When in the Course of Human Events: Kosovo's Independence and the Law of Secession

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I. A DECLARATION OF INDEPENDENCE

On February 17, 2008, Kosovo declared independence from Serbia.[1] Although the declaration came as no surprise, the international response to this act of unilateral secession has been mixed. Serbia condemned the declaration as a criminal act by Kosovo's leaders, but the United States and a handful of other prominent states immediately recognized Kosovo as a new sovereign state.[2] This recognition was condemned by Serbia and Russia, along with various other states with their own secessionist concerns, as a violation of international law.[3] Most states, though, harboring legitimate concerns about the legality of the secession and its global consequences, simply chose not to offer recognition.[4]

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1. *Kosovo MPs Proclaim Independence*, BBC NEWS, Feb. 17, 2008, http://news.bbc.co.uk/2/hi/europe/7249034.stm.

2. Condoleezza Rice, Sec'y of State, U.S. Dep't of State, U.S. Recognizes Kosovo as Independent State (Feb. 18, 2008), http://www.state.gov/p/eur/ci/kv/index.htm.

3. *Id.*

4. As of November 2008, fifty-three states have officially recognized Kosovo. Among these are all the members of the G7 and twenty-two Members of the European Union. Bosnia

The viability of a state depends, in practical terms, on the acceptance of its existence by other international actors. Kosovo's fate as an independent state is strongly tied to its approval by the other states with whom it aspires to join as an equal. The supporters and opponents, therefore, will likely seek to sway international opinion with the future viability of an independent Kosovo held in the balance. A primary argument in this effort on both sides will be over the legality of Kosovo's secession.

Those legal arguments must rely on the relative importance of certain international legal principles, with opponents extolling the credentials of fundamental principles like territorial integrity and nonintervention, while supporters champion the overriding importance of self-determination.[5] The apparent conflict between some of these principles has fostered a precarious and constantly shifting balance to shape state behavior. Arguments over the legality of Kosovo's independence must seek to define the current state of that balance and characterize the relevant facts of Kosovo's situation to fit their purposes.

The monolithic character of nonintervention and territorial integrity in international law means that supporters of Kosovo's independence, armed with the developing and controversial principle of self-determination, face an uphill battle. While this difficulty means that friends of an independent Kosovo will likely choose an approach based primarily on realist political tactics, the legal argument should not be so easily dismissed. The legality of Kosovo's secession can be strongly advocated with a focus on Kosovo's place in the history of Yugoslav disintegration and the expanding character of the legal significance of self-determination. A careful analysis of the law of self-determination and the impact of the territorial principle of *uti possidetis* coupled with a sensible description of the facts on the ground before and since international intervention in 1999 form a strong argument in favor of

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and Herzegovina is the only breakaway Republic that has not recognized Kosovo; predictably, the Republika Srpska Government has officially condemned the declaration while simultaneously announcing that Kosovo's action precedentially supports the entity's own secessionist aspirations. *Serbs Hint Future Secession Move from Bosnia*, EUBUSINESS, Feb. 22, 2008, http://eubusiness.com/newseu/1203636721/?serachterm=serbs%20Hint%20Future. States that have not recognized Kosovo cite a variety of reasons, including the need for more time, deference to the U.N. Security Council, illegality, concern for setting a precedent, and the desire to oppose U.S. foreign policy. Paul Haven, *The Kosovo Conundrum: Nations Around the World Ponder Whether To Recognize Kosovo*, ABC NEWS, Feb. 22, 2008, http://abcnews.go.com/International/wireStory?id=4331515; *see also* Amir Mizroch, *Israel Won't Recognize Kosovo, for Now*, JERUSALEM POST, Feb. 19, 2008, *available at* http://www.jpost.com/servlet/Satellite?pagename=JPost%2FPArticle%2FshowFull&cid=1203343699593.

5. *Cf.* U.N. Charter art. 1, para. 2, art. 2, para. 4, art. 55.

Kosovo's emergence as a sovereign independent state with all the rights and obligations which that legal personality entails.

II. AWAKENING FROM THE DREAM OF YUGOSLAVIA

The history of the Yugoslav State can be described as the rise and fall of Serbian dominance in the Balkans.[6] After acquiring Kosovo, Sandjak, and northern Macedonia during the Balkan Wars of 1912 and 1913, the Kingdom of Serbia sided with the victors of World War I and enlarged its territory after the war to include Bosnia, Croatia, Slovenia, Montenegro, and Vojvodina.[7] The State was renamed Yugoslavia as it now encompassed almost all the territory inhabited by Southern Slavs.[8] However, its rulers in Belgrade held firmly to Serbian dominance, dissuading other ethnic groups from fully embracing the concept of a unified state.[9] World War II saw Yugoslavia conquered and divided up by the Axis powers but reunited toward the end of the war by a successful Communist guerilla insurgency.[10] The postwar state, known as the Socialist Federal Republic of Yugoslavia (SFRY), was remodeled as a Stalinist-style federation composed of six republics (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) and two autonomous territories within Serbia (Kosovo, populated primarily by ethnic Albanians, and Vojvodina, with a large Hungarian population).[11]

In 1974 Yugoslavia achieved its highest level of federal power sharing with a new constitution providing for a weak central government and a combined executive with representatives from all eight regions.[12] The union remained intact despite the weakness of the central government due to the power of the Communist Party ruling in a one-party system under Josip Broz Tito.[13] However, the death of Tito in 1980 weakened the party, and as the socialist economy fell apart, regional leaders gained power through nationalist populism.[14]

The most infamous of these leaders was Slobodan Milosevic in Serbia. In his rise to power, he cultivated and exploited resentment by

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6. Stefan Oeter, *Yugoslavia, Dissolution*, *in* 4 ENCYCLOPEDIA OF PUB. INT'L L. 1563, 1604 (2000).
7. *Id.* at 1564.
8. *Id.* at 1563-64.
9. *Id.* at 1564-66.
10. *Id.* at 1565.
11. *Id.* at 1565-66, 1590.
12. *Id.* at 1565-66.
13. *Id.*
14. *Id.* at 1566.

