thus under, international law, additional and new criteria for statehood must be met which are not based on effectiveness, and which can be grouped under the broader heading of the obligation to re-

321. *See* discussion *supra* Part II.

322. CRAWFORD, *supra* note 2, at 107.

> spect fundamental rules of international law (that is, at least *jus cogens*) during the entity's creation.[323]

The same author later concludes that "the *existence of a State* under international law is to be determined on the basis of *(a)* criteria based on the concept of effectiveness (the traditional criteria) *and (b)* criteria based on legality [compliance with peremptory norms]."[324] Other scholars have reached similar conclusions.[325]

g. Conclusion

It emerges from the foregoing that entities purportedly created by UNC secession may be regarded as not possessing statehood, and that the declaratory recognition theory is more reflective of state practice than the constitutive. It follows that additional legal factors may operate to deny the statehood of entities purportedly created by UNC secession. As postulated by scholars such as Crawford and Raič, these additional legal factors are peremptory norms of international law which cannot be derogated from. Thus, any argument that a distinction might be drawn between statehood having legal effect (without peremptory norm violations) and statehood having no legal effect[326] (with peremptory norm violations), as Dugard has intimated, is incorrect. Peremptory norms violations during the

---

323. RAIČ, *supra* note 43, at 156.

324. *Id.* at 167.

325. DUURSMA, *supra* note 164, at 127–28; James E. S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT'L L. 103, 112–13 (1965–1966); SHAW, supra note 49, at 149–51; P. K. Menon, *Some Aspects of the Law of Recognition Part VII: The Doctrine of Non-recognition*, 4 REVUE DE DROIT INTERNATIONAL 227, 248–51 (1991). The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, also seems to accord with this position. In Chapter III, which deals with breaches of peremptory norms, Article 41(2) provides that "[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation." *A priori*, it would seem that a putative state born of peremptory norm violations could not be deemed to have satisfied the legal criteria for statehood in international law, even if effective. For general commentary on Article 41(2), see James Crawford et. al, *The ILC's Articles on Responsibility for the Internationally Wrongful Acts: Completion of the Second Reading,* 12 EUR. J. INT'L L. 963, 978–79 (2001); Int'l Law Comm'n Rep. on the Work of Its Fifty-Third Session, *supra* note 230, at 286-91.

326. DUGARD, *supra* note 79, at 131.

process of UNC secession will prevent the attainment of statehood.

It also emerges that the conclusions immediately above cannot be dismissed simply on the grounds of *realpolitik*. In the cases of Chechnya, Abkhazia, South Ossetia, and Transnistria, the existing state was only a world power in one instance, that of Chechnya and Russia. In the remaining case studies, Russia actually supported the purported UNC secessions, but to no avail. If these events were to be explained purely on the grounds of *realpolitik*, one might expect attempted UNC secessions with the support of a world power to be more successful. Rather, it seems that the failure to adhere to peremptory norms, namely, the right of peoples to self-determination and the prohibition on the illegal use of force, offer a more convincing explanation as to why these purported UNC secessions were unsuccessful.

C. How is a Breach of Peremptory Norms to be Identified?

Having determined that peremptory norm violations during the process of UNC secession will prevent the attainment of statehood, it must be considered how such violations are to be identified. Is it up to individual states to identify violations, or should the international community adopt a consensus approach? In this regard, the Dissenting Opinion of Judge Skubiszewski in the *Case Concerning East Timor (Portugal v Australia)*[327] provides guidance. Referring to the peremptory norm prohibiting the illegal use of force, Judge Skubiszewski has remarked that the obligation to refuse recognition in the context of the illegal use of force "does not arise only as a result of a decision by the Security Council ordering non-recognition. The rule is self-executory."[328] In other words, individual states are legally obliged to not extend recognition to UNC secessionist entities that have violated peremptory norms during their formative process. This obligation endures even when interna-

327. East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90, 92 (June 30).

328. *Id.* at 262–63 (dissenting opinion of Skubiszewski, J.). *See generally* James Crawford, *The General Assembly, the International Court and Self-Determination*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE, ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 585, 605 (Vaughan Lowe & Malgosia Fitzmaurice eds.,1996).

tional fora, such as the General Assembly and Security Council, have remained silent.

