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# Secession in International Law and Relations: What Are We Talking About?

GLEN ANDERSON\*

## I. INTRODUCTION

Since the end of the Cold War scholars have devoted increasing attention to the process of state creation known as “secession.” Exactly what the concept of secession entails, however, is still very much a moot point. The concept remains undefined by treaty law and United Nations (UN) declaratory General Assembly resolutions. Indeed the word “secession” is conspicuously absent from virtually all international legal instruments.<sup>1</sup> This situation is explicable by the fact that secession represents a challenge to perhaps the two most fundamental principles of international law: the sovereignty and territorial integrity of states. Secession is thus viewed negatively and is

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1. With the exception of the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (G.A. Res. 36/103, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/103 (Vol. X), at 80 (Dec. 9 1981)), which in Article 2(II)(f) proclaims “[t]he duty of . . . State[s] to refrain from the promotion, encouragement or support, direct or indirect, of rebellious or secessionist activities within other States under any pretext whatsoever, or any action which seeks to disrupt the unity or to undermine or subvert the political order of other States.” Of course secession in a non-colonial context is widely believed to be *implicitly* mentioned within 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 (G.A. Res. 2625 (XXV), ¶ 7, U.N. Doc. A (Oct. 24 1970)), which provides that “[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or colour.” The same text is repeated, *mutatis mutandis*, in Article 1 of the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (G.A. Res. 50/6, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/6, at 1 (Oct. 24, 1995)). If it is accepted that the word “secession” also encompasses decolonization—as this article propounds *infra*—then other instruments might also be considered as *implicitly* touching upon colonial secession, principal among which is the Declaration on the Granting of Independence to Colonial Countries and Peoples. See G.A. Res. 1514 (XV), U.N. Doc. A/15 (Dec. 14, 1960).

associated with chaos, schism, fragmentation, and instability.<sup>2</sup> So strong is the sentiment against secession that former UN Secretary-General, U Thant, contended in 1970 that the international organization “has never accepted and does not accept and I do not believe will ever accept the principle of secession of part of its Member State[s].”<sup>3</sup>

With the lack of a legal definition of secession, various scholars have attempted to define the concept. Some scholars, it would seem, are determined to minimize the scope of secession, circumscribing their definitions to only the most exacting circumstances.<sup>4</sup> Others adopt broad definitions that encompass a wide range of circumstances.<sup>5</sup> In any event, virtually all scholarly definitions fail to enumerate any reasoning to *justify* their inclusion or exclusion of certain definitional elements.<sup>6</sup>

The present article aims to address this deficiency by examining the etymological and conceptual bases of secession. Significantly, it also combines this examination with recourse to international law. The article thus produces a definition of secession that is informed etymologically, conceptually and legally. It is submitted that this mixed approach is desirable for two reasons: first, secession is, *prima facie*, a concept of generic application and meaning, and thus, any definition of secession in any specific context must account for etymological and conceptual foundations; and second, given that the present article is focused specifically on secession in the context of international law and relations, any comprehensive definition relating thereto must account for relevant international legal principles.

## II. DEFINITION OF SECESSION

On the basis of the forthcoming analysis, the present article defines secession in the context of international law and relations as: The withdrawal of territory (colonial or non-colonial) from part of an existing state to create a new state.

2. Bertus de Villiers, *Secession – The Last Resort for Minority Protection*, J. OF ASIAN & AFR. STUDIES 1 (2012).

3. *Secretary-General’s Press Conferences*, 7 UN Monthly Chron. 35, 36 (1970).

4. Here the definitions provided by Heraclides and Crawford are apposite. *See generally* ALEXIS HERACLIDES, *THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS* 1 (1991); *see also* JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 375 (2d ed. 2006) [hereinafter CRAWFORD].

5. Here the definitions Buchanan and Raič are apposite. *See* Allen Buchanan, “*Secession*,” STAN. ENCYCLOPEDIA OF PHIL. (Feb. 24, 2013), *available at* <http://plato.stanford.edu/entries/secession>; DAVID RAIČ, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 308 (2002).

6. Radan’s work is a notable exception. *See* Aleksandar Pavković & Peter Radan, *Secession: A Word in Search of a Meaning*, in *ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION* 17–32 (Aleksandar Pavković & Peter Radan eds., 2008); Aleksandar Pavković & Peter Radan, *CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION* 5–30 (2007).

The foregoing definition includes and excludes a number of distinct elements, some of which may not be immediately obvious. First, it suggests, in a conceptual sense, that secession is synonymous with withdrawal; second, it captures consensual and unilateral secession; third, it excludes irredentism, which does not involve the creation of a new state, but rather the amalgamation of an existing state's territory, in whole or part, with another existing state; fourth, it includes the independence of colonial territories. The reasoning that informs these various definitional elements is enumerated below.

### III. ETYMOLOGICAL AND CONCEPTUAL BASES OF SECESSION

The etymology of “secession” lies in the Latin terms “*se*” meaning “apart” and “*cedere*” meaning “to go.”<sup>7</sup> This indicates that secession is synonymous with moving apart or withdrawing. This meaning is mirrored by the *Oxford English Dictionary* which defines “secession” as “[t]he action of seceding or formally withdrawing from an alliance, a federation, a political or religious organization, or the like.”<sup>8</sup> In an abstract sense, secession is thus synonymous with withdrawal.

At this initial point it is apposite to consider whether the concept of secession requires—from the perspective of the object undergoing secession—endogenous or exogenous motivation. At first blush it might seem that the definitions of secession cited above only require a withdrawal, not an endogenously or exogenously motivated withdrawal. To investigate this question further, it is useful to briefly consider the definition of the related terms “annexation” and “cession.”

The etymology of “annexation” lies in the Latin term “*annecetere*” which means “to bind to.”<sup>9</sup> The *Oxford English Dictionary* similarly defines “annex” as the “join[ing] in a subordinate capacity” and

7. Definition of Secession, ONLINE ETYMOLOGICAL DICTIONARY <http://www.etymonline.com/index.php?search=secession&searchmode=term> (last visited Feb. 18, 2013); see also Radan, *supra* note 6, at 18; Craven suggests that the Latin antecedent is “*secessionem*.” See Greg Craven, ‘Of Federalism, Secession, Canada and Quebec’ (1991-1992) 14 THE DALHOUSIE L. J. 231, 232 (1991-1992); GREGORY CRAVEN, SECESSION: THE ULTIMATE STATES RIGHT 3 (1986).

8. 9 OXFORD ENGLISH DICTIONARY, 348 (Clarendon Press, 1933). Other English language dictionaries also define secession as synonymous with withdrawal. The *Macquarie Dictionary* describes “secession” as “the act of seceding.” The same dictionary defines the term “seceding” as “withdraw[ing] formally from an alliance or association, as from a political or religious organization.” (*Macquarie Dictionary* 1277 (Macquarie, 4th ed. 2005)); The *Collins English Dictionary* suggests that “secession” connotes “the act of seceding” with the same dictionary defining the term “seceding” as “formal withdrawal of membership, as from a political alliance, church, organization etc.” (*Collins English Dictionary* 1389 (Harper Collins, 4th ed. 1998)); see also MILICA ZARKOVIC BOOKMAN, THE ECONOMICS OF SECESSION 3 (St Martin’s Press, 1993).

9. Definition of Annex, ONLINE ETYMOLOGICAL DICTIONARY <http://www.etymonline.com/index.php?search=annex&searchmode=none>.

“annexation” as the “attaching . . . [of a] possession, or territorial dependency.”<sup>10</sup> These definitions indicate that from the perspective of the object being annexed, the incorporation is exogenous. This prompts the question: are the concepts of secession and annexation synonymous? The answer must be in the negative, as the two words are not used interchangeably, thereby indicating that “secession” connotes endogenous motivation.

This finding is reinforced by examination of the term “cession,” the etymology of which lies in the Latin phrase “*cedere*” which means “go away.”<sup>11</sup> The *Oxford English Dictionary* concomitantly defines “cession” as the “ceding” or “giving up” of an object.<sup>12</sup> These definitions indicate that an object that is ceded is under the control of an exogenous force. The question must therefore be asked: are the concepts of secession and cession synonymous? Given that the two words are not used interchangeably, it would seem the answer is “no,” thus again indicating that secession connotes endogenous motivation.

Bearing these conceptual points in mind, it is necessary to consider the definition of secession specifically in the context of international law and relations. In order to advance the definition of secession within this context, it must first be ascertained within this particular context what the term describes the secession *of*. An initial answer might be that secession refers to the withdrawal of territory from part of an existing state to create a new state. Whilst this answer is generally descriptive of the factual events associated with secession, it does not fully describe the legal processes that inform these factual events. A more detailed answer is that secession refers to the withdrawal of territory and *sovereignty* from part of an existing state to create a new state. Thus, it is not only the loss of territory which is central, but also the legal title, or sovereignty, asserted over this territory.<sup>13</sup> This generates the inevitable and controversial question: what is sovereignty?

The concept of “sovereignty” is notoriously vexing to define.<sup>14</sup> A

10. 1 OXFORD ENGLISH DICTIONARY, 339 (Clarendon Press, 1933).

11. Definition of Cession, ONLINE ETYMOLOGICAL DICTIONARY <http://www.etymonline.com/index.php?search=cession&searchmode=none>; Quoted in “Cede,” ONLINE ETYMOLOGICAL DICTIONARY <http://www.etymonline.com/index.php?search=cede&searchmode=none>.

12. 2 OXFORD ENGLISH DICTIONARY, 239 (Clarendon Press, 1933).

13. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 2 (Routledge, 7th ed. 1997).

14. The etymological basis of the word “sovereignty” lies in the Latin term “*superanus*” meaning “chief” or “principal.” Quoted in *Sovereignty*” ONLINE ETYMOLOGICAL DICTIONARY, <http://www.etymonline.com/index.php?search=sovereign&searchmode=none> (last visited March 21, 2013); see also ESA PAASIVIRTA, *Internationalization and Stabilization of Contracts Versus State Sovereignty*, 60 BRIT. Y.B. OF INTL. L., Vol. 60 331 (1989); THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION (Francis Kofi Abiew ed., 1999);

useful starting point, however, is provided by the *Corfu Channel Case (UK v Albania)*,<sup>15</sup> where Alvarez J noted that “[b]y sovereignty, we understand the whole body of rules and attributes which the state possesses in its territory, to the exclusion of all other states . . . .”<sup>16</sup> *A priori*, only states may possess and exercise sovereignty.<sup>17</sup> The definition also emphasizes the internal or domestic nature of sovereignty, suggesting a state’s ability to legislate rules and procedures throughout its territory without external interference.

Crawford has provided a more recent and detailed definition of sovereignty:

In its most common modern usage, sovereignty is the term for ‘the totality of international rights and duties recognized by international law’ as residing in an independent territorial unit—the State. It is not itself a right, nor is it a criterion for statehood (sovereignty is an attribute of States, not a precondition). It is a somewhat unhelpful but firmly established, description of statehood; a brief term for the State’s attribute of more-or-less plenary competence.<sup>18</sup>

Crawford’s definition suggests that sovereignty is not a criterion of statehood, but rather a descriptor thereof, and thus the withdrawal of territory from part of an existing state to create a new state is, in effect, a partial withdrawal of sovereignty. Once sovereignty over a given territory has been withdrawn by the process of secession, the newly created state then enjoys “more-or-less plenary legislative competence” throughout its territory.<sup>19</sup>

RUTH LAPIDOTH, *AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICT* (1996); Robert Trisotto, *Seceding in the Twenty-First Century: A Paradigm for the Ages*, 35 *BROOK. J. INT’L L.* 422–25 (2010); For a particularly extensive discussion of the etymology of the term “sovereignty” see GERARD KREIJEN, *STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA* 27–28 (2004).

15. *Corfu Channel (U.K. and N. Ir. v. Alb.)*, 1949 *I.C.J.* 4, 43 (Apr. 9, 1949).

16. *Id.*

17. HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 15 (1990); ABIEW, *supra* note 14, at 25.

18. CRAWFORD, *supra* note 4, at 32.

19. *Id.* Other scholars have espoused similar definitions of sovereignty: MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 161 (7th ed. 2013); Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings* 31 *DENV. J. INT’L L. & POL’Y* 373, 375 (2003); ABIEW, *supra* note 14, at 24–25; Samuel M Makinda, *Sovereignty and International Security: Challenges for the United Nations*, 2 *GLOBAL GOVERNANCE* 149, 150 (1996); CATHERINE J IORNS, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty* 24 *CASE W. RES. J. INT’L L.* 199, 236 (1992); Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context* 26 *BROOK. J. INT’L L.* 417, 419–20 (2000–2001); see also STEPHEN D KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 20–21 (1999); ROBERT JACKSON, *SOVEREIGNTY: EVOLUTION OF AN IDEA*, 10–11 (2007); LUZIUS WILDHABER, *Sovereignty and International Law, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 427–52 (Ronald St. John MacDonald & Douglas M. Johnson eds., 1983); ALAN JAMES,

Importantly, Crawford's definition does not equate the attribute of sovereignty with absolute plenary legislative competence. This is because sovereignty has traditionally been conceived as subject to the overarching limits imposed by international law.<sup>20</sup> This requirement flows principally from the widely accepted premise that all states enjoy equal sovereignty.<sup>21</sup> In order for this proposition to possess any meaningful significance, it follows that states must be free to exercise plenary legislative competence *only* within their respective sovereign territory.

In more recent times, sovereignty has undergone even more substantial qualifications, particularly with the general acceptance of peremptory norms (*jus cogens*).<sup>22</sup> These norms, integrated into Article 53 of the 1969 Vienna Convention on the Law of Treaties and confirmed by the International Court of Justice (ICJ) in cases such as *Nicaragua v the United States of America*,<sup>23</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v the United States of America)*<sup>24</sup> and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*<sup>25</sup> are non-derogable, requiring

SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 1 (Paul Wilkinson ed., 1986); ANTONIO CASSESE, INTERNATIONAL LAW 48–53 (Oxford University Press, 2d ed., 2005); JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL 'NATIONAL' IDENTITY 75–108 (2000); HANNUM, *supra* note 17, at 14–23; The realist scholar, Morgenthau, describes sovereignty as “supreme power over a certain territory.” HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 13 (1973).

20. The term “independence” has been defined by Anzilotti J as “no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no higher authority than that of international law.” Customs Regime Between Germany and Austria (Ger. v. Austria), Advisory Opinion, 1931 P.C.I.J. (ser. A/B) Nos. 41, 45, 57 (Mar. 19) (Individual Opinion of Judge Anzilotti); *see also* Karima Bennoune, *Sovereignty vs. Suffering? Re-Examining Sovereignty and Human Rights through the Lens of Iraq*, EUR. J. INT'L. L., 245–46 (2002).

21. In this regard see U.N. Charter arts. 2(1) and 2(7). *See generally* MICHAEL R FOWLER AND JULIE M BUNCK, LAW, POWER AND THE SOVEREIGN STATE 47 (1995) on the subject of sovereign equality; EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW 114–15, 120 (1972).