Serbs over Kosovo's independent status.[15] While Kosovo was technically a part of Serbia it enjoyed almost complete autonomy within the federation.[16] In 1989, the republican Serbian Government seized control of Kosovo, imposed martial law, and succeeded in revoking the region's constitutional status as an autonomous territory.[17] That same year, the Milosevic regime took over the Vojvodina region and successfully instigated a pro-Serbian coup in Montenegro.[18]

Meanwhile, the other four republics, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia, had begun democratic reforms.[19] Wary of Serbian dominance in the federal government, they focused on their internal institutions, achieving a degree of Western modernization.[20] Democratization paved the way for the rise of nationalist leaders and independence movements.[21]

The end of Yugoslavia began June 25, 1991, when Croatia and Slovenia declared independence from the SFRY.[22] At the time, the European Community and the United States condemned the declarations.[23] The European Community successfully brokered a three-month cease-fire agreement hoping peaceful negotiations could prevail.[24] However, the activities of local militias in Croatia continued and full-scale civil war broke out.[25]

Disagreement arose among EC Member States as to how to respond to the crisis. Some Members, notably France and the United Kingdom, sought a solution that would preserve the territorial integrity of Yugoslavia, but others, Germany in particular, were ready to recognize Croatia and Slovenia as independent states.[26] Ultimately, the EC Members agreed to establish a process by which to decide collectively whether to recognize the independence of any breakaway Yugoslav Republics.[27] They created the Arbitration Commission of the International Conference for Peace in Yugoslavia headed by French Judge Robert Badinter (Badinter Commission) to address legal questions

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15. *Id.* at 1566, 1590.
16. *Id.*
17. *Id.*
18. *Id.* at 1566.
19. *Id.* at 1566-67.
20. *See id.* at 1567.
21. *See id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 1568.
27. *Id.* at 1569.

related to the crisis and to determine whether an applicant republic had met the criteria established by the European Community for recognition.[28]

By this time Bosnia-Herzegovina and Macedonia had also declared independence and the Badinter Commission's Opinion No. 1 stated that the SFRY was in a "process of dissolution."[29] In answer to the question whether the Serb populations of Croatia and Bosnia-Herzegovina had a right to self-determination, the Commission's Opinion No. 2 held that the right of self-determination "must not involve changes to existing frontiers at the time of independence" absent mutual consent among the states involved.[30] It tempered this pronouncement with the exhortation that "norms of international law require states to ensure respect for the rights of minorities."[31]

The guidelines established by the European Community for recognition included respect for the rule of law, democracy and human rights, minority rights, and the inviolability of peacefully determined international boundaries.[32] On January 11, 1992, the Badinter Commission released its opinions on the application of all four breakaway republics.[33] Slovenia and Macedonia were deemed to have met the requirements.[34] Croatia, however, had not fulfilled its obligations to its minority Serb community, and Bosnia-Herzegovina was found not to have sufficiently indicated its desire for independence and needed to demonstrate that desire via a referendum.[35] Despite the Badinter Commission's findings, Slovenia and Croatia were recognized by the European Community.[36] Bosnia-Herzegovina held a referendum, boycotted by the Serbs, that overwhelmingly indicated its will to be independent, and the European

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28. *Id.*; *see also* Danilo Türk, *Recognition of States: A Comment*, 4 EUR. J. INT'L L. 66, annex 1 (1993) (Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union').

29. Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178, app. (1992) (Badinter Commission Opinion No. 1); *see also* Oeter, *supra* note 6, at 1569.

30. Pellet, *supra* note 29, app. (Badinter Commission Opinion No. 2).

31. *Id.*; *see also* JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW: HOW NATIONALISM AND SELF-DETERMINATION SHAPE A CONTEMPORARY LAW OF NATIONS 270 (2007).

32. Türk, *supra* note 28, annex 1 (Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union').

33. *See* Pellet, *supra* note 29, app. (Badinter Commission Opinions Nos. 4-7).

34. *See id.* (Badinter Commission Opinions Nos. 6-7).

35. *See id.* (Badinter Commission Opinions Nos. 4-5).

36. John Dugard & David Raič, *The Role of Recognition in the Law and Practice of Secession*, *in* SECESSION, INTERNATIONAL LAW PERSPECTIVES 94, 127-28 (Marcelo G. Kohen ed., 2006); Oeter, *supra* note 6, at 1571.

Community recognized the new state immediately afterwards.[37] All three states acceded to U.N. membership four months later.[38] The European Community never acted on the Badinter Commission's recommendation for Macedonia due to Greece's grievance over the name of the new state.[39] In April 1993, Macedonia was admitted to the United Nations under the name "Former Yugoslav Republic of Macedonia" though no EC Member had individually recognized the new state.[40] Finally, in May 2006, Montenegro conducted a referendum on independence and, with fifty-five percent approving, became the last of the Yugoslav Republics to attain independence.[41]

Meanwhile, the situation in Kosovo had worsened significantly under Serbian occupation during the 1990s. Ethnic Albanians were denied the right to participate in government life and were treated to discriminatory segregation for health care and education.[42] Furthermore, they were subject to rampant human rights abuses by the Serbian authorities including beatings, arbitrary arrests, and torture.[43] The Kosovar Albanian leaders held a referendum in 1992 in which the population overwhelmingly chose independence from Serbia.[44]

However, the international community, while expressing concern about the situation in Kosovo, did not press the issue. Sanctions against Belgrade were lifted and the Dayton Peace Accords were signed without any answer to the Kosovo question.[45] A violent resistance emerged in Kosovo in the late nineties and was met by harsh response from the Serb authorities in which civilians were directly targeted in a campaign of ethnic cleansing.[46] By 1998 the crisis had produced an estimated 230,000 Kosovar Albanian refugees.[47]

The international community doggedly pursued a peaceful solution. The United Nations Security Council issued chapter VII resolutions demanding that the parties observe a cease-fire and negotiate an

37. Dugard & Raič, *supra* note 36, at 130-32; Oeter, *supra* note 6, at 1571.
38. Oeter, *supra* note 6, at 1571.
39. *Id.* at 1571-72.
40. *Id.* at 1572.
41. *Montenegro Declares Independence*, BBC NEWS, June 4, 2006, http://news.bbc.co.uk/2/hi/europe/5043462.stm.
42. Oeter, *supra* note 6, at 1590.
43. *Id.*
44. *Id.* at 1590-91.
45. *Id.* at 1591.
46. *Id.*
47. *Id.* at 1592.