D. Are States Created by UNC Secession Held to Stricter Account vis-à-vis Compliance with Peremptory Norms Compared with Already Existing States?

One final matter requiring consideration is whether states created by UNC secession are held to stricter account *vis-à-vis* compliance with peremptory norms compared with already existing states. In this regard, state practice indicates in the affirmative.

It has been demonstrated that the TRNC and Transnistria violated the interconnected peremptory norms of the right of peoples to self-determination and the prohibition on the illegal use of force, and have therefore been denied statehood. With regard to already existing states, however, it is clear that a breach of the peremptory norm prohibiting the illegal use of force does not necessarily call statehood into question. Turkey and Russia, which respectively deployed military forces into the TRNC and Transnistria, continue to enjoy statehood. Furthermore, the United States has been accused of routinely violating the peremptory norm prohibiting the illegal use of force over several decades. The most recent example is the 2003 invasion of Iraq which occurred for factually unsubstantiated reasons and without Security Council authorization. It is beyond question, however, that the United States has not had its statehood called into question. Nor have other states, such as Britain and Australia, which were also involved in the illegal occupation of Iraq.

State practice thus indicates that a violation of peremptory norms during the process of UNC secession will prevent that entity's attainment of statehood, whilst a similar breach by an already existing state will not necessarily affect statehood. These different consequences are perhaps not surprising, given that international law has traditionally given preference to the continuity, as opposed to extinction, of states.[329] To allow per-

329. *See, e.g.*, CRAWFORD, *supra* note 2, at 701 ("[G]enerally, the presumption—in practice a strong presumption—favours the continuity and disfavours the extinction of an established State."); *see also id.* at 672–95; MAREK, *supra* note 163, at 548; Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253, 258–60 (1993); Roda Mushkat, *Hong Kong and Succession of Treaties*, 46 INT'L & COMP. L.Q. 181, 183–87 (1997).

emptory norm violations to invalidate the statehood of already existing states would lead to an unacceptable situation whereby considerable territory would be open to challenge by third states. Clearly, this extreme application of peremptory norms would be legally and practically unacceptable.[330]

E. Breach of Peremptory Norms During the Process of UNC Secession and the Legal Obligation of Nonrecognition

Where a breach of peremptory norms occurs during the process of UNC secession, a legal obligation arises on the part of third states to refuse recognition to the entity concerned. This arises as a result of the declaratory recognition theory, consideration of relevant state practice in terms of physical acts and omissions, and the doctrine of nonrecognition for entities that have not satisfied the objective legal criteria for statehood.[331]

The origins of the legal obligation of nonrecognition can be traced to the response of U.S. Secretary of State, Henry Stimson, to Japan's seizure of Chinese Manchuria during late 1931 and subsequent purported establishment of Manchukuo. On January 7, 1932, Secretary Stimson sent two identical notes to China and Japan containing the following statement:

> In view of the present situation and of its rights and obligations therein, the American Government deems it to be its duty to notify both the government of the Chinese Republic and the Imperial Japanese that it cannot admit the legality of any situation de facto nor does it intend to recognize any treaty or agreement entered into between these government, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and that it does not intend to recognize any situation, treaty or agreement which may be brought about by

330. RAIČ, *supra* note 43, at 158.

331. *See, e.g.*, IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 410–23 (1961); CRAWFORD, *supra* note 2, at 160; DUGARD, *supra* note 79, at 135–36; ORAKHELASHVILI, *supra*, note 222, at 375; RAIČ, *supra* note 43, at 156; CHARLES DE VISSHER, LES EFFECTIVITÉS DE DROIT INTERNATIONAL PUBLIC 25 (1967); Antonello Tancredi, *Neither Authorized nor Prohibited - Secession and International Law after Kosovo, South Ossetia and Abkhazia*, 18 IT. Y.B. INT'L L. 37, 62 (2008).