22. *Jus cogens* refers to “compelling law” and can be contrasted with *jus dispositivum*, which refers to law “subject to the dispensation of the parties.” *See* ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 8–9 (2006); CRAWFORD, *supra* note 4, at 99–100; RAIČ, *supra* note 5, at 142.

23. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 100–01 (June 27).

24. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 330, 919 (Nov. 6) (separate opinion on Judge Simma); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 260, 9146 (Nov. 6) (separate opinion on Judge Kooijmans); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 291, part 1.1 (Nov. 6) (dissenting opinion on Judge Elaraby).

25. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 122, 3.1 (July 9) (separate opinion of Judge Elaraby).

observance from states even in the context of their domestic legislation. Sovereignty is therefore not an absolutist concept.

The “qualified” approach to sovereignty, with its emphasis on respect for international law and compliance with peremptory norms, is thus the present article’s preferred interpretation.<sup>26</sup> It follows then that whenever sovereignty—as described above—is withdrawn from territory forming part of an existing state to create a new state, secession will have occurred.

#### IV. SECESSION IS A PROCESS AND AN OUTCOME

Another important conceptual issue relating to secession is that it is a process which leads to an outcome.<sup>27</sup> Kohen, for example, has correctly observed that “[s]ecession is not an instant fact. It always implies a complex series of claims and decisions, negotiations and/or struggle, which may – or may not – lead to the creation of a new State.”<sup>28</sup>

Crucially, the process by which withdrawal is achieved need not have any impact upon the eventual outcome. This can be demonstrated by way of a simple analogy. A car, for example, can be built precisely to plan by a robotic or human assembly line. Although both cars are the result of different production processes, the outcome is identical: a new car.

The conflation of process and outcome outlined above, however, is endemic throughout scholarly discussions of secession. Crawford has defined secession as “the creation of a State by the *use or threat of force without the consent of the former sovereign*.”<sup>29</sup> Secession can thus only occur when the use or threat of force is employed without the existing

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26. This approach is supported by various scholars: Dan Philpotti, *Sovereignty*, STAN. ENCYCLOPEDIA OF PHIL., available at <http://plato.stanford.edu/entries/sovereignty/> (last updated June 8, 2010); JEAN BODIN, *LES SIX LIVRES DE LA REPUBLIQUE*, LIVRE 1, CH. 6, 131 (1576); Oscar Schachter, *Sovereignty – Then and Now*, in *ESSAYS IN HONOR OF WANG TIEYA* 671 (Ronald St. John MacDonald ed., 1994); IVAN A SHEARER, *STARKE’S INTERNATIONAL LAW* (11th ed., 1994); HANNUM, *supra* note 17, at 19; Clarence Jenks, *The Thesis and Its Critics*, in *SOVEREIGNTY WITHIN THE LAW II* (Arthur Larson et al. eds., 1695); Manfred Lachs, *The Development and General Trends of International Law in Our Times*, 169 *RECUIL DES COURS* 29–41 (1980–IV); Georg Nolte, *Secession and External Intervention*, in *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 65, 70 (Marcelo G. Kohen ed., 2006); Helmut Steinburger, *Sovereignty*, in 4 *ENCYCLOPEDIA OF PUB. INT’L L.* 518 (Rudolf Bernhardt ed., 2000); JAN H.W. VERZUL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 265 (1968); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (7th ed. 2008).

27. Pavković & Radan, *supra* note 6, at 7.

28. MARCELO G KOHEN, *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 14 (2006); see also Bruno Coppieters, *Introduction*, in *CONTEXTUALIZING SECESSION: NORMATIVE STUDIES IN A COMP. PERSP.* 4–5 (Bruno Coppieters and Richard Sakwa eds., 2003).

29. CRAWFORD, *supra* note 4, at 375 (emphasis added).

state's consent. Heraclides has similarly conditioned the outcome of secession on the specific process by which it is achieved: "Secession is a special kind of territorial separatism involving states. It is an abrupt *unilateral* move to independence on the part of the region that is a metropolitan territory of a sovereign independent state."<sup>30</sup> Remarkably, Kohen, who has specifically alluded to secession as both a process and an outcome, has also defined the term in relation to a specific process, namely, "the creation of a new independent entity through the separation of part of the territory . . . of an existing State, *without the consent of the latter*."<sup>31</sup> Other scholars have devised similarly restrictive definitions.<sup>32</sup> Yet nowhere in the Latin antecedents for the term "secession" and the dictionary definitions hitherto reviewed is the outcome of secession made contingent on the specific process of withdrawal. This indicates that attempts to narrow the definition of secession in the international law and relations context cannot be conceptually justified.

Once it is accepted that the specific process of withdrawal is separate from the outcome, it emerges that there are two basic secession types: consensual and unilateral. The former can be divided into two further secession types: constitutional and politically negotiated. These three secession processes are discussed below.

*Constitutional secession* occurs with the existing state's consent, and does not involve the use or threat of force. This secession type can be divided into two sub-categories: negotiated and explicit. The former occurs within the framework of the existing state's constitution, even though there are no specific constitutional provisions relating to secession.<sup>33</sup> Typically, a constitutional amendment is negotiated, which allows for the lawful secession of part of the existing state's territory. In *Reference re Secession of Quebec*,<sup>34</sup> for example, the Canadian Supreme Court indicated that in the future, Quebec or any other

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30. HERACLIDES, *supra* note 4, at 1 (emphasis added).

31. KOHEN, *supra* note 28, at 3 (emphasis added).

32. John Dugard, *A Legal Basis for Secession – Relevant Principles and Rules*, in SECESSION AND INT'L L.: CONFLICT AVOIDANCE – REGIONAL APPRAISALS 89, 89 (Julie Dahlitz, ed. 2003); JO ERIC MURKENS, SCOTTISH INDEPENDENCE: A PRACTICAL GUIDE 9 (Jo Eric Mukens et al. eds., 2002); Frida A. Pfirter and Silvina G. Napolitano, *Secession and International Law: Latin American Practice*, in SECESSION, INT'L L. PERSPECTIVES 375 (Marcelo G. Kohen ed., 2006); LINDA S. BISHAI, FORGETTING OURSELVES, SECESSION AND THE (IM)POSSIBILITY OF TERRITORIAL IDENTITY 33 (2004); GNANAPALA WELHENGAMA, MINORITIES' CLAIMS: FROM AUTONOMY TO SECESSION, INTERNATIONAL LAW AND STATE PRACTICE 214 (2000); Yuchao Zhu and Dongyan Blachford, *Ethnic Dispute in International Politics: Manifestation and Conceptualizations* 12 NATIONALISM & ETHNIC POLITICS 25, 46 (2006).

33. Andrei Kreptul, *The Constitutional Right of Secession in Political Theory and History* 17(4) 39, 77 J. LIBERTARIAN STUD.

34. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

Canadian province may be able to secede constitutionally from Canada, provided a constitutional amendment effecting secession was negotiated.<sup>35</sup> In 2000, the Canadian federal parliament passed the Clarity Act, which reaffirmed the constitutional process prescribed by the Court: a clear referendum vote in favour of secession,<sup>36</sup> followed by negotiated agreement between Quebec and the rest of Canada,<sup>37</sup> and finally the passage of a constitutional amendment lawfully effecting Quebec's secession.<sup>38</sup> Scholars such as Radan and Amar have deduced a similar right from the Constitution of the United States (US),<sup>39</sup> notwithstanding the judgment of the US Supreme Court in *Texas v White*,<sup>40</sup> which has been traditionally regarded as precluding a constitutional right to secession.<sup>41</sup>

Explicit constitutional secession occurs when the existing state's constitution prescribes a specific procedure for the secession of part of its territory, usually federal or provincial units. The 1921 Liechtenstein Constitution,<sup>42</sup> 1931 Chinese Constitution,<sup>43</sup> 1947 Constitution of the Union of Burma,<sup>44</sup> 1968 Constitution of the Czechoslovak Socialist

35. See Peter Radan, *Constitutional Law and Secession: The Case of Quebec*, 2 MACARTHUR L. REV. 69–85 (1998); see generally Peter Radan, "You Can't Always Get What You Want": The Territorial Scope of An Independent Quebec 41 OSGOODE HALL L. J. 629, 633 (2003); Pierre Bienvenu, *Secession by Constitutional Means: Decision of the Supreme Court of Canada in the Quebec Secession Reference* 21 HAMLIN J. OF PUB. L. AND POL'Y 1, 1–65 (1999); Marc Arthur Thibodeau, *The Legality of an Independent Quebec: Canadian Constitutional Law and Self-Determination in International Law*, 3 B.C. INT'L & COMP. L. REV. 99, 99–142 (1979–80); Rosemary Rayfuse, *Reference re Secession of Quebec from Canada: Breaking Up Is Hard to Do*, 21 UNSW L. J. 834, 839–41 (1998); Johan D van der Vyver, *Self-Determination of the Peoples of Quebec Under International Law*, 10 FLA. ST. J. OF TRANSNAT'L L. & POL'Y 8–11 (2000); Kevin MacMillan, *Secession Perspectives and the Independence of Quebec*, 7 TUL. J. INT'L & COMP. L. 333, 353–59 (1999); Jean Raby, *Quebec: Trendsetter for a Polarized World?*, 33 HARV. INT'L L. J. 441–58 (1992).

36. Clarity Act, S.C. 2000, c. 26, art. 1 (Can.); Reference re Secession of Quebec, *supra* note 34, at 87.

37. Clarity Act, *supra* note 36, art. 2; Reference re Secession of Quebec, *supra* note 34, at 87–88.

38. Clarity Act, *supra* note 36, art. 3; Reference re Secession of Quebec, *supra* note 34, at 94–97. In the aforementioned paragraphs, the Court noted, however, that an amendment to the Constitution of Canada may be difficult, if not impossible to achieve.

39. Peter Radan, *An Indestructible Union...of Indestructible States: The Supreme Court of the United States and Secession*, 10 LEGAL HISTORY 187, 195 (2006); Akhil Reed Amar, *The David C Baum Lecture: Abraham Lincoln and the American Union*, U. ILL. L. REV. 1109, 1115 (2001).

40. *Texas v. White*, 74 U.S. 700, 726 (1869).

41. See Cass R. Sunstein, *Constitutionalism and Secession*, 58 CHI. L. REV. 633 (1991).

42. LIECHTENSTEIN CONSTITUTION 1921, art. 4(2).

43. XIANFA art. 4 (1975) (China). This right was expressly expunged by Article 4 of the 1975 Chinese Constitution.

44. CONSTITUTION OF THE SOCIALIST REPUBLIC OF THE UNION OF BURMA 1947, ch. 10. The right was expunged by the 1974 Constitution of the Socialist Republic of the Union of Burma. See LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 99–100

Republic,<sup>45</sup> 1974 Constitution of the Socialist Federal Republic of Yugoslavia,<sup>46</sup> and 1977 Constitution of the Soviet Union,<sup>47</sup> for instance, all alluded to the concept of secession (even if in an incomplete, vague or only theoretical manner) for constituent national groups. More recently, the 1984 Saint Christopher and Nevis Constitution,<sup>48</sup> 1994 Ethiopian Constitution<sup>49</sup> and 2003 Constitutional Charter of the State Union of Serbia and Montenegro<sup>50</sup> prescribed a specific procedure for secession under certain circumstances.

*Politically negotiated secession* occurs with the existing state's consent and does not necessarily involve the use or threat of force. It requires that the existing state and the secessionist entity be willing to politically negotiate the resolution of a secessionist situation. It is most likely to occur when the existing state fails to provide any constitutional avenue for secession for constituent national groups and when relations between the existing sovereign and secessionist entity are amicable.<sup>51</sup> Numerous historical examples of politically negotiated secession exist. In June 1905, Norway seceded from the Union of Sweden and Norway after a plebiscite for independence was endorsed by ninety-nine percent of Norwegians.<sup>52</sup> In December 1918, following the "Act of Union,"

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(1978); see Josef Silverstein, *Politics in the Shan State: The Question of Secession from the Union of Burma*, 18 J. ASIAN STUD. 43–49 (1958); JORRI DUURSMAN, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES 90 (1996).

45. 1968 CONSTITUTION OF THE CZECHOSLOVAK SOCIALIST REPUBLIC, Preamble; see RAIČ, *supra* note 5, at 313–14.

46. 1974 SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA CONSTITUTION, Preamble.

47. KONSTITUTSIJA SSSR (1977), art. 72 [KONST. SSSR][USSR CONSTITUTION] [hereinafter USSR CONSTITUTION].

48. ST. CHRISTOPHER & NEVIS CONST., art. 113, §1 & 2 (1984); MIODRAG JOVANOVIĆ, CONSTITUTIONALIZING SECESSION IN FEDERALIZED STATES: A PROCEDURAL APPROACH, 138–39 (2007); Simeon C. R. McIntosh, *The St. Kitts-Nevis Question: Secession or Constitutional Reform?*, 7 CARIBBEAN L. REV. 419–63 (1997).

49. 1995 Constitution of Ethiopia, art. 60 § 1, 4, 5; Alem Habtu, *Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution* 35(2) PUBLIUS 313–35 (2005); Ugo A Mattei, *The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions*, CARDOZO ELECTRONIC L. BULLETIN, available at <http://www.jus.unitn.it/cardoza/Review/Constitutional/Mattei2.html>; Alem Habtu, *Ethnic Pluralism as an Organizing Principle of the Ethiopian Federation*, 28 DIALECTICAL ANTHROPOLOGY 91–123 (2004); Minasse Haile, *The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development*, 20 SUFFOLK TRANSNAT'L L. REV. 33 (1996).

50. See Ethiopian Constitution, *supra* note 49; Art. 60 of the now defunct 2003 Constitutional Charter of the State Union of Serbia and Montenegro §§ 1–5; see Miodrag Jovanović, *Consensual Secession of Montenegro – Towards Good Practice?*, in ON THE WAY TO STATEHOOD: SECESSION AND GLOBALIZATION 138 (Aleksandar Pavković & Peter Radan eds., 2008); see JOVANOVIĆ, *supra* note 48, at 126–28.

51. See generally Robert A Young, *How Do Peaceful Secessions Happen?* CAN. J. OF POL. SCI. 773, 773–92 (1994).

52. *Id.* at 781–83; KAREN LARSEN, A HISTORY OF NORWAY 484–95 (1948); MARGARET STEWART OMRĀNIN, NORWAY, SWEDEN CROATIA: A COMPARATIVE STUDY OF STATE

Iceland seceded from Denmark and assumed the status of an independent state, although still remaining under the personal union of the Danish Monarchy.<sup>53</sup> In 1922, Southern Ireland gained its independence from the United Kingdom after an act of British parliament relinquished the territory.<sup>54</sup> In August 1960, the Senegal government seceded from the Mali Federation, arguing that the federation was comprised of sovereign states, all of which retained an inherent right to withdraw.<sup>55</sup> In November 1961, Syria withdrew from the United Arab Republic.<sup>56</sup> In August 1965, Singapore seceded from the Malaysian Federation with the latter's legislature passing a bill to effect separation.<sup>57</sup> In September 1991, after a period of considerable political confusion, the Soviet Government recognized the sovereign independence of former union republics: Estonia, Latvia, and Lithuania, which opened the way for other union republics, such as Azerbaijan, Kazakhstan, Kirgizstan, Tajikistan, Turkmenistan, Uzbekistan, Armenia, Belarus, Georgia, Moldova and Ukraine to also negotiate their secession from the USSR.<sup>58</sup> In January 1993, Czechoslovakia was peacefully dissolved by the respective secessions of the Czech Republic and the Slovak Republic.<sup>59</sup>

*Unilateral secession* occurs without the existing state's consent and *may* also involve the use or threat of force.<sup>60</sup> It usually occurs in the absence of relevant constitutional provisions and political negotiation.