agreement with international supervision.[48] Nevertheless, Serbia's continued resistance to international demands exhausted attempts by Western powers to broker a peaceful agreement.[49] On March 24, 1999, the North Atlantic Treaty Organization (NATO) commenced a military air campaign against Serbia.[50] The eleven-week campaign ended with the withdrawal of Serbian forces from Kosovo.[51] The United Nations Security Council then quickly adopted Resolution 1244 providing for U.N. administration of Kosovo.[52]

Resolution 1244 established the United Nations Interim Administration Mission in Kosovo (UNMIK) to oversee the administration of the region and carry out the resolution's mandate.[53] UNMIK's mission was multifaceted. Among its many duties were to perform civilian administrative functions, to promote human rights, to coordinate humanitarian relief and the reconstruction of infrastructure, to maintain civil law and order, and to assure the safe return of refugees.[54] UNMIK was further charged with promoting autonomy and democratic self-government and "[f]acilitating a political process designed to determine Kosovo's future status."[55]

To aid in the vital task of resolving Kosovo's status, the United Nations appointed former President of Finland Martii Ahtisaari as Special Envoy to Kosovo to engage in talks between Kosovo and Serbia on the future of Kosovo.[56] The results of the Envoy's work were released in March 2007 as the Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Proposal).[57] The Ahtisaari Proposal, though it never mentions independence, was understood as a plan for "[i]ndependence with international supervision" and called for the creation of a constitution for Kosovo as a multiethnic democracy respecting human and minority rights.[58] Serbia, decrying independence

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48. S.C. Res. 1160, U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. Doc. S/RES/1199 (1998); Oeter, *supra* note 6, at 1591.

49. Oeter, *supra* note 6, at 1591-93.

50. *Id.* at 1593.

51. *Id.* at 1594.

52. S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999); *see also* Oeter, *supra* note 6, at 1594.

53. S.C. Res. 1244, *supra* note 52.

54. *Id.*

55. *Id.*

56. Special Envoy to Kosovo, *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, U.N. Doc. S/2007/168 (2007).

57. The Secretary-General, *Comprehensive Proposal for the Kosovo Status Settlement, delivered to the Security Council*, U.N. Doc. S/2007/168/Add.1 (2007) [hereinafter *Ahtisaari Proposal*].

58. *Id.*

as a non-option, refused to accept the plan.[59] The Security Council was also unable to agree on the final draft of the proposal due to Russian resistance.[60] The proposal finally died without Security Council agreement in the summer of 2007.[61]

Frustrated by the lack of progress under U.N. administration, the European Union unilaterally planned to take over UNMIK's operation in the region with a team designed to aid Kosovar authorities to achieve self-sufficient modern government.[62] Those authorities, equally frustrated, took it upon themselves to formally announce their independence. The resulting situation is an independent Kosovar Government operating with significant foreign administrative aid and protected by foreign troops. While the United States promptly granted formal recognition of Kosovo as a sovereign independent state, it emphasized the administration's desire that Kosovo adhere to the Ahtisaari Proposal.[63] Indeed, Kosovo's current status could be most aptly characterized as "[i]ndependence with international supervision."[64]

III. THE LAW OF SECESSION

Secession occurs when part of an existing state separates from that state to become a new state or to join with another. In this way, secession is primarily a matter of fact rather than law. International legal issues arise, however, in relation to the seceding entity's legal personality as well as its rights and obligations under international law and the rights and obligations of third states as a consequence of that secession.[65] The legality of a secession, and consequently of the seceding state, turns on the application of various legal principles rather than on a coherent "law of secession."[66]

A. Territorial Integrity and Nonintervention

The primary principles invoked by those contesting the legality of a secession are the principles of territorial integrity and nonintervention.

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59. Dugard & Raič, *supra* note 36, at 130.

60. *See* General Rapporteur, *Committee Report on Kosovo and the Future of Balkan Security*, ¶¶ 24, 70, *delivered to the NATO Parliamentary Assembly*, NATO Doc. 051 CDS 08 E (May 27, 2008), *available at* http://www.nato-pa.int/Defaultasp?SHORTCUT=1480.

61. *See id.* ¶ 5.

62. *See* Council Joint Action 2008/124/CFSP, 2008 O.J. (L 042) 92-93.

63. Rice, *supra* note 2.

64. *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, *supra* note 56.

65. Dugard & Raič, *supra* note 36, at 95.

66. *Id.*

Both principles are enshrined in the United Nations Charter and are fundamental norms of the international legal system.[67] It is argued that any act by a third state to further secessionist movements is a violation of the Charter.[68] Many states have cited this rule when refusing to recognize a seceding state, but at other times, states seem to ignore the principle. However, the Badinter Commission's characterization of the Balkan crisis as "dissolution" rather than secession illustrates how states can contrive methods to recognize a seceding state without acknowledging any right to secession.[69]

B. Self-Determination

The modern understanding of self-determination in international law has its beginnings with the U.N. Charter. Article 1(2), together with Article 55, proclaims a purpose of the organization to develop "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[70] In today's political environment, it is easy to read this clause as an explicit protection of the rights of minorities and minority groups. However, this does not match with the drafters' intent in an utterly state-centered conception of international rights.[71] Just as equality of rights meant the equality of states' rights, so too, the self-determination of peoples referred to the right of a state to govern its territory free of foreign interference.[72]

Self-determination as a principle in international law further developed through state practice and United Nations General Assembly resolutions within the context of decolonization.[73] Chapter XI of the U.N. Charter addresses the obligations of members toward non-self-governing territories under their control.[74] The Charter instructs members, in regard to such territories, "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions."[75] While laying the groundwork for increased autonomy for colonial territories,

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67. U.N. Charter art. 2, para. 4.

68. *See* Dugard & Raič, *supra* note 36, at 95.

69. *See* Pellet, *supra* note 29, app. (Badinter Commission Opinion No. 1).

70. U.N. Charter art. 55.

71. Judge Rosalyn Higgins, *Self-Determination and Secession*, *in* SECESSION AND INTERNATIONAL LAW 21, 22-24 (Julie Dahlitz ed., 2003).

72. *See id.*

73. *See* G.A. Res. 1514(XV), U.N. Doc. A/4494 (Dec. 14, 1960); G.A. Res. 1541(XV), U.N. Doc. A/4526 (Dec. 15, 1960); G.A. Res. 2625(XXV), U.N. Doc. A/8018 (Oct. 24, 1970).

