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

Glen Anderson

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

Dr. Glen Anderson*

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* BA (Hons) BA/LLB (Hons) PhD (Macq), Lecturer in Law, University of Newcastle, Australia.
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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 Since ancient times, empires have come and gone and new political units have emerged, only in turn to be superseded by others.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, Slovenia, Montenegro, Serbia, Kosovo (Yugoslavia), and South Sudan (Sudan). Unsuccessful UNC secessions, such as the Turkish Republic of Northern Cyprus (Republic of Cyprus), Chechnya (Russia), Abkhazia (Georgia), South Ossetia (Georgia), and Transnistria


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.


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
While existing legal scholarship tends to focus on whether particular UNC secessions are legal or illegal in international law, 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.


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 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.” This definition includes consensual, unilateral, and colonial or non-colonial. Part II outlines the parameters of the right to UNC secession in international law. Part II 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 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.

Secession is thus a broad method of state creation; it is not confined to unilateralism or situations where the secessionist group uses or threatens to use force. The unifying element which ties all varieties of secession together is an endogenously motivated withdrawal. 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.


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.


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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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-

\textsuperscript{18} Id. at 346–49.


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\(^\text{21}\) ("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.\(^\text{22}\)

This text is repeated, \textit{mutatis mutandis}, by Article 1 of the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations\(^\text{23}\) which provides that the U.N. will, \textit{inter alia}:

\[\text{[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.}\(^\text{24}\)


\(^{22}\) Id., principle 5, ¶ 7 (emphasis added).


\(^{24}\) 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:

\[\text{*Opinio 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:

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25. *Id.*
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
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.\textsuperscript{34}

Fourth, state practice indicates that the right to UNC secession is only available in response to human rights abuses \textit{in extremis} (ethnic cleansing, mass killings, and genocide) as opposed to \textit{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.\textsuperscript{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 \textit{in moderato} and \textit{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 \textit{in extremis}.\textsuperscript{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

\textsuperscript{[t]his term [\textit{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 \textit{opinio juris}.}


\textsuperscript{34.} Anderson, \textit{supra} note 23, at 394.

\textsuperscript{35.} See discussion of case studies \textit{infra}, Part III.C.2. and Part IV.B.2.

\textsuperscript{36.} Although a broader right to UNC secessionist self-determination, justified on the grounds of human rights abuses \textit{in moderato} and \textit{in extremis} arguably forms \textit{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 rights abuses \textit{in extremis}. See Anderson, \textit{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.\(^{41}\)

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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.

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

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 Raic, Statehood and the Law of Self-Determination 74 (2002).

44. Id. at 58; Crawford, supra note 2, at 52.


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. This does not mean, however, that there must be an absence of disputed frontiers. 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.

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

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).

This general rule was later affirmed in the *North Sea Continental Shelf Cases*\(^5\) and *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad).*\(^6\)

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.\(^7\) 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.\(^8\) Shaw, for example, has observed that:


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, “[*uti nunc aes aedas, quibus, de agitur, nec vi nec clam nec pre- cario 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-


\(^{56}\) 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; RAČ, *supra* note 43, at 297.
perty. 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.\(^64\)


\(^{60}\) Raić, _supra_ note 43, at 298; Radan, _supra_ note 4, at 245–46.


\(^{62}\) Raić, _supra_ note 43, at 298.


\(^{64}\) 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 powers66 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 irredentist67—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 “irredentism,” and its contrast with “secession,” see Anderson, supra note 1, at 371–73.

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-

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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.


73. RADAN, *supra* note 4, at 245–46.
principle of international law. Not only did the commission trans-
pose a colonial principle of uncertain status to a radically dif-
ferent situation – the dissolution of a sovereign state – but it
also radically transformed the principle. Whereas in the colo-
nial context *uti possidetis* constitutes a delimitation principle,
as applied by the Arbitration Commission it serves as an in-
consistent 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 par-
ties involved but has become a binding solution that can be
imposed upon unwilling participants.  