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SECESSION AND FORMATION 9–11 (1976); JANE JACOBS, *THE QUEST OF SEPARATISM: QUEBEC AND THE STRUGGLE OVER SOVEREIGNTY* 26–51 (1981).

53. RICHARD F. TOMASSON, *ICELAND: THE FIRST NEW SOCIETY* 21 (1980); GUNNAR KARLSSON, *THE HISTORY OF ICELAND* 280–84 (2000).

54. Bill Kissane, *The Doctrine of Self-Determination and the Irish Move to Independence, 1916-1922*, 8 J. OF POL. IDEOLOGIES 327 (2002); see Stephane Dion, *Why is Secession Difficult in Well-Established Democracies? Lessons from Quebec*, 26(2) BRIT. J. OF POL. SC. 269, 270 (1996).

55. Buchheit, *supra* note 44, at 99; Rosalyn Cohen, *Legal Problems Arising from the Dissolution of the Mali Federation*, 36 BRIT. Y.B. INT'L L. 376 (1960); WILLIAM F. FOLTZ, *FROM FRENCH WEST AFRICA TO THE MALI FEDERATION* (1965); SHELDON GELLAR, *SENEGAL: AFRICAN NATION BETWEEN ISLAM AND THE WEST* 20–21 (1982).

56. Buchheit, *supra* note 44, at 99.

57. RAIČ, *supra* note 5, at 314–15.

58. See CRAWFORD, *supra* note 4, at 395; Regarding the independence of the Baltic republics, see also Rein Müllerson, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 42(3) INT'L AND COMP. L.Q. 473, 480–81. (1993) (regarding the independence of the Baltic republics).

59. Jiri Malenovsky, *Problèmes juridiques liés à la Partition de la Tchécoslovaquie, y Compris Tracé de la Frontière*, 39 ANNUAIRE FRANCAIS DE DROIT INT'L 305 (1993); Jon Elster, *Transition, Constitution-Making and Separation in Czechoslovakia*, 36 EUR. J. SOC. 105–34 (1995); ABBY INNES, *CZECHOSLOVAKIA: THE SHORT GOODBYE* 176–219 (2001); Pavković & Radan, *supra* note 6, at 73–78.

60. According to the definition of secession provided by Crawford, unilateral secession and the use or threat of force are concomitant. See CRAWFORD, *supra* note 4, at 375.

However unilateral secession can occur despite the existence of constitutional provisions (which are either deemed inadequate by the secessionist entity or ignored), and can be preceded by initial attempts at political negotiation, which ultimately fail.

When unilateral secession occurs, the existing state's claim to sovereignty over the seceding territory conflicts with that of the (putative) secessionist state. This impasse attracts the supervening jurisdiction of international law, which then purports to employ legal principles to resolve the dispute. Foremost among such principles is the international law of self-determination, as developed and applied by UN instruments such as the UN Charter, the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>61</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>62</sup> the International Covenant on Civil and Political Rights<sup>63</sup> the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations,<sup>64</sup> and Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.<sup>65</sup>

Examples of successful unilateral colonial secessions<sup>66</sup> include Indonesia (the Netherlands), the Democratic Republic of Vietnam (France), Algeria (France) and Guinea-Bissau (Portugal).<sup>67</sup> The independence of Bangladesh (Pakistan), Eritrea (Ethiopia), Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Slovenia, Serbia and Kosovo (Yugoslavia) and South Sudan (Sudan) are arguably instances of successful unilateral non-colonial (UNC) secessions.<sup>68</sup> Other attempts at UNC secession, such as Tibet (China), Katanga (Congo), Biafra (Nigeria), Kashmir (India), the Karen and Shan States (Burma), the Turkish Republic of Northern Cyprus (Cyprus), Tamil Elam (Sri

61. G.A. Res. 1514 (XV), U.N. Doc. A/1541 (Dec. 14, 1960).

62. G.A. Res. 2200 (XXI), U.N. Doc. A/2200 (Dec. 16, 1966) (The Economic Rights Covenant entered into force as a treaty on 3 January 1976).

63. *Id.* (The Civil Rights Covenant entered into force as a treaty on 23 March 1976.).

64. G.A. Res. 2625 (XXV), U.N. Doc. A/2625 (Oct. 24, 1970).

65. G.A. Res. 3314 (XXIX), U.N. Doc. A/3314 (Oct. 24, 1995).

66. For why decolonization constitutes secession, see the present article *infra*.

67. See CRAWFORD, *supra* note 4, at 384–88.

68. See CRAWFORD, *supra* note 4, at 391. South Sudan might alternatively be considered a consensual secession, given that it was ultimately achieved by way of a referendum. See Anthony J. Christopher, *Secession and South Sudan: an African Precedent for the Future?*, 93 S. AFR. GEOGRAPHICAL J. 125, 125–32 (2011) (explaining that an agreement regarding a constitutional means of attaining secession was effective); see Peter Radan, *Secessionist Referenda in International and Domestic Law*, 18 NATIONALISM & ETHNIC POLS. 8–21 (2012). It should be noted, however, that this vote was the ultimate culmination of “the longest civil conflict on the continent [of Africa].” Khalid Medani, *Strife and Secession in Sudan*, 22 J. DEMOCRACY 135, 135 (2011). The secession of South Sudan might therefore be classified as unilateral in substance.

Lanka), Kurdistan (Iraq/Turkey), Bougainville (Papua New Guinea), Serbian Krajina (Croatia), Anjouan (the Islamic Republic of Comoros), Nagorny-Kharabakh (Azerbaijan), Somaliland (Somalia), Chechnya (Russian Federation), Gagauzia (Moldova), Transnistria (Moldova), Abkhazia (Georgia)<sup>69</sup> and South Ossetia (Georgia),<sup>70</sup> have been unsuccessful.<sup>71</sup>

#### V. WHEN DOES THE PROCESS OF SECESSION CONCLUDE AND THE OUTCOME BEGIN?

Once it is accepted that secession is a process that leads to an outcome, it must be determined how the process is distinguishable from the outcome. The short answer is that the process ends and the outcome begins when the seceding territory completes the transformation to a new state. Yet trying to determine precisely when this transformation occurs is a complex (and controversial) issue. This is mainly due to the ongoing conflict between the declaratory, constitutive and constitutive-collective recognition theories. The declaratory recognition theory, propounded by scholars such as Chen, Brierly, Crawford, Raič and Cassese maintains that recognition is not a *sine qua non* for statehood.<sup>72</sup> The constitutive recognition theory, advocated by scholars such as Oppenheim, Lauterpacht and Roth postulates that recognition is a *sine qua non* for statehood.<sup>73</sup> The constitutive-collective recognition theory, argued by scholars such as Kelsen and Dugard similarly suggests that

69. CRAWFORD, *supra* note 4, at 403; Abkhazia *may* eventually become a successful UNC secession, given that the Russian Federation, Nicaragua, Venezuela, Nauru, Vanuatu and Tuvalu have extended recognition on the 26 August 2008, 5 September 2008, 10 September 2009, 15 December 2009, 15 December 2009, 23 May 2011 and 18 September 2011 respectively. But see Jelena Radoman, *Future Kosovo Status – Precedent or Universal Solution*, 3 W. BALKANS SEC. OBSERVER 14 (2006) for discussion of the Abkhazia conflict in general; see also CRISIS MANAGEMENT INITIATIVE, *CONFLICT RESOLUTION IN GEORGIA: A SYNTHESIS ANALYSIS WITH A LEGAL PERSPECTIVE* 1–58 (Antje Herrberg ed., 2006) for discussion of the Abkhazia conflict in general.

70. South Ossetia *may* eventually become a successful UNC secession, given that the Russian Federation, Nicaragua, Venezuela, Nauru and Tuvalu have extended recognition on the 26 August 2008, 5 September 2008, 10 September 2009, 15 December 2009, and 19 September 2011 respectively. For discussion of the South Ossetia Conflict in general, see Herrberg, *supra* note 69; see also Gerard Toal, *Russia's Kosovo: A Critical Geopolitics of the August 2008 War Over South Ossetia*, 49 EURASIAN GEOGRAPHY & ECON. 670 (2009).

71. See CRAWFORD, *supra* note 4, at 403; Herrberg, *supra* note 69, at 13.

72. See TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIFIC REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES* 14 (1951); J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 139 (Humphrey Waldock ed., 6th ed. 1963); CRAWFORD, *supra* note 4, at 22–23 and 26; RAIČ, *supra* note 5, at 89–167; Cassese, *supra* note 19, at 73–77.

73. See Lassa F L Oppenheim, *International Law*, in 1 *THE LAW OF PEACE* 125–26 (Hersch Lauterpacht ed., 8<sup>th</sup> ed. 1955); Hersch Lauterpacht, *Recognition of States in International Law*, 53 YALE L. J. 385 (1944); Brad R Roth, *GOVERNMENTAL ILLEGITIMACY IN INT'L L.* 128 (2000).

collective recognition by international organisations is a *sine qua non* for statehood.<sup>74</sup> The difference between the three recognition theories is important in the context of secession, because depending on which one is accepted, the process of secession ends and the outcome begins at different points. For proponents of the declaratory theory, this critical point *prima facie* occurs when a putative state satisfies the criteria for statehood based on effectiveness.<sup>75</sup> For proponents of the constitutive theory, this point definitively occurs when a putative state satisfies the criteria for statehood based on effectiveness *and* attains the recognition of other states. For proponents of the constitutive-collective theory, this point definitively occurs when a putative state satisfies the criteria for statehood based on effectiveness *and* attains admission to the UN.

In order to determine when the process of secession ends and the outcome begins, two interrelated questions must be addressed: first, it must be ascertained what the generally accepted criteria for statehood based on effectiveness common to the declaratory, constitutive and constitutive-collective recognition theories are; and second, it must be determined, *de lege lata*, whether the recognition of other states is a *sine qua non* for statehood.

#### VI. WHAT ARE THE GENERALLY ACCEPTED CRITERIA FOR STATEHOOD BASED ON EFFECTIVENESS COMMON TO THE DECLARATORY, CONSTITUTIVE AND CONSTITUTIVE-COLLECTIVE RECOGNITION THEORIES?

The declaratory, constitutive and constitutive-collective recognition theories hold that a putative state must satisfy the four criteria enumerated in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which stipulates:

The 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 other states.

Although these four criteria have been generally regarded as orthodoxy, an additional fifth criterion—independence—has also been widely held as essential to the satisfaction of the criteria for statehood

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74. See HANS Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 79 (1951); JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 73, 79 (1987).

75. It *prima facie* occurs because the declaratory theory entails consideration of the impact of peremptory norm (*jus cogens*) violations which will invalidate a seceding territory's claim to statehood. If there are no peremptory norm violations, then statehood will be achieved. See the present article *infra*.

based on effectiveness, and is thus common to proponents of the declaratory, constitutive and constitutive-collective recognition theories.<sup>76</sup> A detailed overview of these five criteria is beyond the scope of the present article, but the following skeletal points might nonetheless be observed.

*First*, Oppenheim has defined a permanent population as “an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.”<sup>77</sup> A permanent population, however, need not be a constant one. In the *Western Sahara Case*,<sup>78</sup> for example, the ICJ ruled that nomadic tribes satisfied the criterion.<sup>79</sup> On the other hand, populations which only move into a territory for the purpose of gaining economic benefit, or to conduct scientific research, do not satisfy the criterion.<sup>80</sup>

*Second*, a state must possess a defined territory. It is throughout this territory that the state exercises sovereignty. A defined territory does not, however, require an absence of undisputed frontiers. A 1929 German-Polish Mixed Arbitral Tribunal emphasized this point, remarking:

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.<sup>81</sup>

This general rule was later affirmed by the ICJ in the *North Sea Continental Shelf Cases*<sup>82</sup> and *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)*.<sup>83</sup>

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76. The independence criterion is arguably subsumable within art 1(d) of the 1933 Montevideo Convention. See generally, CRAWFORD, *supra* note 4, at 62; RAIČ, *supra* note 5, at 74.

77. Oppenheim, *supra* note 73, at 118.

78. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

79. *Id.* at 342–44; see generally Gino J. Naldi, *The Statehood of the Saharan Arab Democratic Republic*, 25 J. INDIAN INT’L L. 448, 452–53 (1985); DIXON, *supra* note 19, at 119.

80. Antarctica, for example, which is populated by scientific personnel, is not a state. See generally Bengt Broms, *States*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 44 (Mohammed Bedjaoui ed., 1991); MALANCZUK, *supra* note 13, at 76.

81. *Deutsch Continental Gas Gesellschaft v. Polish State*, 5 I.L.R. 11, 14–15 (1929); see generally CRAWFORD, *supra* note 4, at 49–50; RAIČ, *supra* note 5, at 61.

82. *North Sea Continental Shelf (Ger. v. Den. & Ger. v. Neth.)*, 1969 I.C.J. 3, 32 (Judgments); see generally, CRAWFORD, *supra* note 4, at 50.

83. *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, 1994 I.C.J.

*Third*, in relation to the effective government criterion, recent scholarship by Raič has indicated that a state created by secession pursuant to the law of self-determination will *not*, by virtue of the “compensatory force principle,”<sup>84</sup> be required to strictly satisfy the effective government criterion.<sup>85</sup> In the case of consensual secession, where there is no clash of sovereignty between the existing state and putative secessionist state, the application of this principle is relatively uncontroversial: the degree of governmental effectiveness required is substantially reduced. In the case of unilateral secession, however, the situation is more nuanced. Drawing upon case studies from the colonial context (Congo, Algeria, Guinea-Bissau and Angola) as well as the non-colonial context (Bangladesh, Croatia and Kosovo), the compensatory force principle indicates that the government can be somewhat ineffective, or of minimal utility, with respect to effective control throughout its territory.<sup>86</sup> Conversely, as indicated by the Turkish Republic of Northern Cyprus (TRNC), Abkhazia and South Ossetia, it would seem that a territorial entity created by secession *not* in conformity with the law of self-determination (i.e., not established in response to deliberate, sustained and systematic government-sponsored discrimination) will simply be unable to satisfy the effective government criterion.<sup>87</sup> Thus, in the state creation context, the effective government criterion has been arguably reformulated to equate with the right of peoples to external self-determination.<sup>88</sup>

Having elaborated this general principle, however, it is apposite to note that it is not absolute. The independence of Bosnia-Herzegovina from the Socialist Federative Republic of Yugoslavia (SFRY), for example, cannot be easily explained by the operation of the law of self-determination and the compensatory force principle.<sup>89</sup> At the time of its

6, 44, 52 (Feb. 3)(Judgment); *see generally* CRAWFORD, *supra* note 4, at 50.