74. U.N. Charter arts. 73-74.

75. *Id.*

the Charter in no way requires the option of independence for dependent territories.[76]

Throughout the 1950s and 1960s, sympathy grew within the United Nations, due in no small part to the accession to membership of Asian and African States, for recognition of a concrete right of self-determination enjoyed by all peoples.[77] These sentiments are embodied in two General Assembly resolutions passed in 1960.[78] Resolution 1514 proclaims that subjection of a people to "alien subjugation, domination and exploitation" is a violation of fundamental human rights and that all peoples have a right to self-determination.[79] This description is complimented by Resolution 1541 which defines the criteria to be used in designating a non-self-governing territory and what rights those territories have.[80] A non-self-governing territory is one that is geographically certain, as well as culturally and ethnically distinct, from the administering power.[81] These criteria are neither conclusive nor exhaustive, but rather act as a minimal list under the circumstances that establish a "*prima facie* case" for non-self-governance.[82] The Resolution further provided that such territories may be said to have achieved self-governance if, through a democratic process, they attain independence, integrate with the administering power, or enter a relationship of free association with that power.[83] These resolutions provided the blueprint for U.N.-guided decolonization.

Although self-determination had been increasingly used as a justification for the independence of colonial peoples, the right was seen as universal and not limited by the colonial context of its assertions. In 1970 the General Assembly passed the Declaration of Friendly Relations that pressed for a "speedy end to colonialism."[84] The Declaration combined concepts from Resolutions 1514 and 1541 and effectively expanded them outside the colonial context. It explicitly deems "alien subjugation, domination and exploitation" to be violations of the principle of self-determination and that people denied the right to self-

76. *Id.*
77. Higgins, *supra* note 71, at 24-26.
78. *See* G.A. Res. 1514, *supra* note 73; G.A. Res. 1541, *supra* note 73.
79. G.A. Res. 1514, *supra* note 73.
80. G.A. Res. 1541, *supra* note 73.
81. *Id.*
82. *Id.*
83. *Id.*
84. G.A. Res. 2625, *supra* note 73.

determination may exercise that right by choosing independence, integration, or free association.[85]

In 1998 the Supreme Court of Canada issued an advisory opinion on the legal implications of hypothetical secession by Quebec.[86] The Court's opinion addressed, inter alia, the right of self-determination under international law. According to the Court, the importance of territorial integrity means that, in general, the right to secede comes from domestic rather than international law.[87] However, the Court held that the principle of self-determination may give rise under international law to a right of secession.[88] The Court acknowledged that the right to self-determination is held by peoples and that it is possible for a people to make up only a portion of a state's population.[89] This right, the Court noted, is "normally fulfilled through *internal* self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."[90] "A right to *external* self-determination arises . . . in only" three possible situations: (1) colonialism; (2) when a people is subjected to alien subjugation, domination, or exploitation; and possibly (3) when a defined people is denied meaningful access to government.[91] The Court qualifies the third situation by noting that it may not be fully established within international law as a justification, and that if it is, secession remains a last-resort solution.[92]

The right of self-determination has evolved over the latter half of the twentieth century to protect groups who are systematically prevented from governing themselves. In its most sophisticated form, the law of self-determination describes who holds the right (a "people"), the particular circumstances when that right may be exercised, and how that exercise is to take shape. Concern for territorial integrity constantly presses against and shapes the right of self-determination. In its current form, self-determination is still tempered by the need to promote stable boundaries. The doctrine of *uti possidetis* plays an important role in preventing the potential chaos caused by shifting boundaries.

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85. *Id.*
86. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).
87. *Id.* para. 112.
88. *Id.*
89. *Id.* para. 124.
90. *Id.* para. 126.
91. *Id.* paras. 126, 138.
92. *Id.* paras. 134-135.

C. Uti Possidetis

As the principle of self-determination has matured in international law, so has its territorial counterpart, *uti possidetis*. According to the principle of *uti possidetis*, when a territory gains independence, new international boundaries should only be drawn where there previously existed internal administrative boundaries at the time of independence.[93]

As a legal concept, *uti possidetis* has its origins in Roman law.[94] If a dispute arose between parties over title to land, the praetor could issue an edict granting the right of possession to the current possessor until ownership could be determined: *uti possidetis, ita possideatis* (as you possess, so may you possess).[95] The main legal effect of the edict was to shift the burden of proof to the nonpossessing party.[96] It did not operate to alter or determine ownership of the land.[97]

In the eighteenth century, legal scholars began using the term *uti possidetis* in international law.[98] The term became synonymous with the rule of *status quo post bellum* by which a state was legally entitled to territory acquired during war.[99] This adaptation of the principle recasts *uti possidetis* with a significantly different nature. In addition to being adapted to public rather than private purposes, the term no longer referred to a temporary right of possession and legal status during dispute but to outright title to land.[100]

The two most significant uses of *uti possidetis* occurred during the decolonization of Latin America in the early nineteenth century and of Africa in the mid-twentieth century. The breakup of large colonial entities in Latin America prompted the first application of *uti possidetis* in a self-determination context.[101] The use of the principle served two primary purposes: (1) to establish agreeable international boundaries between self-governing entities within larger colonial territories and (2) to prevent the recognition of *terra nullius* open to European reconquest.[102] The colonial economic structure had fostered the

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93. Steven R. Ratner, *Drawing a Better Line:* Uti Possidetis *and the Borders of New States*, 90 AM. J. INT'L L. 590, 590 (1996).

94. SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF *UTI POSSIDETIS* 10 (2002); Ratner, *supra* note 93, at 592-93.

95. Ratner, *supra* note 93, at 593.

96. *Id.*

97. *Id.*

98. LALONDE, *supra* note 94, at 21.

99. *Id.*

100. Ratner, *supra* note 93, at 593.

101. *Id.*

102. *Id.* at 593-94.

establishment of urban trading centers and the Spanish authorities had drawn official boundary lines to delimit the trading spheres of influence for these centers.[103] By adopting these lines, the new independent states were able to maintain the economic status quo while preventing questions over de facto control.[104]

This use of official boundaries at the time of independence is known as *uti possidetis juris* and can be contrasted with the method advocated by Portuguese Brazil—making the dispositive factor which government actually controlled the territory, *uti possidetis de facto*.[105] The latter method would be more in line with the principle's Roman origin, focusing on actual possession. It could be argued that the Latin American example supports the use of two standards: one for the conversion of administrative boundaries of territory controlled by the same colonial power and another for the adoption of boundaries between colonies of differing allegiance.