> means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States are parties.[332]

This position was afterward endorsed by the League of Nations Assembly, which on March 11, 1932, declared it was "incumbent upon the Members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris."[333] The Assembly then appointed an Advisory Committee to delineate the precise scope of nonrecognition with regards to Manchukuo. The committee recommended that Manchukuo be prohibited, *in toto*, from accession to international conventions, even those which dealt with seemingly innocuous subject matter such as the 1913 Universal Postal Convention and 1926 Sanitary Convention.[334] Passports issued by Manchukuo were deemed to be without legal effect, and states were prohibited from making quotations in "Manchukuo" currency. Regarding consuls, the committee considered it acceptable for states to maintain their diplomatic presence in Manchukuo for the protection of the citizens of these states. Consuls were, however, under the strict obligation not to undertake any action which might be interpreted as indicating express or implied recognition of Manchukuo as a state.[335]

The recommendations of the committee were therefore to enforce an *absolutist* policy of nonrecognition against Manchukuo. This absolutist position, however, was ultimately found to be untenable, with the League of Nations making a series of concessions relating to issues, including, *inter alia*, postal services and the issuing of visas.[336]

---

332. NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW 77 (1994).

333. *Id.* Specifically, Article 10 of the Covenant of the League of Nations obliged members "to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League." League of Nations Covenant art. 10. Article 1 of the Kellogg-Briand Pact condemned "recourse to war for the solution of international controversies, and renounce[d] it as an instrument of national policy in the relations with one another." *See* WALLACE-BRUCE, *supra* note 332, at 78–79 (quoting Kellogg-Briand Peace Pact, art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 U.N.T.S. 57).

334. RAIČ, *supra* note 43, at 159.

335. *Id.*

336. *Id.*

More recent guidance on the legal obligation of non-recognition has been provided by the ICJ in its *Namibia Advisory Opinion*.[337] Namibia had been a German colony before the establishment of the League of Nations, but upon Germany's defeat in World War I the colony became a "C" mandate, the administration of which was entrusted to neighboring South Africa. With the demise of the League of Nations, South Africa assumed unfettered control of Namibia, and when Chapter XII of the U.N. Charter purported to resurrect Namibia's mandate status South Africa objected, arguing that it was no longer subject to any international legal obligations. For a period of thirteen years the General Assembly called upon South Africa to perform its obligations and promote Namibia's sovereign independence. As a consequence of Pretoria's resistance to such requests, the General Assembly terminated South Africa's mandate relationship with Namibia in October 1996. In 1970 Security Council Resolution 276 declared South Africa's continuing presence in Namibia illegal.[338] It was against this backdrop that the ICJ's Advisory Opinion was delivered.[339]

After determining Resolution 276 was a *bona fide* "declaration of illegality and invalidity,"[340] the ICJ held that U.N. member states were:

> [U]nder obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.[341]

The court then expounded specifically upon the types of dealings and interactions with South African authorities within Namibia, which would be inconsistent with the declaration of illegality and invalidity, given that they might imply South Af-

---

337. Namibia Advisory Opinion, 1971 I.C.J. 16 (June 21).

338. S.C. Res. 276, ¶ 2 (Jan. 30, 1970).

339. *See generally* GOWLLAND-DEBBAS, *supra* note 241, at 287–303; WALLACE-BRUCE, *supra* note 332, at 88–89; CRAWFORD, *supra* note 2, at 163; MILANO, *supra* note 39, at 137.

340. Namibia Advisory Opinion, 1971 I.C.J. ¶ 121. *See generally* RAIČ, *supra* note 43, at 160.

341. Namibia Advisory Opinion, 1971 I.C.J. ¶ 133. *See generally* RAIČ, *supra* note 43, at 160.

rica's continuing presence in Namibia as legal.[342] The court noted that the legal obligation of nonrecognition entailed abstention from treaty relations in all cases where the South African government purported to act on behalf of or concerning Namibia. Further, this obligation required that states refrain from invoking or applying bilateral treaties concluded by South Africa on behalf of or concerning Namibia which involved active intergovernmental cooperation. It also required abstention from diplomatic and consular activity in Namibia and from "economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory."[343] This has generally been interpreted as mandating the nullity of all South Africa's official acts *vis-à-vis* Namibia.[344]