84. RAIČ, *supra* note 5, at 104.

85. *Id.* at 104, 364; BROWNLIE, *supra* note 26, at 71; MALCOLM N. SHAW, INTERNATIONAL LAW, 205 (Cambridge, 6th ed., 2008); DUGARD RECOGNITION, *supra* note 74, at 78–79.

86. RAIČ, *supra* note 5, at 394.

87. *Id.*

88. DUGARD RECOGNITION, *supra* note 74, at 79.

89. 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 of 1991 Slovenia again declared its independence, and this time the JNA made no response, thereby indicating acquiescence with Slovene independence. *See* Marc Weller, *The International Response to the Dissolution of the*

independence, Bosnia-Herzegovina did not strictly satisfy the effective government criterion, with various parts of the Republic's territory remaining beyond the Bosnian-Herzegovinian government's control.<sup>90</sup> Furthermore, it was not clear that Bosnia-Herzegovina was established pursuant to the law of self-determination, which permits the unilateral pursuit of external self-determination by peoples when their internal self-determination is consistently and egregiously denied by the existing state. As Raič has observed:

Even if it would be accepted that Bosnia-Herzegovina seceded from the SFRY unilaterally, and assuming for the moment that the [Bosnian Muslims] formed a 'people' in an ethnic sense and thus a collectivity potentially entitled to a right of secession, the question must be addressed whether the [Bosnian Muslims] were in practice exposed to such harm (in the form of, for instance, a serious violation of their right of internal self-determination and/or serious and widespread violations of their individual human rights) *prior* to the proclamation of independence in March 1992, that the relevant secession has to be considered the *ultimum remedium* for safeguarding their identity, freedom and human rights. On the basis of the facts of the relevant period, the answer can only be in the negative. For the [Bosnian Muslims] were exposed to serious and widespread violations of their human rights only *after* the proclamation of independence.<sup>91</sup>

Despite the exceptional case of Bosnia-Herzegovina it would nonetheless seem, from the case studies mentioned above, that the compensatory force principle is generally valid, functioning to reduce the stringency of the effective government criterion when the newly created state is established pursuant to the law of self-determination. Bosnia-Herzegovina should therefore be viewed as an aberration based upon political and factual expediency.

*Fourth*, a state must have the ability to enter relations with other states, which requires that it must politically and legally represent itself to other states and within international forums.<sup>92</sup> As Crawford has noted, however, in terms of its practical implications, the criterion

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*Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992); STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER COMMISSION: A CONTEXTUAL STUDY OF PEACEMAKING IN THE POST-COLD WAR WORLD (2000); Macedonia's secession formally occurred once the SFRY was dissolved, thereby ensuring that no existing state remained to challenge Macedonian independence. See PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 195 (2002) [hereinafter RADAN, THE BREAK-UP OF YUGOSLAVIA].

90. Weller, *supra* note 89, at 590.

91. RAIČ, *supra* note 5, at 415–16.

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

represents a conflation of the effective government and independence criteria.<sup>93</sup>

*Fifth*, in relation to the independence criterion, it has been argued that a state created by secession must demonstrate formal and actual independence.<sup>94</sup> The former requires that the state created manifest the formal hallmarks of independence, while the latter requires the absence of political control by other states.<sup>95</sup>

In summation, before the process of secession can be said to have concluded, these five criteria based on effectiveness must be fulfilled by any putative secessionist state.

#### VII. IS THE RECOGNITION OF OTHER STATES A *SINE QUA NON* FOR STATEHOOD?

Having enumerated the five criteria for statehood based on effectiveness, it remains to be determined whether the recognition of other states is a *sine qua non* for statehood. In other words, must other states have extended recognition to a putative secessionist state before it can legally claim statehood? The resolution of this question is different depending on which of the declaratory, constitutive or constitutive-collective recognition theories is accepted as most accurately representing *lex lata*.<sup>96</sup>

#### VIII. THE DECLARATORY RECOGNITION THEORY

With regard to treaty law, no support exists for the position that recognition is a *sine qua non* for statehood. The most influential international treaty—the UN Charter—is completely silent on the topic. Regional treaties, however, indicate support for the declaratory approach. Article 3 of the Montevideo Convention and Articles 13 and 14 of the Charter of the Organization of American States suggest that statehood antedates recognition, thereby supporting the declaratory recognition theory.

State practice also indicates that the declaratory theory is generally

93. CRAWFORD, *supra* note 4, at 62.

94. RAIČ, *supra* note 5, at 75.

95. *Id.* at 78.

96. There are of course commentators that hold none of these theoretical approaches are appropriate. Worster, for example, has noted that, “[a]lthough many authors state that one or the other theory is confirmed by practice, the record does not bear this statement out; neither of these two theories [the declaratory and constitutive] satisfactorily describes the state of law on the matter.” William Thomas Worster, *Law, Politics and the Conception of the State in Recognition Theory*, 27 B.U. INT’L L. J., 115, 118–19 (2009); *contra* Crawford, who has suggested that “[s]ome continental writers . . . have tended to regard recognition as combining both declaratory and constitutive elements. One can sympathize with these views, but at a fundamental level a choice has to be made.” CRAWFORD, *supra* note 4, at 27.

correct. In December 1974, for example, the General Assembly adopted the non-binding Definition of Aggression,<sup>97</sup> Article 1 of which provided the following definitions:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term “State”:

- (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
- (b) Includes the concept of a “group of States” where appropriate.

Article 1 thus indicates that states can exist irrespective of whether they are recognized by other states or are members of the UN. *A priori*, the Definition of Aggression, which was adopted by consensus, confirms the validity of the declaratory recognition theory.

The declaratory recognition theory is also supported with respect to the break-up of the SFRY. On 2 May 1992, European Community (EC) member states declared in relation to the Former Yugoslav Republic of Macedonia (FYROM) 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.”<sup>98</sup> Hence, the Republic of Macedonia was considered to constitute a state—not an entity, territorial entity or putative state—prior to receiving the recognition of EC member states. A similar situation occurred regarding the Federal Republic of Yugoslavia (Serbia Montenegro). This state was established in 1992, but recognition was only granted in 1996. Nonetheless, numerous diplomatic statements recognized that the Federal Republic of Yugoslavia was a state under international law from 1992 onwards, despite not having received recognition.<sup>99</sup>

With regard to judicial decisions, the preponderance of evidence once again indicates support for the declaratory theory. A 1929 German-Polish Mixed Arbitral Tribunal, when commenting upon

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97. G.A. Res. 3314 (XXIX), ¶ 1, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

98. RAIČ, *supra* note 5, at 36 (quoting EPC Informal Meeting of Ministers for Foreign Affairs, *Declaration on the Former Yugoslav Republic of Macedonia, Guimaraes, 1-2 May 1992*, EPC Press Release 53/92) (emphasis added).

99. *See, e.g.*, Committee of Senior Officials of the Helsinki, *SCO Declaration concerning the Need for Undertaking Urgent and Immediate Steps With Respect to Yugoslavia*, in YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION 22 (May 20, 1992); Organisation of Islamic Cooperation, Resolution 1/6-Ex on the Situation in Bosnia and Herzegovina, 6th Sess., Islamic Conference of Foreign Ministers, 1–2 (Dec. 1992); *see generally* RAIČ, *supra* note 5, at 36.

Poland's existence stated that "the recognition of a State is not constitutive but merely *declaratory*. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognized by the States from which it emanates."<sup>100</sup>

Support for the declaratory position is also found within the report of the Commission of Jurists relating to the Aaland Islands dispute. The report's section dealing with Finland's independence noted the various recognitions Finland had received, but subsequently elaborated that:

these facts by themselves do not suffice to prove that Finland, from this time onwards, became a sovereign State . . . [T]he same legal value cannot be attached to recognition of new States in war-time, especially to that accorded to belligerent powers, as in normal times . . . In addition to these facts which bear upon the external relations of Finland, the very abnormal character of her internal situation must be brought out. This situation was such that, for a considerable time, the conditions required for the formation of a sovereign State did not exist.<sup>101</sup>

It follows that although Finland enjoyed the recognition of numerous states, this did not, *ipso facto*, mandate that Finland possessed statehood. Although the Commission clearly regarded the recognitions extended as legally relevant, they were not taken as conclusive, with considerations of the "conditions required for the formation of a sovereign State" also necessary.<sup>102</sup>

More recent support for the declaratory recognition theory can be found in the decisions of the Badinter Arbitration Commission, established to advise the European Peace Conference on Yugoslavia. In its Opinion No. 1,<sup>103</sup> handed down on 29 November, 1991, the Commission stated that "the effects of recognition by other states are purely *declaratory*."<sup>104</sup> This position was reiterated by Opinion No. 8,<sup>105</sup> handed down on 4 July 1992, which held that "recognition of a State by other States [only has] *declarative* value . . . ." <sup>106</sup> Opinion No. 10,<sup>107</sup>

100. CRAWFORD, *supra* note 4, at 24 (quoting *Deutsch Continental Gas Gesellschaft v. Polish State*, 5 I.L.R. 11, 13 (1929) (emphasis added) (alterations omitted); see generally RAIC, *supra* note 4, at 37;

101. CRAWFORD, *supra* note 4, at 24 (quoting Aaland Islands Question, *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, 3 LEAGUE OF NATIONS OFFICIAL JOURNAL 8 (Oct. 1920).

102. CRAWFORD, *supra* note 4, at 24.

103. *Arbitration Commission on the Peace Conference in Yugoslavia*, 31 I.L.M. 1421, 1494-95 (1992) [hereinafter Badinter Arbitration Commission]

104. *Id.* (emphasis added); see also CRAWFORD, *supra* note 4, at 24 (emphasis added).

105. Badinter Arbitration Commission, *supra* note 103, at 1522-23.

106. *Id.* (emphasis added); see also CRAWFORD, *supra* note 4, at 399 (emphasis added).

also delivered on 4 July 1992, reaffirmed this view, stating that “recognition is not a prerequisite for the foundation of a State and is purely *declaratory* in its impact.”<sup>108</sup> The Commission thus propounded that statehood is constituted prior to any acts of recognition, provided that the criteria for statehood based on effectiveness are fulfilled.<sup>109</sup>

Support for the declaratory recognition theory is also arguably found within the Canadian Supreme Court advisory opinion, *Reference re Secession of Quebec*.<sup>110</sup> There, the court noted that although recognitions would be politically advantageous for a newly seceded Quebec, they would not be a *sine qua non* for statehood. Indeed the court explicitly held that “recognition by other states is not . . . necessary to achieve statehood.”<sup>111</sup> The Court therefore rejected the constitutive recognition theory.<sup>112</sup>

Further support for the declaratory view is arguably contained within the *Bosnian Genocide Case*.<sup>113</sup> In that case, the Federal Republic of Yugoslavia argued that the ICJ was not competent to adjudicate claims on the Genocide Convention, because the Federal Republic of Yugoslavia and Bosnia-Herzegovina had not recognized each other at the time the legal proceedings were commenced.<sup>114</sup> The ICJ rejected this argument, noting that mutual recognition had subsequently been granted in the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accord),<sup>115</sup> and that any chronological defects could be overcome by re-filing the claim after this time.<sup>116</sup> This suggests that Bosnia-Herzegovina's rights were opposable to the Federal Republic of Yugoslavia from the time the former became a state in fact, notwithstanding the lack of recognition between the two parties.<sup>117</sup> Hence, the ICJ implicitly endorsed the declaratory recognition theory, thereby discounting the constitutive view that statehood only

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107. Badinter Arbitration Commission, *supra* note 103, at 1525–26.

108. *Id.* at 1526; *see also* RAIČ, *supra* note 5, at 37.

109. CRAWFORD, *supra* note 4, at 399.

110. *See Reference re Secession of Quebec*, *supra* note 34.

111. *Id.*

112. *See* RAIČ, *supra* note 5, at 37 (claiming that “[t]he Canadian Supreme Court rejected the constitutive theory in *Reference re Secession of Quebec*”).

113. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugoslavia*), Preliminary Objections, 1996 I.C.J. 595 (July 11, 1996).

114. *Id.* at 612–14.

115. The Agreement was finalized on December 14, 1995. *See also* NATO, *15 years ago, Dayton Peace Accords: a milestone for NATO and the Balkans* (Dec. 14, 2010), [http://www.nato.int/cps/en/natolive/news\\_69290.htm](http://www.nato.int/cps/en/natolive/news_69290.htm).

116. *Bosn. & Herz. v. Yugoslavia*, *supra* note 113, at 612–13.

117. CRAWFORD, *supra* note 4, at 25.

crystallizes post-recognition.<sup>118</sup>

The declaratory recognition theory also enjoys preponderant support from eminent scholars. Chen 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.”<sup>119</sup> The same scholar has also observed that “[a] State may exist without positive relations with other States; but it is not without rights or without means of exercising them . . . .”<sup>120</sup> Thus, the grant of recognition from existing states or international organizations, such as the UN, is not considered a constitutive component of statehood. Brierly has similarly contended that:

[t]he better view is that the granting of recognition to a new state is not a ‘constitutive’ but a ‘declaratory’ act; it does not bring into legal existence a state which did not exist before. A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them *as* a state. The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely the independence of the body claiming to be a state, and to declare the recognizing state’s readiness to accept the normal consequences of that fact, namely the usual courtesies of international intercourse.<sup>121</sup>

Or as Crawford has 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 practice, and it is supported by a substantial body of opinion.<sup>122</sup>

Other scholars have propounded similar views.<sup>123</sup>

118. *Id.*

119. Ti-Chiang Chen, *supra* note 72, at 14.

120. *Id.* at 38.