Decolonization in Africa presented different problems. The people seeking independence were not the descendants of the colonial settlers, but people who shared their heritage with the precolonial inhabitants. Nor had the development of the society occurred along colonial boundaries. Instead, it had those boundaries arbitrarily placed around and through it. Thus Africa was faced with the question of whether to accept the colonial boundaries as new international frontiers or to devise a system for total restructuring.[106] Adherents of the Pan-African Movement had long advocated the latter approach, but as the new states emerged, local elites were more interested in stability and maintaining the status quo at independence.[107] In 1964, amid a variety of territorial disputes threatening to destabilize the continent, the Organization of African Unity (OAU) adopted the Cairo Resolution calling on all African States "to respect the borders existing on their achievement of national independence."[108] In this way Africa inherited all of its official colonial boundaries, both internal and external. *Uti possidetis juris*, while not mentioned by name, had been adopted for all borders in postcolonial Africa.

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103. *See* LALONDE, *supra* note 94, at 25-27.
104. *Id.* at 29.
105. *Id.* at 31-32.
106. Ratner, *supra* note 93, at 595.
107. *Id.*
108. Organization of African Unity [OAU], *Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government* ¶ 7, AHG/Res. 16 (I) (July 1964); *see also* LALONDE, *supra* note 94, at 117-19.

The most recent opportunities for the application of *uti possidetis* occurred with the end of the Soviet Union and its influence in Europe. The resulting dissolutions of Czechoslovakia, the Soviet Union, and Yugoslavia all occurred along preexisting internal borders. The Czech and Slovak parts of Czechoslovakia were historically very well-defined, the line chosen being the original border between Moravia and Austria-Hungary.[109] The former Soviet Republics, excluding the Baltic States, agreed to retain the Soviet administrative borders in the Charter of the Commonwealth of Independent States.[110] These lines had been altered by Stalin before World War II to divide ethnic groups and increase the Kremlin's influence in the Republics.[111] As a result, ethnic unrest has become a catalyst for border-related disagreements among the Republics.

The breakup of Yugoslavia has clearly been the most problematic of the post-Cold War period. Immediately recognizing the destabilizing effect the Yugoslav crisis could have on Europe as a whole, the European Community acted quickly to influence the situation by establishing the Badinter Commission to advise them on matters of law relating to the crisis and to determine whether individual Yugoslav Republics had met the EC criteria for recognition as independent states.[112]

The Badinter Commission claimed that the circumstances indicated that the SFRY was in a process of dissolution and indicated that the principle of *uti possidetis juris* should be applied to determine the resulting international boundaries.[113] Citing the International Court of Justice's dictum in the 1986 *Frontier Dispute* case that *uti possidetis* is an international "principle of a general kind" rather than a regional device whose relevance is confined to its previous uses, the Commission accepted *uti possidetis* as a principle to be applied universally in cases of dissolution, not simply in a particular regional or colonial context.[114]

While the potential crisis in the Balkans saw the acceptance by the international community of *uti possidetis* as a historically well-established general principle of international law applicable in cases of dissolution outside the context of decolonization, the dramatic and sustained violence in the region has led some scholars to question the Badinter Commission's expansion of the principle and its continued

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109. Ratner, *supra* note 93, at 597.

110. *Id.*

111. *Id.*

112. *See* Enver Hasani, Uti Possidetis Juris*: From Rome to Kosovo*, 27 FLETCHER F. WORLD AFF. 85, 93-94 (2003); *see also* Ratner, *supra* note 93, at 591.

113. Pellet, *supra* note 29, app. (Badinter Commission Opinions Nos. 1-2).

114. *Id.* (Badinter Commission Opinion No. 3).

validity in a postcolonial world.[115] If the primary purpose of *uti possidetis* is to ensure stability, perhaps its application as a legal principle should be confined to areas in which that result is likely.[116] One striking difference between the Yugoslav situation and other state breakups was the lack of agreement among the Republics that new international borders should be drawn at all. In the American and African decolonizations the question of independence was firmly decided. The "dissolution" of Yugoslavia could just as easily have been defined as the secession of some of its constituent republics. It can be argued that the failure of *uti possidetis* to secure stable borders promotes its application only in situations of dissolution and that the Badinter Commission's mischaracterization of the crisis prompted an application to what was, in reality, a case of territorial secession.[117] In any event, the Badinter Commission's opinions remain the most recent and authoritative proclamation on, and application of, the law of secession.

IV. THE RIGHTS OF KOSOVO

In consideration of present and historical circumstances, Kosovo had a valid right under international law to declare independence on February 17, 2008, and to secede from the Republic of Serbia. The people of Kosovo were internally denied their right to self-determination in a manner which invoked an external right. Secession was a valid exercise of that right, particularly in the context of a continued "dissolution" of Yugoslavia. Also, the nature of the border of Kosovo within Serbia was such that Kosovo's secession did not violate the principle of *uti possidetis*. It is important to recognize that Kosovo's right depended on the reality of circumstances at the time of its declaration rather than at a prior time, such as the beginning of the dissolution of the SFRY in 1991 or the NATO intervention and beginning of U.N. administration in 1999. While the international presence in Kosovo for almost a decade surely confuses any understanding of Kosovo's rights vis-à-vis Serbia, it would be inappropriate to ignore the effects of that reality on the self-determination of the Kosovar people.

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115. *See* Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J. INT'L L. 31, 48-57 (1998); Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. U. L. REV. 50, 54-57 (2000); Ratner, *supra* note 93, at 613-14.

116. Ratner, *supra* note 93, at 608-09.

117. Radan, *supra* note 115, at 54-55.

A. Kosovo's Right of Self-Determination

It is clear that under modern international law self-determination is a right of all peoples.[118] It is not limited to an understanding of peoples as the whole population of a state. There are, nevertheless, limits on a people's right to exercise self-determination externally. To know if Kosovo has that right, we must first ask whether the Kosovars are a "people" and then whether the circumstances warrant an external exercise of self-determination.