Although incisive from a normative perspective, these criti-
cisms 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 cri-
sis—the primary example of state practice relevant to the ex-
tension of *uti possidetis* to the non-colonial context—reveals
ambiguity and confusion on this point.  
The European Union, for example, did not expressly endorse application of *uti possi-
detis* 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 main-
taining international peace and security. Any resolutions sug-
gestig respect for federal borders must therefore be interpret-
ed 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 pronounc-
ements and Security Council Resolutions, it does not appear,
despite claims to the contrary by distinguished jurists such as

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74. SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD:

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 DÉMENBREMENTS 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 . . . . [1]In 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.\(^7^6\)

It would thus seem that the application of the \textit{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 \textit{de lege ferenda}, but it is a step too far to categorize it as a \textit{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.

\textbf{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.\(^7^7\)

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”\(^7^8\)—has ensured that a state cre-

76. \textit{Lalonde, supra} note 74, at 202.

77. See Hans M. Blix, \textit{Contemporary Aspects of Recognition, in} 130 \textit{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,” \textit{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 people to self-determination will not be required to strictly satisfy the effective government criterion. Conversely, contemporary international law indicates that a state created by UNC secession in violation of the right of people 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 people to external self-determination.

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, 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.

RAIĆ, 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.\textsuperscript{82} Importantly, all four case studies represent instances of peoples exercising a valid right to external self-determination.

\textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{82} Meaning secession that occurs in the colonial context without the metropolitan power’s consent.

\textsuperscript{83} RAJC, supra note 43, at 64.

\textsuperscript{84} Id.

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. RAČ, supra note 43, at 65.
90. See RAČ, 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.\footnote{Raič, supra note 43, at 66–67.}

\textit{A priori}, the law of self-determination reduced the threshold of the effective government criterion.

\textit{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.\footnote{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).}

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.\footnote{Raič, supra note 43, at 96.} 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
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.
98. BEDJAOUI, supra note 94, at 112–38.
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, 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.” This was followed one month later by General Assembly Resolution 3181, which expressly declared that Guinea-Bissau was an independent state.

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. 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.
103. RAIČ, supra note 43, at 99.
In November 1975, after a violent and protracted war of liberation, Portugal agreed to allow Angola its independence. 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.

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.
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; see also supra text accompanying note 79.
108. Raić, 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 effec-
tive government criterion. Conversely, attempts at UNC seces-
sion contrary to this right, such as the TRNC, Chechnya, Ab-
khazia, 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 Paki-
stan. 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 posi-
tions, especially in key areas such as administration and the
armed forces. Bengali representation in all Pakistani govern-
ment services, for example, was estimated to be only 15 per-
cent, 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-

110. Richard Sisson & Leo E. Rose, War and Secession: Pakistan, India
and the Creation of Bangladesh 9 (1990); Philip Oldenburg, A Place Insuf-
ciently 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);
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.\textsuperscript{112}

East Pakistan was also economically neglected, and by 1960 had a per capita income 30—36 percent less than the West.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{116}

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

\textsuperscript{112} Ved P. Nanda, \textit{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).
\textsuperscript{113} HERACLIDES, supra note 15, at 150.
\textsuperscript{114} Id. at 149; BAXTER, supra note 110, at 67.
\textsuperscript{115} Nanda, supra note 112, at 331–32.
\textsuperscript{116} Id. at 333.
\textsuperscript{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 \textit{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 \textit{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.

\textit{b. Croatia—UNC Secession}

In the wake of Croatian elections in which the liberal reformist politician, Dr. Franjo Tudjman, and the Croatian Democrat-
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 Croats.\(^{123}\) 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.


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 Mladić 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-

126. RAČ, supra note 43, at 351.
127. Hanson, supra note 125, at 86; RAČ, supra note 43, at 352.
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

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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.

\textit{Id.}

130. Hanson, supra note 125, at 77–78; Raić, supra note 43, at 353.
132. Raić, supra note 43, at 354; Stojanovic, supra note 124, at 352.

\end{footnotesize}
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. RAIC, 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.” \textit{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-Albans from Kosovo.


\textsuperscript{139.} PAVKOVIĆ, \textit{supra} note 131, at 193; Bellamy, \textit{supra} note 137, at 121.


NATO responded by commencing high altitude air strikes 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.

The violence ended on June 12, when Serbian President Slobodan Milošević, 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, 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. 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,


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

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 \textit{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 \textit{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


\(^{148}\) Several other scholars similarly hold this interpretation. See, e.g., Raič, \textit{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, \textit{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.”