121. BRIERLY, *supra* note 72, at 137–39.

122. CRAWFORD, *supra* note 4, at 22–23.

123. BROWNIE, *supra* note 26, at 88; CASSESE, *supra* note 19, at 73–75; DIXON, *supra* note 19, at 135; MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 60–63 (6th ed. 1987); 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 (2006); LOUIS L JAFFÉ, JUDICIAL ASPECTS OF FOREIGN RELATIONS; IN PARTICULAR OF THE RECOGNITION OF FOREIGN POWERS 97–98, 372 (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, 461 (1926); *see also* Hersch Lauterpacht, *Recognition of States in International Law*, 53 YALE L. J. 385, 424 (1944); ALEXANDRE MÉRIGNHAC, 1 TRAITÉ DE DROIT PUBLIC INTERNATIONAL 328 (1905); ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 13–14,

IX. THE CONSTITUTIVE AND CONSTITUTIVE-COLLECTIVE  
RECOGNITION THEORIES

Unlike the declaratory recognition theory, no treaty provisions exist which support the constitutive theory either implicitly or explicitly. With regard to the constitutive-collective theory, it has been suggested that Article 4 of the UN Charter may imply that admission to the UN is tantamount to the conferral of statehood by collective means.<sup>124</sup> Article 4 of the UN Charter provides that:

1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.<sup>125</sup>

Articles 4(1) and 4(2) thus restrict membership to states only.<sup>126</sup> The suggestion that Article 4 implies a collective conferral of statehood, however, must be rejected, as examination of the Charter's *travaux préparatoires* indicates that a Norwegian proposal to endow the UN with the power to recommend collective recognition of statehood was

147–48 (1986); Karl Doehring, *State*, in 4 ENCYCLOPEDIA OF PUB. INT'L L. 600, 604 (Rudolf Bernhardt ed., 1992); Philip Marshall Brown, *The Effects of Recognition*, 36 AM. J. OF INT'L L. 106 (1942); Josef L. Kunz, *Critical Remarks on Lauterpacht's "Recognition in International Law"*, 44 AM. J. OF INT'L L. 713 (1950); KRYSZYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 130–61 (2d ed. 1968); Manfred Lachs, *Recognition and Modern Methods of International Co-operation*, 35 BRIT. Y.B. INT'L L. 252 (1959); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 135–36 (1963); J. G. STARKE, STUDIES IN INTERNATIONAL LAW 91–100 (1965); 1 DANIEL PATRICK O'CONNELL, INTERNATIONAL LAW 81, 128–34, (Stevens ed., 2d ed. 1970); JAMES E. S. FAWCETT, THE LAW OF NATIONS 49, 55 (2d ed. 1971); J. S. Davidson, *Beyond Recognition*, 32 N. IR. L. Q. 22 (1981); P. K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES 13 (1994); Donald A. Heydt, *Non-recognition and the Independence of Transkei*, 10 CASE W. RES. J. INT'L L. 167, 185 (1978); Colin Warbrick, *Recognition of States: Recent European Practice*, in ASPECTS OF STATEHOOD AND INSTITUTIONALISM IN CONTEMPORARY EUROPE, 24–30 (Malcolm Evans ed., 1997); BURNS WESTON, ET AL., INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM ORIENTED COURSEBOOK 847 (2nd ed. 1980); Jure Vidmar, *Conceptualizing Declarations of Independence and International Law* 32, OXFORD J. LEGAL STUD. 2, 5 (2011).

124. See KELSEN, *supra* note 74, at 79.

125. *Id.*; U.N. Charter arts 2(1) and 2(7); Statute of the International Court of Justice (June 26, 1945).

126. This wording contrasts with Article 1(2) of the League of Nations Covenant, which allowed membership by "any fully governing State, Dominion or Colony." The wording of Article 4, therefore, was purposeful, designed to exclude entities that were not states. See DUGARD, *supra* note 74, at 52; Konrad Ginther, *Article 4*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 162 (Bruno Simma ed., 1994).

discarded.<sup>127</sup> Furthermore, history reveals that on occasion, territorial entities have been admitted to the UN which did not at the time of admittance, *stricto sensu*, qualify as states: the Byelorussian Soviet Socialist Republic and Ukrainian Soviet Socialist Republic are but two examples.<sup>128</sup>

Very little evidence in support of the constitutive recognition theory can be gleaned from state practice. However, several scholars have contended—if only very cautiously—that the practice of EC states during the break-up of the SFRY and the Soviet Union *may* represent an affirmation of the constitutive recognition theory. This is because recognition in these contexts was predicated not only on the criteria for statehood based on effectiveness, as outlined by the Montevideo Convention, but also additional grounds, enumerated by the Declaration on the Guidelines on the Recognition of New States.<sup>129</sup> These Guidelines provided that recognition should only be granted to states that respect the provisions of the UN Charter, guarantee the human rights of any ethnic and national minorities, respect the inviolability of internationally recognized boundaries, subscribe to nuclear non-proliferation and meet international standards regarding human rights.<sup>130</sup> By moving beyond the criteria for statehood based on effectiveness, scholars such as Hillgruber interpret EC states as having adopted a predominantly constitutive approach to recognition, as the acquisition of statehood *seems* to be predicated upon arbitrary Euro-centric criteria devoid of legal precedent.<sup>131</sup>

127. United Nations Conference on International Organization, Amendments and Observations on the Dumbarton Oaks Proposal, submitted by the Norwegian Delegation, U.N. Doc. 2 G/7, ¶¶ 1, 2 (May 3, 1945). As Aufricht has correctly observed “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, except for the purposes of membership in the Organization,” *quoted in* Hans Aufricht, *Principles and Practice of Recognition by International Organizations*, 43 AM. J. INT’L L., 691 (1949); *see generally* RAIČ, *supra* note 5, at 42; Van der Vyver, *Statehood in International Law*, 5 EMORY INT’L L. REV. 23 (1991).

128. KONRAD G. BÜHLER, STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS: LEGAL THEORIES VERSUS POLITICAL PRAGMATISM 172–73 (2001); RAIČ, *supra* note 5, at 43–44.

129. *European Community: Declaration on the Guidelines on the Recognition of New States*, *International Legal Materials*, 31 I.L.M. 1485, 1485–87 (1992).

130. *Id.*; *see generally*, SHEARER, *supra* note 26, at 125; Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EUR. J. INT’L L. 36, 43 (1993); Colin Warbrick, *Recognition of States*, 4 INT’L & COMP. L. Q. 473, 477–78 (1992).

131. Interestingly, Hillgruber seems to start from the premise that the constitutive theory is correct before examining the operation of the EC Guidelines for Recognition of New States. He does so on the grounds that non-recognition could not be utilized as a weapon against renegade states, if compliance with the Montevideo Convention was the only requirement of statehood. This assumes, however, that recognition and statehood are necessarily coterminous. *See* Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT’L L. 494 (1998).

The legitimacy of this claim, however, is highly suspect. To begin with, the long title of the Guidelines—Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union—inherently suggests that they are targeting acts of *recognition* and not the conferral of statehood. This view is also borne out by reference to the language employed throughout the Guidelines, which arguably suggests that new states may exist prior to recognition. Paragraph 4, for example, enunciates that:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their *readiness to recognise*, subject to the normal standards of international practice and the political realities in each case, those new *states* which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.<sup>132</sup>

Had the Guidelines been intended to propound a constitutive approach to recognition, paragraph four would more than likely have employed the words “entity,” “territorial entity” or “putative state” in place of the word “state.” The correct interpretation then is that the Guidelines were designed to mould a common recognition *policy* among EC member states, rather than serving to confirm statehood itself.<sup>133</sup> According to this interpretation, the Guidelines are wholly subsumable within the declaratory recognition theory.<sup>134</sup>

Finally it should be noted that although the constitutive and constitutive-collective recognition theories draw support from scholars, this could not be said to be as widespread as scholarly support for the declaratory theory.<sup>135</sup>

132. *Declaration on the Guidelines on the Recognition of New States*, *supra* note 129, at 1486–87 (emphasis added).

133. Brownlie, for example, has correctly noted that “[r]ecognition, as a public act of state, is an optional and political act and there is no legal duty in this regard.” BROWNLIE, *supra* note 26, at 89–90.

134. Crawford, for example, has written: “But overall the international approach to the dissolution of Yugoslavia, unhappy as it has been, does not support the constitutive theory, still less demand that we adopt it as a general matter.” CRAWFORD, *supra* note 4, at 25.

135. In relation to the constitutive theory, see OPPENHEIM, *supra* note 73, at 125–26; GEORG JELLINEK, ALLEGMEINE STAATSLHRE, 273 (5th ed. 1928); Roth, *supra* note 73, at 128; GEORG SCHWARZENBERGER, I INTERNATIONAL LAW 134 (3d. ed. 1957–76); BERNARD R. BOT, NONRECOGNITION AND TREATY RELATIONS 17–19 (A. W. Sijthoff ed., 1968); SATYAVRATA R. PATEL, RECOGNITION IN THE LAW OF NATIONS 119–22 (N. M. Tripathi ed., 1959); JAN H. W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 578–90 (Sijthoff ed., 1968–76); Henry J. Richardson III, *Excluding Race Strategies from International Legal History: The Self-*

X. PRE-EMINENCE OF THE DECLARATORY RECOGNITION THEORY  
AND THE MODERN CRITERIA FOR STATEHOOD

Once the declaratory recognition theory is accepted, however, the modern criteria for statehood must be considered, because there are numerous examples of effective territorial entities (i.e., entities that have satisfied the five criteria enumerated above) that have been denied statehood by the international community of states. In other words, international forums such as the Security Council and General Assembly have, on certain occasions, refused to accord the title of “state” to territorial entities that satisfy the five criteria for statehood based on effectiveness discussed above.<sup>136</sup> Given that the declaratory recognition theory is accepted as generally correct, it follows that some other factor must be operating to prevent otherwise effective territorial entities from attaining the title of “state,” not to mention recognition as a state.

This other factor is a breach of peremptory norms (*jus cogens*).<sup>137</sup> Where a breach of peremptory norms occurs during a putative state’s formative process, statehood will be legally denied.<sup>138</sup> Although scholars have postulated a variety of peremptory norms, the most pertinent in the context of state creation are the interconnected norms of self-determination and the prohibition on the illegal use of force.<sup>139</sup> Put simply, an effective secessionist entity will be denied statehood if it breaches these peremptory norms during its formative process.<sup>140</sup> Generally, these norms might be summarized as requiring that a people (defined as a nationally-based sub-state group) may not establish a new

*executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 Vill. L. Rev. 1125–27 (2000); Myres S. McDougal and W. Michael Reisman, *Rhodesia and the United Nations: the Lawfulness of International Concern*, 62 AM. J. INT’L L. 17 (1968); see Derry J. Devine, *Rhodesia Since the Unilateral Declaration of Independence*, 1 ACTA JURIDICA 63, 90–145 (1973); Derry J. Devine, *Rhodesia and the UN: The Lawfulness of International Concern – A Qualification*, 2 COMP. & INT’L L. J. S. AFR. 454, 456 (1969); In relation to the constitutive-collective theory, see Kelsen, *supra* note 74, at 79; Dugard, *supra* note 32, at 79.

136. Rhodesia’s non-recognition from 1965 to 1980, which arguably breached the peremptory norm of the right of peoples to self-determination, is a good example. Dugard, *supra* note 32, at 90; RAIČ, *supra* note 5, at 130–31; CRAWFORD, *supra* note 4, at 128–31; James E. S Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. OF INT’L L. 112 (1965–1966); CHRISTIAN HILLGRUBER, *Die Aufnahme Neuer Staaten in die Völkerrechtsgemeinschaft: das Völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19 und 20 Jahrhunderts* 601 (1998).

137. CRAWFORD, *supra* note 4, at 107; Duursma, *supra* note 44, at 127–32; RAIČ, *supra* note 5, at 156–57.

138. CRAWFORD, *supra* note 4, at 128; RAIČ, *supra* note 5, at 156–57.

139. CRAWFORD, *supra* note 4, at 129–32; Glen Anderson, *Unilateral Non-Colonial Secession and the Use of Force: Effect on Claims to Statehood in International Law*, 28 CONN. J. INT’L L. 197 (2013).

140. *Unilateral Non-Colonial Secession and the Use of Force*, *supra* note 139, at 240.

state where the group has *not* previously been systematically denied their right to internal self-determination by the existing state. This requirement will be satisfied in a colonial context where the territory concerned is geographically, ethnically and culturally distinctive from the metropolitan power, as enumerated in Resolution 1541<sup>141</sup> and general state practice.<sup>142</sup> In the non-colonial context, guidance as to the circumstances where internal self-determination might be denied is provided by 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 and Article 1 of the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.<sup>143</sup> The latter provides that the UN will, *inter alia*:

[c]ontinue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right to self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and *thus possessed of a government representing the whole people belonging to the territory without distinction of any kind*.<sup>144</sup>

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

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141. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1541 (XV), U.N. Doc. A/RES/1541(XV) (Dec. 15, 1960) [hereinafter Declaration on the Granting of Independence].

142. See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), *supra* note 141; G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, (Oct. 24, 1970), especially, Principle 5 paragraphs 2(b) and 6; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 79; Also state practice in terms of physical acts and omissions (successful instances of decolonization).

143. Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, G.A. Res. 50/6, U.N. GAOR, 50th Sess., U.N. Doc. A/Res/50/6 (Oct. 24, 1995). For an extended analysis of this declaration and its legal effects, see Glen Anderson, Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects, 41 DENV. J. INT'L. L. & POL'Y 345 (2013).

144. G.A. Res. 50/6, *supra* note 144, at 2 (emphasis added).

“territorial integrity or political unity” and that accordingly, secession will only be permissible under certain strictly circumscribed circumstances.<sup>145</sup> However UNC secessionist case studies such as Bangladesh, the TRNC, Abkhazia, South Ossetia and Kosovo collectively indicate that only when human rights violations by the existing state are *in extremis* (ethnic cleansing, mass killings and genocide) as opposed to *in moderato* (political, cultural and racial discrimination) will a right to secession be perfected in international customary law.<sup>146</sup> It is thus under these conditions that force can be applied by a non-colonial secessionist group against the existing state without breaching the interconnected peremptory norms of self-determination and the prohibition on the illegal use of force.<sup>147</sup>

When the requirements based on effectiveness *are* satisfied and the peremptory norms of self-determination and the prohibition on the illegal use of force are *not* violated, however, a secessionist state can be said to legally exist. The outcome of secession can thus be distinguished from the process at this point.

#### XI. IS IRREDENTISM SECESSION?

According to one school of thought, irredentism should be included within the definition of secession,<sup>148</sup> whilst according to

145. *Id.*

146. *Unilateral Non-Colonial Secession and the Use of Force: Effect on Claims to Statehood in International Law*, *supra* note 139, at 232; *Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions*, *supra* note 143, at 394–95.

147. It is generally accepted that Articles 2(4) and 51 of the UN Charter apply only to states and not “peoples” or sub-state groups. For arguments to this effect, see *Unilateral Non-Colonial Secession and the Use of Force*, *supra* note 139, 215–16; John Dugard, *The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism*, 16 INT’L & COMP. L. Q. 157, 172 (1967); YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 85–86 (4th ed. 2005); Rodney Pails, *Self-Determination, the Use of Force and International Law*, 20(1) U. TASMANIA L. REV. 70, 78–79 (2001); Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 449 (Antonio Cassese ed., 1986); Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace*, 8 N.Y.L. SCH. J. HUM. RTS. 49, 101 (1990–1991).

148. Karin von Hippel, *The Resurgence of Nationalism and Its International Implications*, 17(4) THE WASH. Q. 185, 185–86 (1994); Christine Haverland, *Secession*, in IV ENCYCLOPEDIA OF PUB. INT’L L. 354 (Rudolf Bernhardt ed., 2000); RAIĆ, *supra* note 5, at 308; ANA S. TRBOVICH, *A LEGAL GEOGRAPHY OF YUGOSLAVIA’S DISINTEGRATION* 23 (2008); Julie Dahlitz, *Introduction*, in *SECESSION AND INT’L L.* 6 (Julie Dahlitz ed., 2003); Thio has endorsed verbatim the definition provided by Haverland: Li-Ann Thio, *International Law and Secession in the Asia and Pacific Regions*, in *SECESSION: INT’L L. PERSPECTIVES* 297 (Marcelo G Kohen ed., 2006); KOHEN, *supra* note 28, at 3; Pflirter and Napolitano, *supra* note 32, at 375; BARBARA GOODWIN, *USING POLITICAL IDEAS* 277 (5th ed. 2007); Ouguergouz endorses the definition of secession postulated by Haverland: Fatsah Ouguergouz, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE*

another school, it should not.<sup>149</sup> It is therefore necessary to determine whether irredentism should be included within the definition of secession.