Determining that the ethnic Albanians of Kosovo are a "people" is not a difficult task. The Supreme Court of Canada in *Reference re Secession of Quebec*, having determined that Quebec had no right to secede regardless, chose not to answer definitively whether Quebecers were a "people," but seemed to assume as much in its analysis.[119] The Badinter Commission was equally unclear. When asked whether the Serbian population of Croatia and Bosnia had a right to self-determination, the Commission responded by reiterating the principle of *uti possidetis juris* and the duty to protect the rights of minorities.[120] The Commission further held that "ethnic, religious or language communities . . . have the right to recognition of their identity under international law."[121] A direct answer to the question would have properly required a preliminary determination that the relative groups were "peoples," but the opinion did not answer the question asked. Nevertheless, by insisting on the application of *uti possidetis*, the opinion effectively assumes they are a "people" in order to have a right of self-determination that could be tempered by concern for territorial stability.[122]

In the end, there is scarce authority on what constitutes a "people." One reasonable explanation is that the definition of a "people" is difficult to put into words but unnecessary in practice because the categorization is obvious and self-evident: you will know one when you see it. Another helpful approach is to contrast a "people" with a "minority"; the former have a right of self-determination and the latter do not.[123] In any event, the Kosovar Albanians are clearly an "ethnic, religious or language communit[y]" and make up approximately ninety percent of the

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118. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 1, U.N. Doc. A/6316 (Mar. 23, 1967), http://www.unhchr.ch/html/menu3/b/a_ccprhtm.

119. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 125 (Can.).

120. *See* Pellet, *supra* note 29, app. (Badinter Commission Opinion No. 2).

121. *Id.*

122. *See* SUMMERS, *supra* note 31, at 168-71.

123. *See id.* at 269-70; Higgins, *supra* note 71, at 36-37.

population of Kosovo.[124] A determination that they are not a "people" under international law would run counter to the legal purpose of self-determination.

Whether Kosovars may externally exercise their right to self-determination as a people still depends on whether that right has been sufficiently violated.[125] This requires an understanding of the political situation in Kosovo. The right to exercise self-determination in the colonial context has an unassailable pedigree and is nearly always validated in cases of alien subjugation, domination, and exploitation. It is thus relevant to ask whether Kosovo asserted its right to exercise self-determination in the framework of those colonial justifications, which arose out of military occupation by a foreign power.

The Kingdom of Serbia acquired Kosovo from the Ottoman Empire during the Balkan Wars of 1912-1913.[126] After World War II, in order to preserve the fractious Yugoslav State, the Tito regime provided for the sharing of power among the Republics as well as two "autonomous regions" within the Republic of Serbia—Vojvodina and Kosovo.[127] These regions attained their highest degree of autonomy in the 1974 constitution, almost equal to that of the Republics.[128] In 1989 Serbian troops took over the autonomous Government of Kosovo and altered its political status, formally removing the autonomy it lost de facto.[129] The ethnic Albanian population was actively prevented from participating in their own government through the use of military force.[130]

It is easy to view these events as an internal matter and not as *alien* subjugation or domination. This view appears to be supported by state practice, i.e., the lack of international response to the matter at a time when ethnic tensions in Yugoslavia were attracting significant attention. However, the international response to oppression in southern Africa of the majority population by ethnic minorities strongly supports the view that such action by Serbia was illegitimate.[131] The resulting situation certainly entails the alien subjugation of one *people* by another if not by another state. Though both peoples reside in the same territorial state,

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124. *See* Oeter, *supra* note 6, at 1590; Pellet, *supra* note 29, app. (Badinter Commission Opinion No. 2).

125. *See* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 126-139 (Can.).

126. Oeter, *supra* note 6, at 1564.

127. *Id.* at 1565-66.

128. *Id.* at 1566.

129. *Id.*

130. *Id.*

131. *See* Resolution Concerning Southern Rhodesia, S.C. Res. 217, U.N. Doc. S/Res/217 (1965).

the subjugation is regional in nature, in that it is directed at a particular territorial entity because of the people living in it. Recognition of Kosovo's right of self-determination on these grounds, while being an expansion of the subjugation criterion, would nevertheless be in accord with the principles of international law and the rights of peoples.

A third possible justification for an external exercise of self-determination was discussed in *Reference re Secession of Quebec*. That is a situation where "a definable group is denied meaningful access to government."[132] The broadness of this situation underlines the qualification that external self-determination arises only as a last resort. While this justification may not be fully accepted as an international legal norm, it clearly fits the situation in Kosovo under Serbian rule. The Kosovar Albanians were deliberately exiled from public life.[133] The result was war. When the situation finally attracted significant international attention, Serbia failed to respond positively to any attempts at a peaceful solution. It was clear the Kosovars' right to self-determination would not be respected internally.

Further complicating the issue is the fact that Serbian dominance of Kosovo ended abruptly in 1999.[134] Over the subsequent years, Kosovo had been administered by UNMIK and protected by NATO troops. While the future status of Kosovo had been in question during that time, the possibility of complete reintegration with Serbia was never seriously proposed. Was the situation such that the Kosovars' right to self-determination was being respected *internally*, thus abrogating their external right?

The U.N. administration sought to support political autonomy and build up Kosovo's institutions, not tear them down.[135] The rights of the people to pursue their development were not denied. The U.N. presence was meant to be temporary, but after almost a decade, no agreement on Kosovo's future status had been met. The Ahtisaari Proposal, which allowed for supervised independence, was rejected by Serbia and blocked in the Security Council by Russia. When Kosovo declared independence in February 2008, no plan for the future of Kosovo was being discussed.[136] Theoretically, if no proposal could be accepted by the

132. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 138 (Can.).
133. Oeter, *supra* note 6, at 1590.
134. *Id.* at 1594.
135. *See* S.C. Res 1244, *supra* note 52.
136. *Ahtisaari Proposal*, *supra* note 57.