\textit{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. 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). 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-Bosnia in November 1991.

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; TERRITT, 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 “Republika Srpska” was adopted by the Serb Republic of Bosnia-Herzegovina on August 12, 1992. See RADAN, supra note 4, at 189.

151. RAČ, supra note 43, at 414; RADAN, supra note 4, at 187–93.
ence on Yugoslavia\textsuperscript{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.”\textsuperscript{153} In the wake of a referendum on independence (boy-\textsuperscript{cotted by Bosnia’s Serb minority) in which 99.4 percent of votes were in favor of independence, fighting erupted between Bos-\textsuperscript{nian Muslims and Bosnian-Serb irregulars and between the JNA and Bosnian-Croat irregulars.\textsuperscript{154}} Aware of these developments, EC-member states and the United States extended recognition to Bosnia-Herzegovina on April 6 and 7, 1992, respectively.\textsuperscript{155} At this point, the fighting between the various groups within Bosnia-Herzegovina intensified.\textsuperscript{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 \textit{in extremis}. As Raič has noted: “the [Bosnian Muslims] were exposed to serious and widespread violations of their human rights only \textit{after} the proclamation of independence.”\textsuperscript{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.\textsuperscript{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

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\item \textsuperscript{152} Opinion No. 4, 31 I.L.M. 1501–1503 (1992).
\item \textsuperscript{153} Id. at 1503; see also Raič, supra note 43, at 414.
\item \textsuperscript{154} RADAN, supra note 4, at 187.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} RAČ, supra note 43, at 414.
\item \textsuperscript{157} Id. at 415–16.
\item \textsuperscript{158} Id. at 416.
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the concomitant compensatory force principle. It may be best classified as *sui generis*.


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. 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.

D. Independence

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

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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

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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

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; RAIC, 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.\textsuperscript{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.\textsuperscript{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 Milošević approved their creation. To a certain extent then, Serbian Krajina appeared to be under Serbia’s political control.\textsuperscript{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 . . . .”\textsuperscript{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

\textsuperscript{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. \textit{See} Judith Armatta, \textsc{Twilight of Impunity: The War Crimes Trial of Slobodan Milosevic} 160–63 (2010).

\textsuperscript{171} Rać, \textit{supra} note 43, at 79–80. For information on the Vance peace-plan, which is named after Cyrus Vance, see generally Amy Lou King, \textit{Bosnia-Herzegovina-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).

\textsuperscript{172} Rać, \textit{supra} note 43, at 80.

\textsuperscript{173} Crawford, \textit{supra} note 49, at 130.
Bosnia-Herzegovina. In The Prosecutor v. Dusko Tadić, 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:

"The 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."

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 Vladimir Putin to sell discounted gas to Ukraine, and also purchase $15 billion in Ukrainian bonds. 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.

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.\textsuperscript{178} A political power vacuum ensued, and Russian special forces moved into Crimea to take up strategic positions and organize local resistance.\textsuperscript{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.\textsuperscript{180} Rather ominously, Russian military forces remained within Crimea during the referendum.\textsuperscript{181} These measures paved the

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way for Crimea’s integration into Russia on March 18, 2014.\textsuperscript{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.\textsuperscript{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.

\textit{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 \textit{not} necessarily be required to follow the existing state’s internal administrative boundaries. \textit{A priori}, the application of the \textit{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 \textit{not}, by virtue of the compensatory force principle, be required to strictly satisfy the effective government criterion.\textsuperscript{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.\textsuperscript{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.

\footnotesize{182. Steven Myers & Peter Baker, \textit{Putin Recognizes Crimea Secession, Defying the West}, N.Y. Times (Mar. 17, 2014), http://nyti.ms/1gF8TEj.
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.).