The etymology of “irredentism” lies in the Italian term “*irredenta*,” meaning “unredeemed.”<sup>150</sup> The *Oxford English Dictionary* corresponds with this meaning, defining an “irredentist” as “an adherent of the party which advocates the recovery and union to Italy of all Italian speaking districts now subject to other countries.”<sup>151</sup> In the context of international law and relations, irredentism thus refers to the amalgamation of an existing state’s territory (state A), in whole or part, with another existing state (state B).<sup>152</sup> The process of amalgamation can be divided into four types:

*Type 1:* Exogenous to “state A,” taking the form of forcible annexation by “state B,” of all of “state A’s” territory;

*Type 2:* Exogenous to “state A,” taking the form of forcible

DEMOCRACY IN AFRICA 233 (2003); Milena Sterio, *On the Right to External Self-Determination: “Selfistans”, Secession and the Great Powers’ Rule*, 19 MINN. J. INT’L L. 142 (2010); MILENA STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: “SELFISTANS”, SECESSION AND THE RULE OF GREAT POWERS 24 (2013).

149. Simon Carney, *Self-Government and Secession: The Case of Nations* 5(4) J. OF POL. PHIL. 353 (1997); Michael Hechter, *The Dynamics of Secession*, 35 ACTA SOCIOLOGICA 267 (1992); HERACLIDES, *supra* note 3, at 1; CRAWFORD, *supra* note 4, at 375; Radan, *supra* note 6, at 18; PATRICK DUMBERTY, STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY 18 (2007); Georges Abi-Saab, *Conclusion, in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 473 (Marcelo G Kohen ed., 2006); Coppieters, *supra* note 28, at 4; Christian Tomuschat, *Secession and Self-Determination, in* SECESSION: INT’L L. PERSP. 44 (Marcelo G Kohen ed., 2006); VIVA ONA BARTKUS, THE DYNAMIC OF SECESSION 3 (1999); Buchanan, *supra* note 5; Debra A. Valentine, *The Logic of Secession*, 89 YALE L. J. 802 (1980); Daryl J. Glaser, *The Right to Secession: An Antiseccessionist Defence*, 51 POL. STUD. 369, 371 (2003); Nolte, *supra* note 26, at 65; WELHENGAMA, *supra* note 32, at 212–14; Bishai, *supra* note 32, at 33; GUIBERNAU MONTERRAT, THE IDENTITY OF NATIONS 54 (2007); Bridget L. Coggins, *Secession, Recognition and the International Politics of Statehood* 54 (Unpublished PhD dissertation, Graduate School of the Ohio State University, 2006); Zhu and Blachford, *supra* note 32, at 46; Jaroslav Tir, *Keeping the Peace after Secession: Territorial Conflicts Between Rump and Secessionist States*, 49 J. OF CONFLICT RESOL. 713, 714–15 (2005); Jaroslav Tir, *Dividing Countries to Promote Peace: Prospects for Long-Term Success of Partitions*, 42 J. OF PEACE RES. 545 (2005).

150. The term was used by the *Associazione pro Italia irredenta* to connote the incorporation of the large Italian speaking communities of Trentino, Istria, Trieste and Tyrol into newly unified Italy. See *Irredentist*, ONLINE ETYMOLOGICAL DICTIONARY, <http://www.etymonline.com/index.php?search=irredentist&searchmode=term>; Laura Murray, *Examining Irredentism*, 45 J. INT’L AFF. 648 (1992); Gerlinde Raub, *Irredentism, in* 2 ENCYCLOPEDIA OF PUB. INT’L L. 1451 (1995); James Mayall, *Nationalism and the International Order*, 14 MILLENNIUM 148 (1985); Von Hippel, *supra* note 148, at 185; David Carment and Patrick James, *Internal Constraints and Interstate Ethnic Conflict: Towards a Crisis-Based Assessment of Irredentism*, 39 J. OF CONFLICT RESOL. 84 (1995); DAVID CARMENT, ET AL., WHO INTERVENES? ETHNIC CONFLICT AND INTERSTATE CRISIS 12 (2006).

151. 5 THE OXFORD ENGLISH DICTIONARY, 488 (1933).

152. See Mayall, *supra* note 150, at 148. For a non-exhaustive list of potential irredentist claims, see DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 281 (1985).

annexation of part of “state A’s” territory;

*Type 3:* Endogenous to “state A,” taking the form of complete amalgamation between “state A” and “state B”;

*Type 4:* Endogenous to part of “state A,” taking the form of a secession from “state A,” followed by amalgamation with “state B.”<sup>153</sup>

With regard to type 1 and 2 irredentism, “state B” is forcefully pursuing the annexation of “state A’s” territory. Thus, during the process of annexation, secession, in the form of an endogenously motivated withdrawal, does *not* occur. With regard to type 3 irredentism, although “state A” consents to and therefore exerts control over the amalgamation process, secession in the form of an endogenously motivated withdrawal does *not* occur. With regard to type 4 irredentism, however, prior to amalgamation occurring, an endogenously motivated secession *does* occur. Bearing these remarks in mind, it can now be determined whether irredentism should be included within the definition of secession.

If the words “secession” and “irredentism” are not used interchangeably, as indeed they do not appear to be, it follows that there must be a point of distinction. Bearing in mind the etymological origins of the two words, it is submitted that the point of distinction is that secession refers to an endogenously motivated “withdrawal,” whereas irredentism essentially connotes an endogenously or exogenously motivated “amalgamation.” Secession and irredentism, although related phenomena, are thus not identical. It follows that irredentism should not be included within the definition of secession.

Some further points, however, might be made with regard to exogenous and endogenous irredentism. First, it is clear that under contemporary international law, type 1 and 2 exogenous irredentism qualifies as illegal occupation. Under such circumstances, the original sovereignty of the forcibly annexed territory is held to subsist, at least in legal terms, with the original titleholder.<sup>154</sup> In August 1991, for example, Iraq invaded Kuwait under the loose banner of historical irredentism, citing the fact that Kuwait was once part of the Ottoman province of Basra.<sup>155</sup> The Iraqi invasion of Kuwait, however, was viewed by the international community as categorically illegal, and

153. However, it should be noted though, that some definitions narrow irredentist movements to only the exogenous variant, or a situation of annexation. See THOMAS AMBROSIO, *IRREDENTISM, ETHNIC CONFLICT AND INTERNATIONAL POLITICS* 2 (2001); Hedva Ben-Israel, *IRREDENTISM AND NATIONAL POLITICS* 24 (Naomi Chazan ed., 1991).

154. SC Res 661 implemented a blockade of Iraq, and SC Res 674 authorized states cooperating with Kuwait to use all necessary measures to uphold and implement the blockade. See generally EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 169–70 (2d ed. 2012).

155. See Marc Weller, *IRAQ AND THE USE OF FORCE IN INTERNATIONAL LAW* 18–19 (2010).

collective military action was eventually authorized under Chapter VII of the UN Charter to expel Iraqi forces from Kuwait.<sup>156</sup> From these facts, it can be reasonably inferred that the removal of an illegal foreign occupying force from part of a state's territory does not constitute secession, but instead, liberation, or reversion to lawful sovereign authority.<sup>157</sup>

Second, with regard to type IV endogenous irredentism, it must be explained why such a turn of events does not qualify as secession, given that for at least a brief point in time, a new state has been created. The answer lays in the fact that irredentism, like secession, is both a process and an outcome. During the process of type IV endogenous irredentism, a new state may be temporarily created, but this is not the end point of the process. Type IV endogenous irredentism only occurs as an outcome with the subsequent amalgamation of that territory with an already existing state. Accordingly, in a conceptual sense, type IV endogenous irredentism and secession are not identical concepts, even though secession may form one part of the type IV endogenous irredentism process.<sup>158</sup>

Before concluding, a final issue beckons consideration, namely, whether irredentism can be applied to the creation of a new state throughout part of the territory of two or more existing states.<sup>159</sup> Given that the process of state creation in this context is likely to consist of two or more simultaneous or near simultaneous endogenously motivated withdrawals from existing states, it is submitted that such a turn of events is more correctly described as secession rather than irredentism.<sup>160</sup>

## XII. IS DECOLONIZATION SECESSION?

According to one school of thought, the withdrawal of colonial territories should be included within the definition of secession,<sup>161</sup>

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156. SC Res 661 implemented a blockade of Iraq, and SC Res 674 authorized states cooperating with Kuwait to use all necessary measures to uphold and implement the blockade. See generally EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 169–70 (2012).

157. *Id.* at 151; CRAWFORD, *supra* note 4, at 698; RAIČ, *supra* note 5, at 308.

158. HOROWITZ, *supra* note 152, at 281–82.

159. Although the author is unaware of any historical examples of such phenomena, they nonetheless remain a theoretical possibility and must therefore be considered. One possibility for the future may be the rise of Kurdistan, drawing upon the territory of current day Iraq and Turkey.

160. Benyamin Neuberger, *Irredentism and Politics in Africa*, in *IRREDENTISM AND NAT'L POL.* 97 (Naomi Chazan ed., 1991).

161. CRAWFORD, *supra* note 4, at 330, 375; Pavković & Radan, *supra* note 6, at 18; Peter Radan, *Secessionist Referenda in International Law and Domestic Law*, 18 *NATIONALISM & ETHNIC POL.* 9 (2012) [hereinafter Radan, *Secessionist Referenda*]; Malcolm N. Shaw, *The Role of Recognition and Non-Recognition with Respect to Secession: Notes on Some Relevant Issues*, in *SECESSION AND INT'L L.: CONFLICT AVOIDANCE – REGIONAL APPRAISALS* 245 (Julie Dahlitz

whilst according to another, it should not.<sup>162</sup> Before proceeding to analyse the validity of these respective positions, however, it is first necessary to define the terms “metropolitan power” and “colonial territory.”

The test for determining the difference between a metropolitan power and colonial territory is contained within Resolution 1541,<sup>163</sup> adopted by the General Assembly just one day after the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>164</sup> Principle IV of Resolution 1541 provides: “*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”<sup>165</sup>

Principle V of the same Resolution continues:

Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctiveness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory

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ed. 2003); Haverland, *supra* note 148, at 354–55; Patrick Thornberry, *Self-Determination and Indigenous Peoples: Objection and Responses*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 39, 52–54 (Pekka Aiko & Martin Scheinin eds., 2000); THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 181 (1997); Ouguerouz, *supra* note 148, at 235; *see also* INGRID DETTER DE LUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 15 (2d ed. 1987); Przetacznik, *supra* note 147, at 103; HANNA BOKOR-SZEGŐ, THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION 53 (1978).

162. Hechter, *supra* note 149, at 267; HERACLIDES, *supra* note 4, at 1; Thomas M Franck et al., *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty*, in SELF-DETERMINATION IN INT'L LAW: QUEBEC AND LESSONS LEARNED 283 (Anne F. Bayefsky ed., 2000); Rosalyn Higgins, *Self-Determination and Secession*, in SECESSION AND INT'L LAW: CONFLICT AVOIDANCE—REGIONAL APPRAISALS 35 (Julie Dahlitz ed., 2003); Aleksandar Pavković, *Introduction*, in ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION 1, 2–3 (Aleksandar Pavković and Peter Radan eds., 2008); *see also* Pavković and Radan, *supra* note 6, at 2; Nolte, *supra* note 26, at 65; Jaroslav Tir, *Keeping the Peace After Secession: Territorial Conflicts Between Rump and Secessionist States*, 49 J. OF CONFLICT RESOL. 713, 714 (2005); KOHEN, *supra* note 28, at 3; Dahlitz, *supra* note 148, at 6–7; Dumbery, *supra* note 149, at 19; Trbovich, *supra* note 148, at 1; Bishai, *supra* note 32, at 33; REIN MÜLLERSON, INTERNATIONAL LAW, RIGHTS AND POLITICS: DEVELOPMENTS IN EASTERN EUROPE AND THE CIS 72 (1994); WELHENGAMA, *supra* note 32, at 260–61; Anna Michalska, *Rights of Peoples to Self-Determination in International Law*, in ISSUES OF SELF-DETERMINATION 71, 81 (William Twining ed., 1990); Thomas D. Grant, *Extending Decolonization: How the United Nations Might Have Addressed Kosovo*, 28 GA. J. INT'L & COMP. L. 9, 25–26 (1999); Urs W. Saxer, *The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States*, 14 LOY. L.A. INT'L & COMP. L. REV. 581, 636 (1992); GOODWIN, *supra* note 148, at 264, 277.

163. Declaration on the Granting of Independence, *supra* note 141.

164. *Id.*

165. *Id.* Principle IV.

concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.<sup>166</sup>

Thus, where a territory is “geographically separate and is distinct ethnically and/or culturally from the country administering it” the territory concerned is, *prima facie*, of a colonial nature. The use of the word “administering” is significant as it implies an inherently unequal relationship between the metropolitan power and the colonial territory. Central to this unequal relationship is that the metropolitan power enjoys control, by virtue of its sovereign authority, over the colonial territory. Principle V explicitly builds upon the import of Principle IV, providing that once a *prima facie* “case of geographical and ethnical or cultural distinctiveness of a territory exists, other elements may then be brought into consideration.”<sup>167</sup> These elements may be of an “administrative, political, juridical, economic or historical nature.”<sup>168</sup> If these elements “affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination” it can be safely assumed that the territory concerned is of a colonial nature.<sup>169</sup>

In order to determine whether decolonization—the independence either by consensual or unilateral withdrawal—of a colonial territory from a metropolitan power should be included within the definition of secession, it is necessary to recall the centrality of sovereignty to the secession process as highlighted previously. Bearing this in mind, it must be determined whether a metropolitan power possesses sovereignty throughout its colonial territories.

Sureda, when considering this question, has asserted that:

The idea of trust not being acceptable, the presence of the metropolis in its colonies has gradually been considered illegal unless confirmed by an act of self-determination. This seems to indicate that, within the context of colonialism, self-determination has become a preemptory norm of International Law whereby a state’s title to a territory having colonial status is void.<sup>170</sup>

According to this position the combined effect of Chapter XI of

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166. *Id.* Principle V.

167. *Id.*

168. *Id.*

169. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1541 (XV), U.N. Doc. A/RES/1541(XV) (Dec. 15, 1960).

170. A RIGO SUREDA, THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION: A STUDY OF UNITED NATIONS PRACTICE 353 (1973).

the UN Charter, Resolution 1541<sup>171</sup> and the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>172</sup> is to displace or render "void" the metropolitan power's sovereignty over its colonial territories.