Serbian and Kosovar authorities, the U.N. presence in Kosovo would continue indefinitely.[137]

The election of a more pro-Western government in Belgrade at the beginning of 2008 prompted renewed efforts by the European Union to press Serbia toward accepting independence for Kosovo.[138] Despite offers of faster approval for membership for Serbia in the organization, these efforts were met with staunch resistance.[139] The international community had failed to find a diplomatic settlement for Kosovo's independence but also refused to return control to Serbia.[140] This precarious and impermanent yet unending limbo perpetuated by an international presence is certainly not counted among the appropriate exercises of self-determination available under international law. Nor is it, however, a recognized situation justifying that exercise. Due to this ambiguity, the intervening period between Serbian domination and the declaration of independence seems to add little to help the analysis. If anything, international intervention made a travesty of Kosovo's opportunities for exercising self-determination; instead of having a choice between independence, integration, and loose association, Kosovo's options were independence, a return to domination, or indefinite political limbo. Faced with no legitimate alternative, Kosovo chose the only method available to effectuate its self-determination.

B. Secession, Dissolution, and Uti Possidetis

Accepting that the Kosovar people were sufficiently denied a right to self-determination, it follows that, in theory, they could exercise that right through secession, integration, or loose association.[141] Kosovo chose secession as the form in which its self-determination would be realized. Secession, though, raises special problems. The creation of new international boundaries may invoke the doctrine of *uti possidetis*. The Badinter Commission's opinions point to a limited acceptance of *uti*

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137. Resolution 1244 required approval from the Security Council before UNMIK's mission could be terminated. The political stalemate on the Council effectively prevented it from taking any action to remove or alter UNMIK's mandate.

138. Judy Dempsey, *Diplomats To Increase Pressure on Serbia To Accept Kosovo Plan*, N.Y. TIMES, Apr. 18, 2007, *available at* http://www.nytimes.com/2007/04/18/world/europe/18kosovo.html.

139. *EU Council Conclusions on Western Balkans* (Mar. 10, 2008), *available at* www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/dsee_20080312_02_/dsee_20080312_02_en.pdf.

140. European Forum for Democracy and Solidarity, Serbia Update (Aug. 13, 2008), http://www.europeanforum.net/country/serbia_update.

141. *See* Declaration on Friendly Relations, G.A. Res. 2625 (XXV), at 124, U.N. Doc. A/8018 (Oct. 24, 1970), *available at* http://www.un.org/document/ga/res/25/ares25.htm.

possidetis as a "general principle of international law" outside of the decolonization process; it may only apply in cases of "dissolution," not simple secession.[142] *Uti possidetis* is the only method prescribed by law for the drawing of borders when a new state emerges without the express agreement of the divided states. If *uti possidetis* does not apply to secession not characterized as "dissolution," international law provides no clear formula for peacefully setting the new boundary. This normative gap effectively nullifies the legality of unilateral secession by preventing the establishment of recognized borders.

While the Badinter Commission's factual finding that Yugoslavia was "in a process of dissolution" has been criticized as a creature of legal convenience, it does provide precedent for a similar finding in the case of Kosovo.[143] As noted, involvement by the European Community in the Yugoslav crisis began in response to policy differences among the Members in regard to the secession of Slovenia and Croatia.[144] Even accounting for independence declarations by Bosnia-Herzegovina and Macedonia, the fact that Serbia and Montenegro, together with the newly converted autonomous regions accounting for half of the voting power of the federal government, wished to maintain the existence of the Yugoslav State strongly detracts from a finding of "dissolution."[145] The Badinter Commission's classifications of the facts aside, Kosovo's secession can be compared to that of the Republics as the continuation of the process begun in 1991 of the dismantlement of Serbia's unwanted dominance through political centralization. Whether the Badinter Commission's easy use of the term "dissolution" allows a similar finding in the case of Kosovo or provides a precedent actually for accepting *uti possidetis* in times of secession, the only difference between then and now is that Kosovo bore a different internal classification, "autonomous region," than the "constituent republics."

The unusual nature of Kosovo's border within Serbia does fuel a challenge to its adoption as a new international frontier.[146] *Uti possidetis juris* provides for the conversion of official administrative borders. The borders between Yugoslavia's constituent republics clearly qualified as such borders, but the boundary delineating Kosovo within Serbia proper is a more questionable candidate. From World War II until 1989, Kosovo

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142. Pellet, *supra* note 29, app. (Badinter Commission Opinions Nos. 1-3); *see also* Radan, *supra* note 115, at 54-55.

143. *See* SUMMERS, *supra* note 31, at 271; Radan, *supra* note 115, at 55.

144. Oeter, *supra* note 6, at 1568.

145. *Id.*

146. *See* Hasani, *supra* note 112, at 93-94.

was an autonomous region of the SFRY within the Republic of Serbia, an arrangement affording a great degree of local independence.[147] This status was revoked, though, in 1989.[148] The boundary was further modified in 1999 to be the delineation of UNMIK's authority.[149] The border was manned and operated by NATO forces.[150]

There is merit in the argument that Kosovo's border before 1999 would not qualify for conversion under *uti possidetis*, but the NATO intervention dramatically altered that border, effectively making it the strongest internal boundary possible.[151] The complete absence of Belgrade's influence in Kosovo for eight years supports a characterization of the UNMIK line as a de facto external boundary. Acceptance of that line as the border of an independent Kosovo does not, though, require an application of a de facto variety of *uti possidetis*, but qualifies under the accepted *uti possidetis juris* standard as well. Serbia agreed with the Security Council to the arrangement established by Resolution 1244, thus legitimizing it as an internal administrative border in Serbia.[152] While its intended temporary nature could diminish its legal significance, the recent derailment of the process on Kosovo's future status demonstrated the intractable nature of the current border arrangement. In any event, the border arrangement that existed before international intervention was clearly off the table as a possible future option.

V. RECOGNITION

Aside from the legality of the secession itself, Serbia further decried, as violating international law, the recognition of Kosovo's independence by other states. This position is based on the premise that international law forbids the recognition of illegal states. Recognition also faces another legal hurdle, albeit a less contentious one: does Kosovo meet the criteria necessary to be a state? The first issue is entirely dependent on the legality of Kosovo's secession, but the second requires a reexamination of the facts on the ground in Kosovo.

Two main theories exist concerning the relationship between statehood and recognition.[153] The constitutive theory advocated by some

147. Oeter, *supra* note 6, at 1565-66.
148. *Id.* at 1566.
149. *Ahtisaari Proposal*, *supra* note 57.
150. Oeter, *supra* note 6, at 1594.
151. *See* S.C. Res. 1244, *supra* note 52.
152. *See* Oeter, *supra* note 6, at 1594.
153. *See* Dugard & Raič, *supra* note 36, at 97.

scholars grants recognition an important and powerful role in the international legal order by contending that statehood is granted by the act of recognition by other states.[154] An entity aspiring to the legal status of statehood effectively requires the acceptance of its potential peers. Established states act as the gatekeepers to legal statehood, and recognition acts as the consent needed to justify legal obligations from established states toward the new state. Thus no qualifications or legal criteria exist under the constitutive theory for recognition, and unrecognized states would not enjoy the international legal personality of statehood.