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. 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
as Vattel, took a different view, arguing that the existing state’s recognition was unnecessary.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{193}

\textsuperscript{188} Id.
\textsuperscript{189} Id. at 377.
\textsuperscript{190} RAIČ, supra note 43, at 93–94.
\textsuperscript{191} Id.
\textsuperscript{192} CRAWFORD, supra note 2, at 382.
\textsuperscript{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-

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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.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{198} Article 1 of which provided that “[a]gression 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. \textit{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.\textsuperscript{199} When Israeli fighter jets shot down British aircraft


Crawford asserts that

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

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\(^{200}\) 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, delivered on November 29, 1991, stated that “the effects of recognition by other states are purely declaratory.” This position was echoed by the BAC’s Opinion No. 8, delivered on July 4, 1992, which provided that “recognition of a State by other States has only declarative value . . . .” In the BAC’s Opinion No. 10, 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.” 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:

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.

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.

205. Id. at 1495 (emphasis added); see Crawford, supra note 2, at 24.
207. Id. at 1521 (emphasis added); see Crawford, supra note 2, at 399.
209. Id. at 1526; see Raič, supra note 43, at 37, n.74.
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* 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"). and that any chronological defects could be rectified by refiling the claim after this time. 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. It follows that the ICJ rejected the constitutive recognition theory and endorsed the declaratory position that statehood can crystallize irrespective of recognition.

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.” 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.

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

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214. The Agreement was finalized on December 14, 1995.
216. Crawford, supra note 2, at 25.
217. Id.
justification for non-recognition . . . . Recognition is usually intended as an act, if not of political approval, at least of political accommodation.”

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.

Numerous other scholars have propounded analogous views.

220. Id. at 26.
221. ANTONIO CASSESE, INTERNATIONAL LAW 73–75 (2d ed. 2005).
222. DIXON, supra note 46, at 133–36; MALANZUK, 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.
with other recognized, well-established, and often powerful states. \textsuperscript{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 \textit{sine qua non} for statehood.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{225} Crawford, \textit{supra} note 2, at 27.
\textsuperscript{226} Id. at 93.
\textsuperscript{227} Raić, \textit{supra} 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.” \(^{228}\) Orakhelashvili, *supra*, note 222, at 8–9.


\(^{230}\) 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 . . . .” \(^{228}\) 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.” \(^{228}\) Crawford, *supra* note 2, at 100. See also Rač, *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, there is widespread agreement that certain norms are peremptory norms. 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-


[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,\(^\text{234}\) “\textit{erga omnes} obligations.”\(^\text{235}\) Further, the ICJ has implicitly referred to the operation of peremptory norms beyond the treaty law context in the \textit{Case Concerning Reservations to the Genocide Convention (Advisory Opinion)},\(^\text{236}\) and the \textit{Nuclear Weapons Advisory Opinion}.\(^\text{237}\) The same court has explicitly confirmed the

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\(\textit{Jus cogens}\) rules, otherwise known as “peremptory rules,” are non-derogable rules of international “public policy.” They render void other, non-peremptory rules which are in conflict with them. \textit{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, \textit{Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules}, 66 \textit{NORDIC J. INT’L L.}, 211, 211–12 (1997). The same author later continues that “\textit{jus cogens} rules are necessarily \textit{erga omnes} rules, but that \textit{erga omnes} rules could exist which are not of a \textit{jus cogens} character.” \textit{Id}. Tams has noted that “[i]t seems beyond doubt that there is, at the very least, considerable overlap between obligations \textit{erga omnes} and norms of \textit{jus cogens}.” \textit{CHRISTIAN J. TAMS}, \textit{ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW} 140 (2005). See \textit{generally id}. at 139–46.

\(\text{234}\). Byers, for example, defines the two terms in a similar yet distinct fashion:

\(\textit{Jus cogens}\) rules,

\(\text{235}\). Crawford notes that the ICJ “has been wary of using the term [peremptory norm], employing virtual synonyms (such as the concept of obligations \textit{erga omnes}).” \textit{CRAWFORD, supra} note 2, at 101.

\(\text{236}\). 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.” \textit{Id}; see \textit{also Whiteman, supra} note 231, at 609.

\(\text{237}\). 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 \textit{jus cogens}, the court determined that “[t]here is . . . no need for the Court to pronounce on this matter.” \textit{Id}. 
operation of peremptory norms beyond the treaty law context in *Nicaragua v the United States of America*,\(^2\)238 *Case Concerning Oil Platforms* (Islamic Republic of Iran v. the United States of America),\(^2\)239 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion).*\(^2\)240 Preponderant scholarly opinion has indicated the same.\(^2\)241


\(^{240}\) 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).