The view propounded by Sureda, however, is an aberrant one, and is not reflected in legal doctrine. In the *Rights of Passage Case (Portugal v India)*,<sup>173</sup> for example, the ICJ held by a majority of 11-4 that Portugal, in 1954, had a right of passage with respect to private persons, civil officials and goods in general over Indian territory surrounding its enclaved territories, Dadra and Nagar-Aveli.<sup>174</sup> By so ruling, the ICJ effectively accepted that Portugal had sovereignty throughout its colonial enclaves. This position was affirmed by the *Western Sahara Case*,<sup>175</sup> where the ICJ held that the request before it, relating to the status of a non-self-governing territory, did not relate to "existing territorial rights or sovereignty over territory."<sup>176</sup> The ICJ thus held that Spain's sovereignty throughout Western Sahara was not in question, but rather its transfer to another state (new or already existing) sometime in the future.<sup>177</sup> Later ICJ cases, such as *Land and Maritime Boundaries Between Cameroon and Nigeria*<sup>178</sup> and *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)*<sup>179</sup> confirmed this position.

The correct view then is that metropolitan powers possess sovereignty throughout their colonial territories, although international law imposes qualifications on the continuing exercise of this sovereignty. Crawford has summarized the position as follows:

The view that sovereignty over a non-self-governing territory remains with the administering State can be accepted only with reservations. That State has accepted far reaching obligations with respect to such territories, obligations not substantially different from those that were accepted by States administering Trust Territories

171. 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).

172. Declaration on the Granting of Independence, *supra* note 141.

173. Case Concerning Right of Passage over Indian Territory (Portugal v. India), Merits, 1960 I.C.J. 6 (Apr. 12).

174. *Id.* at 39; *see generally* FRANK E. KRENZ, INTERNATIONAL ENCLAVES AND RIGHTS OF PASSAGE (1961); CRAWFORD, *supra* note 4, at 614.

175. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

176. *Id.* at 28; CRAWFORD, *supra* note 4, at 615.

177. *See* B.O. Okere, *The Western Sahara Case*, 28 INT'L & COMP. L. Q. 296 (1979).

178. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria), Preliminary Objections, 1998 I.C.J. 275.

179. Case concerning Kasikili/Sedudu Island (Botswana v. Namb.), Judgment, 1999 I.C.J. 1045 (Dec. 13).

under Chapter XII. It is true that the Charter contemplates a greater measure of international supervision of Trust Territories, but even with respect to supervision the two regimes tended to be conflated by subsequent Assembly action. Nonetheless, certain distinctions remained, at least in theory: for example, the plea of domestic jurisdiction was in principle irrelevant to Trust Territories, but was capable of applying to Chapter XI territories, however little that plea may have prevailed in practice. Administering States have more freedom with respect to termination of Non-Self-Governing status than with respect to termination of Trusteeship. And the General Assembly has never claimed or exercised a power to revoke or declare forfeit a State's title to administer a Non-Self-Governing territory: the most it has done is call upon States to terminate such status by granting independence.<sup>180</sup>

*Stricto sensu* colonial territories should thus be classified as constituent parts of the metropolitan power. This conclusion inexorably flows from the very nature of colonisation: a metropolitan power administers (exercises control over) another subordinate territory. Such subordination is the very *discrimen* of colonisation and can only occur if the administered territory is without its own sovereignty. Given this fact, it is entirely appropriate to refer to instances of "decolonization", whereby there is the withdrawal of sovereignty from the metropolitan power and the creation of a new state, as secession.

This interpretation is reflected by the domestic legal structures of the French, Portuguese and British empires. In 1946, for example, the French Fourth Republic was established, which under Article 60 created the French Union, connecting French colonial territories to Paris by a loose federation. This integration—which was achieved without the consultation of the citizens concerned and enshrined the continued economic and political subordination of overseas territories to Paris—explicitly confirmed France's underlying sovereignty throughout its overseas territories.<sup>181</sup> The 1958 French Fifth Republic retained this integrationist structure and remains in force today.

Similarly, the Portuguese colonial empire was integrated into a wider multi-continental Portugal in 1951 by amendment to the 1933 Portuguese Constitution under title 7, entitled *On the Portuguese Overseas*. This integration, which was achieved without the consultation of the citizens, concerned and enshrined the continued

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180. CRAWFORD, *supra* note 4, at 613–14.

181. The validity of the integration is questionable in international law. See Robert Aldrich and John Connell, *France's Overseas Frontier: Départements et Territoires d' Outre-Mer* 62–63 (1992); David A Chappell, *The Noumea Accord: Decolonization Without Independence in New Caledonia?* 72 PAC. AFF. 374 (1999).

economic and political subordination of overseas territories to Lisbon, and explicitly confirmed Portugal's underlying sovereignty throughout its overseas territories.<sup>182</sup>

Although Britain did not adopt the same integrationist approach to its colonial empire, it nonetheless emphasized its underlying sovereignty throughout its colonial territories, even in situations where self-government had been granted by way of devolution.<sup>183</sup> When considering the case of *Madzimbamuto v Lardner-Burke*<sup>184</sup> in the context of Southern Rhodesia, for example, the Privy Council held:

If the Queen in the Parliament of the United Kingdom was Sovereign in Southern Rhodesia in 1965, there can be no doubt that the Southern Rhodesia Act, 1965 and the Order in Council made under it were of full effect there. Several of the learned judges have held that Sovereignty was divided between the United Kingdom and Southern Rhodesia. Their Lordships cannot agree. So far as they are aware it has never been doubted that, when a colony is acquired or annexed, following conquest or settlement, the Sovereignty of the United Kingdom Parliament extends to the colony, and its powers over that colony are the same as its powers in the United Kingdom. So, in 1923, full Sovereignty over the annexed territory of Southern Rhodesia was acquired. That Sovereignty was not diminished by the limited grant of self-government which was then made. It was necessary to pass the Statute of Westminster, 1931, in order to confer independence and Sovereignty on the Six Dominions therein mentioned, but Southern Rhodesia was not included.<sup>185</sup>

The Privy Council later expounded specifically in relation to the convention that the British Parliament would not legislate on matters within the competence of the Legislative Assembly of Southern Rhodesia:

The learned judges refer to a statement of the United Kingdom Government in 1961, already quoted, setting out the convention that the Parliament of the United Kingdom does not legislate without the

182. Again, the validity of the integration is questionable in international law. *See generally* 2 ANTONIO HENRIQUE DE OLIVEIRA MARQUES, HISTORY OF PORTUGAL: FROM EMPIRE TO CORPORATE STATE 227, 229 (2nd ed., 1976); NEIL BRUCE, PORTUGAL OVERSEAS 57–58 (1975); F.C.C. EGERTON, SALAZAR: REBUILDER OF PORTUGAL 262 (1943); Patricia Wohlgemuth, *The Portuguese Territories and the United Nations*, in 545 INT'L CONCILIATION 3 (1963); Inis L. Claude, Jr., *Domestic Jurisdiction and Colonialism*, in NEW STATES AND THE MODERN WORLD 130–32 (Martin Kilson ed., 1975).

183. CRAWFORD, *supra* note 4, at 351.

184. *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645. *See generally* H.H. Marshall, *The Legal Effects of U. D. I. (Based on Madzimbamuto v. Lardner-Burke)*, 17 INT'L & COMP. L.Q. 1022 (1968); CRAWFORD, *supra* note 4, at 351, 369.

185. *Madzimbamuto v. Lardner-Burke*, *supra* note 184, at 722.

consent of the Government of Southern Rhodesia on matters within the competence of the Legislative Assembly. That was a very important convention but it had no legal effect in limiting the legal power [plenary legislative competence] of Parliament.

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.<sup>186</sup>

The foregoing indicates that Britain maintained sovereignty throughout its colonial territories, which despite not being exercised to the fullest extent by convention, was nonetheless an ever-present legal potentiality.

It follows that colonial territories were subject to the overarching sovereignty of their metropolitan power. Once this premise is accepted, it emerges that any withdrawal of this sovereignty to create a new state is secession.

The foregoing discussion has significantly clarified the meaning of secession in the context of international law and relations. Some further definitional issues, however, require examination if a comprehensive legal definition of secession is to be developed—namely, whether a formal declaration of independence is necessary for secession, and whether secession is synonymous with dissolution, devolution and autonomy.

### XIII. IS A FORMAL DECLARATION OF INDEPENDENCE NECESSARY TO ACHIEVE SECESSION?

In order to assess the validity of this requirement, it is necessary to assess the function of a formal declaration of independence.<sup>187</sup> Crawford has suggested that a declaration of independence is “commonly used to refer to the unilateral act by which a group declares that it is seceding and forming a new state. Although usually declaratory in form, a unilateral declaration of independence is not a self-executing act.”<sup>188</sup>

Crawford therefore asserts that a formal declaration of independence *antedates* the outcome of secession and is confined to the unilateral secession process. It is equally possible, however, that a

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186. *Id.* at 722–23.

187. Heraclides has included a formal declaration of independence within his definition of secession. See HERACLIDES, *supra* note 4, at 1.

188. James Crawford, *State Practice and International Law in Relation to Secession*, *Secession*, 69 BRIT. Y.B. OF INT'L L. 85, 86 (1998).

formal declaration of independence may *coincide* with the outcome of secession and thus statehood, thereby signifying, in the opinion of the withdrawing territory, its sovereign and independent status. This may be especially the case where the territory has withdrawn *via* a constitutional or politically negotiated secession process, although it may still be applicable to the unilateral secession process.

With regard to the first type of declaration, namely, *antedating* the outcome of secession, it is clear that the announcement is no more than a declaration of intent; that is, the withdrawing territory is publicly announcing its intention to pursue the process of secession, and therefore, could not be viewed as decisive to the outcome itself.

With regard to the second type of declaration, namely, *coinciding* with the outcome of secession, it must be determined, by reference to the criteria for statehood based on effectiveness and compliance with peremptory norms, whether a formal declaration of independence is legally necessary. Recall that Article 1 of the 1933 Montevideo Convention on the Right and Duties of States provides that “[t]he state as a person on 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 other states.”<sup>189</sup>

Hence, no indication is provided within the criteria for statehood based on effectiveness that a formal declaration of independence is necessary for the creation of a new state. Regarding the criteria for statehood based on compliance with peremptory norms, it is clear that the only restrictions imposed upon putative secessionist states are that they are not born of peremptory norm violations. Should a declaration of independence be issued by a putative secessionist state which has breached a peremptory norm during its formative process, as indicated by the *Kosovo Advisory Opinion*,<sup>190</sup> such a declaration would be unlawful. It emerges then that although a formal declaration of independence might be politically useful for secession, it is legally unnecessary.

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189. Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19, art. 1(d).

190. Unilateral Declaration of Independence, *supra* note 142, ¶ 81; Jure Vidmar, *Conceptualizing Declarations of Independence and International Law*, 32 J. LEGAL STUD. 153, 24 (2012); Besfort Rrecaj, *A Contemporary Interpretation of the Principles of Sovereignty, Territorial Integrity and Self-Determination, and the Kosovo Conundrum*, in *KOSOVO: A PRECEDENT? THE DECLARATION OF INDEPENDENCE, THE ADVISORY OPINION AND IMPLICATIONS FOR STATEHOOD, SELF-DETERMINATION AND MINORITY RIGHTS* 130–31 (James Summers ed., 2011); Gulara Guliyeva, *Kosovo's Independence: Re-Examining the Principles Established by the EC Badinter Commission in Light of the ICJ's Advisory Opinion*, in *KOSOVO: A PRECEDENT?* 279 (2011).

## XIV. IS DISSOLUTION SECESSION?

The etymology of “dissolution” lies in the Latin term “*dissolutus*” meaning “to loosen up” or “break apart.”<sup>191</sup> The *Oxford English Dictionary* concomitantly defines “dissolution” as “disintegration” and the “undoing of . . . bond[s].”<sup>192</sup> In the context of international law and relations, the term is used to denote the legal extinction, as opposed to continuity, of the existing state, after one or more secessions have taken place. As such, dissolution describes an outcome that crystallizes *after* one or more secessions have occurred. Crawford, in this connection, has observed:

It is necessary to distinguish unilateral secession of part of a State and the outright dissolution of the predecessor State as a whole. In the latter case there is, by definition, no predecessor State continuing in existence. But the distinction between dissolution of a State and unilateral secession of part of a State may be difficult to draw in particular cases. The dissolution of a State may be initially triggered by the secession or attempted secession of one part of that State. If the process goes beyond that and involves a general withdrawal of all or most of the territories concerned, and no substantial central or federal component remains behind, it may be evident that the predecessor State as a whole has ceased to exist.<sup>193</sup>

Craven, substituting the term “dismemberment” for “dissolution” has similarly observed:

Dismemberment . . . is merely descriptive of a form of extinction following the disassociation [secession] of various territorial units. As such, it can only really be attributed to a situation *ex post facto* once the lack of continuity of the [existing] State has been finally determined.<sup>194</sup>

Or, as Lalonde has noted: “[t]he principal distinction between dissolution and secession lies in the fact that in a case of dissolution there is no ‘parent’ state entitled to insist on respect for its territorial integrity.”<sup>195</sup>

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191. *Dissolve*, ONLINE ETYMOLOGY DICTIONARY, [http://www.etymonline.com/index.php?term=dissolve&allowed\\_in\\_frame=0](http://www.etymonline.com/index.php?term=dissolve&allowed_in_frame=0) (last visited Feb. 18, 2013); *Dissolute*, ONLINE ETYMOLOGY DICTIONARY, [http://www.etymonline.com/indexindex.php?term=dissolute&allowed\\_in\\_frame=0](http://www.etymonline.com/indexindex.php?term=dissolute&allowed_in_frame=0) (last visited Feb. 18, 2013).

192. 4 THE OXFORD ENGLISH DICTIONARY, 513 (2d ed. 1989).

193. Bayefsky, *supra* note 162, at 42.

194. Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. INT’L L. 333, 369 (1995).

195. SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTING WORLD: THE ROLE OF UTI POSSIDETIS 221 (2002). For further discussion of the distinction between secession

Thus, one or more secessions from an existing state may, after this process or processes are complete, result either in (1) the creation of a new state or states; or (2) the creation of a new state or states, and, if the existing state is rendered extinct, also constitute a situation of dissolution. Hence, although secession and dissolution are related phenomena, they are not, strictly speaking, synonymous.<sup>196</sup>

Most secessions do not result in the existing state's dissolution, as international law preferences the continuity of states even if they are drastically diminished in terms of territory, population and resources.<sup>197</sup> A good illustration of this preference occurred in 1991 when, following the secession of ten member republics, the continuity of the Union of Soviet Socialist Republics (USSR)—with the new name “Russian Federation”—was upheld by the UN and without protest from other states.<sup>198</sup> As Shaw has observed:

[D]espite the approach taken in December 1991 CIS documentation proclaiming the end of the USSR in terms which in law would suggest dissolution or dismemberment of that entity thus logically precluding continuity, it is clear from all the circumstances that this was an essentially political statement not taken by either the parties themselves or by third States as constituting a proclamation of dissolution preventing claims by Russia of continuity. On the

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and dissolution, see Rodoljub Etinski, *Has the SFR of Yugoslavia Ceased to Exist as a Subject of International Law*, in INT'L L. AND THE CHANGED YUGOSLAVA 289 (Radovan Petkovic ed., 1995), especially the remarks by Sir Francis Vallet at 29.