The court did note, however, that nullity cannot be extended to multilateral treaties of a "humanitarian character," as to do so may "adversely affect the people of Namibia."[345] For similar reasons, it also suggested that nullity could not be extended to government acts relating to private matters such as "the registration of births deaths and marriages."[346]

Judge Dillard in his Separate Opinion supported the court's views on the legal obligation of nonrecognition, although he did indicate some qualifications. After suggesting that nonrecognition required "a negative duty of restraint, not a positive duty of action"[347] he noted that the doctrine of nonrecognition "is not so severe as to deny that any source of right whatever can accrue to third persons acting in good faith" as "the cause of minimizing needless hardship and friction would be hindered rather than helped."[348]

---

342. Namibia Advisory Opinion, 1971 I.C.J. ¶¶ 122–27; *accord* Namibia Advisory Opinion, 1971 I.C.J. at 119–20 (separate opinion by Nervo, J.). *See generally* RAIČ, *supra* note 43, at 160.

343. Namibia Advisory Opinion, 1971 I.C.J. ¶ 124.

344. RAIČ, *supra* note 43, at 163; CRAWFORD, *supra* note 2, at 165.

345. Namibia Advisory Opinion, 1971 I.C.J. ¶ 122.

346. *Id.* ¶ 125.

347. Namibia Advisory Opinion, 1971 I.C.J. at 166 (separate opinion by Dillard, J.).

348. *Id.* at 166–67. Judge Petrèn went even further than Judge Dillard, dissenting on the question of nonrecognition and criticizing the severity of obligations espoused by the court. Namibia Advisory Opinion, 1971 I.C.J. at 134–36 (separate opinion by Petrèn, J.). Judge Petrèn suggested that nullity was qualified by "human considerations and practical needs." *Id.* at 134. He

In light of the foregoing it would seem that intergovernmental cooperation on humanitarian grounds is permitted insofar as such cooperation does not imply the recognition or legality of the illegality under contention—in this case, South Africa's continued illegal administration of Namibia.[349] It might be observed, therefore, that the court was departing from the position of absolutist nonrecognition espoused decades earlier in the context of Manchukuo.

The view expressed by the ICJ in the *Namibia Advisory Opinion*[350] has been affirmed by the Security Council in its conduct relating to the TRNC, with no resolution imposing a wholesale ban upon multilateral treaties which deal exclusively with the human rights of individuals.[351] The same approach has been affirmed by the European Court of Human Rights in *Loizidou v Turkey*.[352]

Subsequent cases before the ICJ such *as Case Concerning East Timor* (*Portugal v. Australia*)[353] and *Legal Consequences*

---

also remarked that "necessities of a practical of humanitarian nature may justify certain [intergovernmental] contacts or certain forms of [intergovernmental] co-operation." *Id.*

349. RAIČ, *supra* note 43, at 163–64; CRAWFORD, *supra* note 2, at 167; GOWLLAND-DEBBAS, *supra* note 241, at 310–11.

350. Namibia Advisory Opinion, 1971 I.C.J. at 55–58 ¶¶ 122–33.

351. RAIČ, *supra* note 43, at 162.

352. The European Court of Human Rights noted,

> The Court confines itself to the above conclusion and does not consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the "TRNC." It notes, however, that international law recognizes the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths, and marriages, "the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory."

Loizidou v Turkey, Judgment, 1996-VI Eur. Ct. H.R. 2216, ¶ 45; *see also* Namibia Advisory Opinion, 1971 I.C.J. ¶ 125.

353. East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90, 102 at ¶ 29 (June 30). *See generally* CRAWFORD, *supra* note 2, at 168–72.; Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323 (1994); Christine M. Chinkin, *East Timor Moves into the World Court*, 4 EUR. J. INT'L L. 206 (1993); Maria Clara Maffei, *The Case of East Timor before the International Court of Justice – Some Tentative Comments*, 4 EUR. J. INT'L L. 223 (1993); Thomas D. Grant, *East Timor, The UN System, and Enforcing Non-Recognition in International Law*, 33 VAND. J. TRANSNAT'L L. 273 (2000); Gino

of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)[354] have confirmed the legal obligation of nonrecognition. So too has the 2005 African Union Non-Aggression and Common Defence Pact, which in Article 4(c) requires that "States parties undertake not to recognize any territorial acquisition or special advantage, resulting from the use of aggression."[355] The International Law Commission, in its Articles on Responsibility of States for Internationally Wrongful Acts 2001, has also confirmed the legal obligation of nonrecognition for territorial entities which breach peremptory norms during their formative process, codifying the customary law legal obligation of nonrecognition in Articles 40 and 41.[356]