> 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 degradation 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.\textsuperscript{242} In broad-stroke, this means that an entity created by UNC secession will fail to attain statehood if it breaches peremptory norms during its formative process.\textsuperscript{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 erst-while secessionist movement might violate, in an isolated event, the peremptory norm prohibiting torture.\textsuperscript{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.\textsuperscript{245} Care must therefore be taken to assess the nature of peremptory norm


\textsuperscript{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.” \textsc{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.” \textsc{Dugard, supra} note 79, at 135.

\textsuperscript{243} \textsc{Raić, supra} note 43, at 149.

\textsuperscript{244} \textsc{Crawford, supra} note 2, at 102.

\textsuperscript{245} \textit{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.” \textsc{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,” or instead prevent the attainment of statehood altogether?

This question has not been thoroughly addressed by scholars. Yet, the question is of some significance. 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. Rač 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.

RAČ, supra 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.”

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.

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” if the state concerned is established in violation of peremptory norms.

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 fulfillment of the criteria for statehood based on effectiveness, but that this can somehow be subsequently rendered “without legal effect”\(^\text{252}\) 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\(^\text{253}\) 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,”\(^\text{254}\) “the Turkish Cypriot leadership,”\(^\text{255}\) and “the purported State of the Turkish Republic of Northern Cyprus.”\(^\text{256}\) The declaration by the Commonwealth Heads of Government labelled the Turkish Republic as an “illegal secessionist entity,”\(^\text{257}\) with Britain expressly decla-

\(^{252}\) 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).


\(^{256}\) Id. ¶ 3.


[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.”\textsuperscript{258} The foregoing statements do not suggest that in modern times, states may be established in violation of peremptory norms “without legal effect.”\textsuperscript{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 \textit{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.\textsuperscript{260}

Devine’s conclusions, although reminiscent of constitutive scholars such as Oppenheim,\textsuperscript{261} Kelsen,\textsuperscript{262} and Schwarzenberger,\textsuperscript{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,\textsuperscript{264} the validity of peremptory norms has been affirmed in numerous cases before the ICJ.\textsuperscript{265} Furthermore, since the promulgation of

\textit{Id.} \textit{See also} Rač, \textit{supra} note 43, at 156 n.298.


\textsuperscript{259} Dugard, \textit{supra} note 79, at 131.


\textsuperscript{263} Georg Schwarzenberger, 1 \textit{International Law} 134 (3d ed. 1957).

\textsuperscript{264} \textit{See} discussion \textit{supra} Part IV.A.

\textsuperscript{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. 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


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 Teşkilâtı, or Turkish Resistance Organization (“TMT”), was formed, which initiated attacks on

Greek Cypriot property and campaigned for *taksim* (partition of Cyprus).\footnote{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).}

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.\footnote{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.}

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.\footnote{271. CARMENT ET. AL., supra note 269, at 187.}

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
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. 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. 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. 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

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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 TRNC 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.

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


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

other Russian mini-mountain-states of Kabardinoo-Balkaria, Karatchay-Cherkess, Ingushetia, and Ossetia attempted to secede and form a federation in the Caucasus region. After extensive fighting, the region was reconquered by the Soviet state in 1921, after which thousands of Chechens were forcibly deported to concentration camps. 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. 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.


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 Mountainers, 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 Caucasus 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 Wartorn 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.\footnote{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.\footnote{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. \textit{See} Vanora Bennet, \textit{Crying Wolf: The Return of a War to Chechnya} 244 (2001); Bowker, \textit{supra} note 282, at 466–67. Tishlov paints an assessment of Dudaev as deeply suspicious and paranoid:

\begin{quote}
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.
\end{quote}

\textit{Tishkov, supra} note 282, at 78–79.


\footnote{285} Panico, \textit{supra} note 279, at 270–71; Charney, \textit{supra} note 284, at 463; Raič, \textit{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.


\(^{291}\) 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, supra 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.\textsuperscript{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.\textsuperscript{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 \textit{in extremis}. A \textit{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 \textit{ultimum remedium}. This ensured that Chechnya’s statehood did not crystallize.

\textbf{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.


\textbf{292. See discussion supra Part II.}

\textbf{293. Atrokhov, supra note 279, at 372; RAČ, 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. 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.