196. Crawford has observed that, “[it] is true that the distinction between dismemberment and a series of secessions may be in the eyes of the beholder . . . .” CRAWFORD, *supra* note 4, at 714.

197. CRAWFORD, *supra* 4, at 93, 189; Milenko Kreča, *Succession and the Continuity of Yugoslavia*, 33 JUGOSLOVENSKA REVUJA ZA MEDUNARODNO PRAVO 181 (1992).

198. On 24 December, for example, the Russian Permanent Member to the UN directed a letter to the UN Secretary General from the President of the Russian Federation, Boris Yeltsin, stating, *inter alia*, “the membership of the Union of Soviet Socialist Republics in the United Nations, including the Security Council and all other organs and organizations of the United Nations system is being continued by the Russian Federation (RSFSR) with the support of the countries of the Commonwealth of Independent States. In this connection, I request that the name “Russian Federation” should be used in the United Nations in place of the name [USSR]. The Russian Federation maintains full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations, including financial obligations.” *quoted in* CRAWFORD, *supra* note 4, at 677. A former Foreign Minister of the Russian Federation has written that “Russia, as the continuing State of the USSR, intends to promote in every possible way the strengthening of the United Nations.” Andrei Kozyrev, *Russia: A Chance for Survival*, 71 FOREIGN AFF. 11 (1992); *see generally*, Yehuda Z. Blum, *Russia Takes Over the Soviet Union's Seat at the United Nations* 3 EUR. J. INT'L L. 361 (1992); David O. Lloyd, *Succession, Secession, and State Membership in the United Nations*, 26 N.Y.U. J. OF INT'L L. & POL. 777 (1994); Müllerson, *supra* note 58, at 477; In another context, Müllerson, after extensive analysis, has written that “Russia really does continue the existence of the Soviet Union, albeit with diminished borders and with a diminished population” (Rein Müllerson, *Law and Politics in Succession of States: International Law on Succession of States*, in DISSOLUTION, CONTINUATION AND SUCCESSION IN EASTERN EUROPE, 11 (Brigitte Stern ed., 1998).

contrary,<sup>199</sup> Russia's continuity was asserted and supported by all parties.

Accordingly, only in the very rare circumstances where one or more secessions result in *no* semblance of the existing state will dissolution also have occurred.

One example of the foregoing is the former Socialist Federal Republic of Yugoslavia (SFRY). From 1992 onwards, despite the Belgrade government adducing evidence that the SFRY continued to exist, the international community increasingly held that the SFRY was extinct. In November 1991, for example, Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia<sup>200</sup> indicated that the SFRY was in a process of dissolution.<sup>201</sup> In May 1992, the Security Council in Resolution 757 confirmed this interpretation, noting that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted."<sup>202</sup> In July 1992, Opinion No. 8 of the Arbitration Commission of the Peace Conference on Yugoslavia,<sup>203</sup> noting a European Council Declaration and Resolution 757, asserted that "the SFRY no longer exists."<sup>204</sup> In September of the same year, the Security Council in Resolution 777 echoed this view, asserting that "the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist."<sup>205</sup> The same Resolution noted that "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations."<sup>206</sup> This position was maintained by later Security Council resolutions such as, *inter alia*, Resolution

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199. Malcolm N. Shaw, *State Succession Revisited*, 5 FINNISH Y.B. INT'L L. 34, 49–50 (1994).

200. Maurizio Ragazzi, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia*, 31 I.L.M. 1488, 1494–96 (1992).

201. It should be noted, however, that to speak of dissolution as a process is problematic. Craven, for example, has correctly observed that "[i]f the issue is simply whether or not a State continues to exist, it makes no sense to speak of dismemberment as a process." Craven, *The European Community Arbitration*, *supra* note 194, at 369; *see generally* regarding Opinion No. 1, CRAWFORD, *supra* note 4, at 710; RADAN, *THE BREAK-UP OF YUGOSLAVIA*, *supra* note 89, at 204–05.

202. S.C. Res. 757, *Mandatory Sanctions Against Federal Republic of Yugoslavia (Serbia and Montenegro)*, U.N. Doc. S/RES/757 (May 30, 1992).

203. *Conference on Yugoslavia Arbitration Commission*, *supra* note 200, at 1521–23.

204. *Id.* at 1521; *see generally* CRAWFORD, *supra* note 4, at 710; RADAN, *THE BREAK-UP OF YUGOSLAVIA*, *supra* note 89, at 205–07.

205. S.C. Res. 777, U.N. Doc. S/RES/777 (Sept. 16, 1992).

206. *Id.*

1022.<sup>207</sup> The General Assembly took a less decisive view, but nonetheless maintained that:

the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly.<sup>208</sup>

The question might be asked, therefore, why the USSR was held to continue as a state, but the SFRY was not? Aside from political concerns,<sup>209</sup> there was one principal legal reason, namely, that the SFRY—unlike the USSR—did not form the majority of territory and population of the original state. This fact, more than any other, militated against the claim that the Federal Republic of Yugoslavia (Serbia and Montenegro) essentially represented the continuation of the SFRY.<sup>210</sup> *A priori*, it also militated against the claim that the SFRY had experienced multiple secessions without also experiencing dissolution.

One possible exception to this statement of general principle, however, was the secession and dissolution of the Czech and Slovak Federal Republic (CSFR), which was achieved by voluntary agreement on 31 December 1992 and replaced by two new states: the Czech Republic and Slovakia. As Crawford has suggested, the fact that the majority of territory, population and economic resources of the former CSFR were concentrated in the Czech Republic might have indicated that this was not a case of secession *and* dissolution, but instead only secession.<sup>211</sup>

In conclusion it can be said that secession and dissolution, although related phenomena, are not synonymous. Dissolution only occurs *after* one or more secessions have taken place and the existing state is rendered extinct.

207. S.C. Res. 1022, Immediate Suspension of Sanctions on Federal Republic of Yugoslavia (Serbia and Montenegro), U.N. SCOR, 3595th mtg., U.N. Doc. S/RES/1022 (Nov. 22, 1995).

208. G.A. Res. 47/1, Recommendation of the Security Council, U.N. GAOR, U.N. Doc. A/RES/, ¶ 1 (Sept. 22, 1992).

209. These political concerns essentially related to the alleged advantage that the SFRY would obtain if it could in any way characterize the Yugoslav conflict as a civil war. See CRAWFORD, *supra* note 4, at 709, 714; Craven, *The European Community Arbitration*, *supra* note 194, at 354–55.

210. CRAWFORD, *supra* note 4, at 707.

211. *Id.*; Paul R. Williams, *State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations*, 43 INT'L & COMP. L.Q. 776 (1994).

## XV. IS DEVOLUTION SECESSION?

The etymology of “devolution” lies in the Latin term “*deolvere*” meaning “to roll down.”<sup>212</sup> This is mirrored in the *Oxford English Dictionary* which defines “devolution” as “[t]he passing of . . . power [and] authority” and “[t]he causing of authority, duties, or the like to fall upon a substitute or substitutes.”<sup>213</sup> In the context of international law and relations, the term is commonly used to describe a central government’s voluntary grant of certain legislative powers to regional or local government.<sup>214</sup> The granting of legislative power is temporary and can at any time be unilaterally withdrawn by the central government, which still retains plenary legislative competence and hence, sovereignty.<sup>215</sup> Unlike secession, a new state is not created. It follows that devolution should not be included within the definition of secession.

Noteworthy is that the meaning of “devolution” adopted above conflicts with Crawford’s definition of the same concept, namely: “the grant[ing] of independence by the previous sovereign.”<sup>216</sup> The use of the words “grant”, “independence” and “previous sovereign” indicate that for Crawford, devolution connotes the creation of a new state over part of the territory of an existing state with the latter’s consent.<sup>217</sup> As hitherto indicated such a turn of events is more correctly characterized as constitutional or politically negotiated secession.

## XVI. IS AUTONOMY SECESSION?

The etymology of “autonomy” lies in the Greek term “*autonomos*” which means “to live by one’s own laws.”<sup>218</sup> The *Oxford English Dictionary* correspondingly defines “autonomy” as the “right of self-government, of making one’s own laws.”<sup>219</sup> Scholarly definitions of

212. *Devolve*, ONLINE ETYMOLOGY DICTIONARY, at [http://www.etymonline.com/index.php?termsearch=devolve&allowed\\_in\\_frame=0](http://www.etymonline.com/index.php?termsearch=devolve&allowed_in_frame=0) (last visited Feb. 18, 2013).

213. 4 THE OXFORD ENGLISH DICTIONARY, 577–78 (2d ed. 1989).

214. During 1999, Britain’s Blair Government used devolutionary measures to create the Scottish Parliament, National Assembly for Wales, and the Northern Ireland Assembly. Devolutionary measures have also been used to create self-rule for Greenland (Denmark), the Faroe Islands (Denmark), Aruba (The Netherlands,) and the Netherlands Antilles (The Netherlands).

215. Stephen Young, *Devolution in the United Kingdom: A Revolution on Online Legal Research*, LLRX (June 1, 2001) 1, <http://www.llrx.com/authors/394>.

216. CRAWFORD, *supra* note 4, at 330.

217. *Id.*

218. *Autonomy*, ONLINE ETYMOLOGICAL DICTIONARY <http://www.etymonline.com/index.php?se arch=autonomy&searchmode=none> (last visited Feb. 24, 2013); see also LAPIDOTH, *supra* note 14, at 29.

219. 1 THE OXFORD ENGLISH DICTIONARY, 575 (Clarendon Press, 1933).

autonomy concur.

Lapidoth, for example, has suggested: "A territorial political autonomy is an arrangement aimed at granting a group that differs from the majority of the population in the state, but that constitutes the majority in a specific region, a means by which it can express its distinct identity."<sup>220</sup> Crawford has similarly written: "[A]utonomous areas are regions of a State, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the State of which they are part."<sup>221</sup> Or as has been observed by Hannum and Lillich: "Generally autonomy is understood to refer to independence of action on the internal or domestic level, as foreign affairs and defense normally are in the hands of the central or national government . . . ."<sup>222</sup>

It emerges from the foregoing that autonomous regions operate in a manner akin to states. Unlike states, however, autonomous regions do *not* enjoy sovereignty and hence standing in international law. This is because they exist *within* states and their quasi-independent status can often be revoked or modified by the central government, which still retains plenary legislative competence.<sup>223</sup> As autonomy does not result in a grant of statehood, it is submitted that it should *not* be included within the definition of secession.<sup>224</sup>

## XVII. A COMPREHENSIVE LEGAL DEFINITION OF SECESSION

To recapitulate, in the context of international law and relations, "secession" refers to: The withdrawal of territory (colonial or non-colonial) from part of an existing state to create a new state.

220. Lapidoth, *supra* note 14, at 33.

221. CRAWFORD, *supra* note 4, at 323.

222. Hurst Hannum & Richard B Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L L. 858, 860 (1980). Other scholars have provided similar definitions: Hans-Joachim Heintze, *On the Legal Understanding of Autonomy*, in AUTONOMY: APPLICATIONS AND IMPLICATIONS 7 (Markku Suksi ed., 1998); Savante E Cornell, *Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Perspective*, 54 WORLD POL. 245, 249 (2002); Montserrat Guibernau, *Nations Without States: Political Communities in the Global Age*, 25 MICH. J. INT'L L. 1251, 1260 (2004); MICHAEL HECHTER, CONTAINING NATIONALISM 114 (2000); TIM POTIER, CONFLICT IN NAGORNO-KARABAKH, ABKHAZIA AND SOUTH OSSETIA: A LEGAL APPRAISAL 54 (2001); Stefan Wolff and Marc Weller, *Self-Determination and Autonomy: A Conceptual Introduction*, in AUTONOMY, SELF-GOVERNANCE AND CONFLICT RESOLUTION: INNOVATIVE APPROACHES TO INSTITUTIONAL DESIGN IN DIVIDED SOCIETIES 1, 13 (Marc Weller and Stefan Wolff eds., 2005); Louis B Sohn, *The Concept of Autonomy in International Law and the Practice of the United Nations*, 15 ISR. L. R. 180, 190 (1980).

223. This is confirmed by Heintze, who, when defining "autonomy" states "parts of the state's territory are authorized to govern themselves in certain matters by enacting laws and statutes, but without constituting a state of their own." Heintze, *supra* note 222, at 7.

224. *Contra* Von Hippel, *supra* note 148, at 186.

To this *prima facie* definition, however, we may add the following supplementary points:

*First*, secession is a process which leads to an outcome. The outcome of secession is not defined in relation to the specific process by which it is achieved.

*Second*, secession may occur according to two general processes: consensual and unilateral. The former can be divided into constitutional and politically negotiated secession.

*Third*, generally speaking, the process of secession ends and the outcome occurs when the criteria for statehood based on effectiveness are satisfied and no breaches of peremptory norms of international law (*jus cogens*) can be identified during the putative secessionist state's formative process.

*Fourth*, recognition does not determine when the process of secession ends and the outcome occurs because the declaratory recognition theory, which provides that statehood antedates recognition, is generally recognized as most closely representing *lex lata vis-à-vis* international law. Accordingly, it is theoretically conceivable that the outcome of secession may occur in the total absence of third state recognition (however politically and practically important recognition in such a context may be).

*Fifth*, the previous point is correct unless the total absence of third state recognition is based upon breaches of peremptory norms of international law (*jus cogens*) during the putative secessionist state's formative process. In such a case, the process of secession will be ongoing, and the outcome will not have occurred. Generally, the outcome will be unobtainable and the putative secessionist state will languish as a stateless entity with the prospect of reabsorption by the existing state.

*Sixth*, when secession occurs there is no need for a formal declaration of independence from the (putative) secessionist state. This rule is equally applicable in the context of a formal declaration of independence antedating or coinciding with the outcome of secession.

*Seventh*, and finally, secession is distinguishable from:

- i) *Annexation*, defined as the forcible incorporation, in whole or part, of an existing state's territory by another existing state.
- ii) *Cession*, defined as an existing state's transfer of part of its territory to another existing state, without regard for the desires of the population within the transferring territory.
- iii) *Irredentism*, defined as the amalgamation of an existing state's territory, in whole or part, with another existing state.
- iv) *Dissolution*, defined as the outcome of one or more

secessions from an existing state, facilitating the latter's extinction.

- v) *Devolution*, defined as the voluntary grant of certain legislative powers to a lower level of government and without a transfer of sovereignty.
- vi) *Autonomy*, defined as the power of a sub-state region to regulate its own affairs by enacting legal rules but without a transfer of sovereignty.

Arriving at a justified definition of secession is critical in the context of international law and relations as secession is a well-recognised method of state creation. Rather than assuming (erroneously) that there is a commonly accepted definition of secession, or propounding an arbitrary definition devoid of justification, it is incumbent upon scholars to invoke a more exacting approach. Indeed, when we speak of secession as scholars, it is important to pause and ask: "what are we talking about?"