Naldi, *The East Timor Case and the Role of the International Court of Justice in the Evolution of the Right of Peoples to Self-Determination*, 5 AUSTL. J. HUM. RTS. 106 (1999); André de Hoogh, *Australia and East Timor: Rights* erga omnes*, Complicity and Non-Recognition*, 1999 AUSTL. INT'L L.J. 63 (1999).

354. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 200 (July 9). *See generally* CRAWFORD, *supra* note 2, at 172–73; Fr Robert J. Araujo, *Implementation of the ICJ Advisory Opinion – the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?*, 22 B.U. INT'L L.J. 349 (2004); Christine Gray, *The ICJ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 63 CAMBRIDGE L.J. 527 (2004).

355. ORAKHELASHVILI, *supra* note 222, at 373.

356. Articles 40 provides:

> This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law . . . . A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41 provides:

> States shall cooperate to bring an end through lawful means any serious breach within the meaning of article 40 . . . . No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation . . . . This article is without prejudice to other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Int'l Law Comm'n Rep. on the work of its Fifty-Third Session, *supra* note 230, at 282, 286.

Finally, it should also be observed that the ICJ in its *Kosovo Advisory Opinion*[357] has expressed the view that a declaration of independence made in the context of peremptory norm violations would be unlawful. This *dicta*, although not referring explicitly to the customary law of nonrecognition, nonetheless affirms the interconnection between the creation of states by UNC secession and peremptory norms of international law.

CONCLUSION

The foregoing article has propounded three principal points. First, it has argued that there is a connection between UNC secession and the criteria for statehood in international law. Put simply, states that are created in conformity with the right of oppressed peoples to UNC secession in customary international law do not have to strictly satisfy the effective government criterion. If this were not the case, then the principle of self-determination would itself be rendered almost meaningless, as very few unilateral secessions, be they in the colonial or non-colonial context, have been achieved in circumstances where the effective government criterion has been strictly complied with.

Second, it has been argued that the declaratory recognition theory is more reflective of state practice than the constitutive. This means that a state created by UNC secession may exist in the absence of international recognition. However it has also been shown that where an entity established by UNC secession has violated peremptory norms, the international community will deny statehood and a legal obligation of nonrecognition will apply. From this it can be determined that recognition serves both political and legal purposes.

Third, in light of the preceding two points, the article has argued that there have been many examples of entities purportedly created by UNC secession but which have been denied statehood by the international community. This is the result of statehood now being predicated not only of the criteria for effectiveness (as modified by the law of self-determination) but also compliance with peremptory norms. Where a state has been purportedly created in violation of peremptory norms,

357. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 81 (July 22).

statehood will fail to crystalize. More than likely, this will occur when there is a violation of the interconnected peremptory norms of self-determination and the prohibition on the illegal use of force.[358] This arguably explains why Bangladesh, Croatia, and Kosovo achieved statehood as a result of UNC secession, but the TRNC, Chechnya, Abkhazia, South Ossetia, and Transnistria, have not.

Since World War II, it is therefore arguable that there has been a gradual shift in the requirements for statehood in the context of UNC secession. No longer are the criteria for statehood based on effectiveness sufficient. Rather, these traditional criteria have now been supplemented, and perhaps even overridden, by the importance of peremptory norms, particularly the right of peoples to self-determination. This means that a state purportedly created by UNC secession in violation of peremptory norms will, in contemporary times, simply fail to attain statehood.

358. It is conceivable, however, that if an entity purportedly created by UNC secession systematically breached other peremptory norms during its formative process, such as the prohibition on racial discrimination, apartheid, and torture, it would also be denied statehood.