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.

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
its “commitment to the sovereignty and territorial integrity of Georgia.” 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. 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. 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.

**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.” Unsurprisingly, perhaps, latent ethnic tensions remained between Georgians and South Ossetians.

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298. See discussion supra Part II.
300. Nubberger, supra note 7, at 363 (“[Abkhazia’s statehood] does not have any basis in international law.”).
With the collapse of the Soviet Union in 1991, these tensions reemerged. 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.

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.” 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.

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

Following the Rose Revolution of November 2003, 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.”

Events took a more decisive turn after the “five day war” between Russia and Georgia during August 2008. 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.”

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. More pointedly, it must be asked whether South Ossetians experienced sustained and systematic human

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. 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 Moldova’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. 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

86 percent in the beginning of the nineteenth century, to 48 percent by the beginning of the twentieth century.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{316} \textit{Id.} at 103.
\textsuperscript{317} \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{320}


\textsuperscript{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.\textsuperscript{321} In other words, Transnistria’s population was not subject to sustained and systematic human right abuses \textit{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.

\textbf{f. Scholarly Opinion}

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

\begin{quote}
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.\textsuperscript{322}
\end{quote}

Raič has similarly noted:

\begin{quote}
[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-
\end{quote}

\textsuperscript{321} See discussion supra Part II.

\textsuperscript{322} Crawford, supra note 2, at 107.
spect fundamental rules of international law (that is, at least jus cogens) during the entity’s creation.\textsuperscript{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].”\textsuperscript{324} Other scholars have reached similar conclusions.\textsuperscript{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\textsuperscript{326} (with peremptory norm violations), as Dugard has intimated, is incorrect. Peremptory norms violations during the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{323} RAIČ, supra note 43, at 156.
\item \textsuperscript{324} Id. at 167.
\item \textsuperscript{326} DUGARD, supra note 79, at 131.
\end{itemize}
\end{footnotesize}
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)* 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.” 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-

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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. 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. RAČ, 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; RAČ, supra note 43, at 156; CHARLES DE VISSEHER, 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.\textsuperscript{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.”\textsuperscript{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, \textit{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.\textsuperscript{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.\textsuperscript{335}

The recommendations of the committee were therefore to enforce an \textit{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, \textit{inter alia}, postal services and the issuing of visas.\textsuperscript{336}

\begin{footnotes}
332. NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW 77 (1994).
333. \textit{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 renounced[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. RAČ, supra note 43, at 159.
335. \textit{Id.}
336. \textit{Id.}
\end{footnotes}
More recent guidance on the legal obligation of non-recognition has been provided by the ICJ in its Namibia Advisory Opinion. 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. It was against this backdrop that the ICJ’s Advisory Opinion was delivered.

After determining Resolution 276 was a bona fide “declaration of illegality and invalidity,” 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.

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-

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.
rica’s continuing presence in Namibia as legal.\textsuperscript{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.”\textsuperscript{343} This has generally been interpreted as mandating the nullity of all South Africa’s official acts \textit{vis-à-vis} Namibia.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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”\textsuperscript{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.”\textsuperscript{348}


\textsuperscript{343} Namibia Advisory Opinion, 1971 I.C.J. ¶ 124.

\textsuperscript{344} RAIČ, \textit{supra} note 43, at 163; CRAWFORD, \textit{supra} note 2, at 165.

\textsuperscript{345} Namibia Advisory Opinion, 1971 I.C.J. ¶ 122.

\textsuperscript{346} \textit{Id.} ¶ 125.

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

\textsuperscript{348} \textit{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.” \textit{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.  

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 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. The same approach has been affirmed by the European Court of Human Rights in Loizidou v Turkey.

Subsequent cases before the ICJ such as Case Concerning East Timor (Portugal v. Australia) 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. RAIĆ, supra note 43, at 163–64; CRAWFORD, supra note 2, at 167; GOWLLAND-DEBBAS, supra note 241, at 310–11.


351. RAIĆ, 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.”


of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)\textsuperscript{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.”\textsuperscript{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.\textsuperscript{356}


\textsuperscript{355} Orakhelashvili, supra note 222, at 373.

\textsuperscript{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.

\textsuperscript{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,

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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. 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.