The majority view, known as the declaratory theory, contends that statehood, and thus international legal personality, arises independent of recognition when certain objective criteria are met.[155] The necessary criteria are most authoritatively defined in the Montevideo Convention on Rights and Duties of States as: "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."[156] The act of recognition does not bestow statehood; it merely declares that the criteria have been met. Because, under this view, recognition is only declarative, the effect of recognition is minimal at best. Nevertheless, if an entity has not met the criteria for statehood, recognition of that entity as an independent state would violate an obligation to another state to respect its territorial integrity.

This conceptualization of possible approaches to recognition as a strict dichotomy between realist constitutivism and an idealist declaratory approach is challenged by the realities of state practice.[157] First, recognition remains a highly political act. Both the United Nations and the OAU recognize that recognition remains at the discretion of the granting state whether it acts through legalistic or political mechanisms.[158] The Organization of American States (OAS) Charter claims that a state may exist prior to recognition and that the state should enjoy certain rights.[159] However, these rights are limited, with self-defense being the most important.[160] Only upon granting recognition is a

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154. *Id.*

155. *Id.* at 97-98.

156. Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 3 I.L.M. 88 [hereinafter Montevideo Convention].

157. THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 22 (1999).

158. *Id.* at 22-24.

159. Charter of the Organization of American States, art. 9, Apr. 30, 1948, 119 U.N.T.S. 3.

160. *Id.*; GRANT, *supra* note 157, at 24.

state required to afford the newcomer full legal personality.[161] As the Kosovo crisis aptly demon-strates (as does the entire Yugoslav disintegration process), granting or withholding recognition remains a politically charged decision.[162] Nevertheless, the use of the Badinter Commission to effectuate a collective recognition response to the Yugoslav crisis shows a desire to apply a legal approach in certain circumstances.

The Badinter Commission, however, also demonstrates the desire by states to include additional criteria to those outlined by the Montevideo Convention.[163] In making its findings concerning recognition for the four breakaway Republics, the Commission looked to whether the applicants met the Guidelines on the Recognition of New States established by the European Community.[164] These additional criteria included respect for the rule of law, democracy and human rights, minority rights, and the inviolability of peacefully determined international boundaries.[165]

Since the Montevideo Convention, various additional criteria seem to have emerged as possible requirements for recognition. Among these is self-determination, an impediment to recognition for Southern Rhodesia and the various South African Bantustans.[166] Though inconsistently applied, democracy, minority rights, and constitutional legitimacy have also influenced recognition decisions.[167] These additional criteria for recognition become, under declaratory theory, new requirements for statehood. More accurately though, they demonstrate how recognition decisions are driven by the politics of international relations.[168]

Regardless of their initial political nature, any criteria used consistently over time have the potential to become "addenda" to the objective statehood criteria of the Montevideo Convention.[169] A

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161. Charter of the Organization of American States, *supra* note 159, art. 10.

162. Further examples of the lack of standardization in recognition practice can be seen in the difference in treatment received from the West by the now former Soviet Republics as well as the selective response to the Badinter Commission's recommendations in Yugoslavia.

163. The Montevideo Convention is the most commonly cited source used to define statehood. The four criteria enumerated in the Montevideo Convention are rooted in norms of international law at the time of its ratification in 1933 and were largely assumed to be legitimate measures of sovereignty into the twenty-first century. GRANT, *supra* note 157, at 6-8.

164. Pellet, *supra* note 29, app. (Badinter Commission Opinions Nos. 4-7).

165. Türk, *supra* note 28, annex 1 (Declarations on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union').

166. GRANT, *supra* note 157, at 93.

167. *Id.* at 94-106.

168. *Id.* at 83-84.

169. *See id.* at 30.

reasonable approach to the use of these addenda is to accept their value in cases of secession, dissolution, or other situations where a group legitimately exercises its right to self-determination. Doing so would appropriately limit their application to situations similar to those in which they originally developed.

Kosovo clearly meets three of the four Montevideo criteria. It is arguable, however, whether Kosovo exercises effective government over its territory. Kosovo remains dependent on international administrative and military aid, although the European Union Rule of Law Mission in Kosovo (EULEX) lacks the authoritative role UNMIK enjoyed since the NATO intervention and constitutes a clear step toward more self-sufficiency.[170] With the enactment of its new constitution, Kosovo has taken over primary administrative responsibility for itself while EULEX seeks to "monitor, mentor and advise."[171] It remains doubtful whether the Government in Pristina will be able to effectively govern the Serb-dominated northern areas of the region as long as Serbia actively continues to oppose independence.

Interestingly, state practice provides examples of when effective government was not considered a *conditio sine qua non* of recognition. One prominent example is the recognition of an independent Finland in 1918.[172] Having plunged into civil war near the end of World War I in a complex situation driven by a declaration of independence from Russia as well as the presence of both Russian and German troops, Finland lacked comprehensive control of most of its territory when European States began recognizing its independence.[173] The recognition was clearly driven by the geopolitical interests of the Central Powers.[174] Finland, obviously, recovered from this chaotic condition and hindsight adds reasonableness to a possibly premature exercise of recognition. As the European Union's unprecedented, ambitious administrative mission demonstrates, states that have extended recognition to Kosovo intend to ensure that this remaining statehood criterion be adequately met.

That effort is guided by the Ahtisaari Proposal. Indeed, when the United States formally recognized Kosovo, the official statement included concern that Kosovo stay on the path outlined by the Ahtisaari Proposal.[175] The central part of that plan was to write a constitution

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170. Council Joint Action 2008/124/CFSP, art. 3(a), 2008 O.J. (L 042) 93.
171. *Id.*
172. GRANT, *supra* note 157, at 129-30.
173. *Id.*
174. *Id.* at 129.
175. U.S. Dep't of State, *supra* note 2.

ensuring the rights of ethnic minorities, fundamental rights, and myriad other elements of modern liberal government.[176] The new constitution came into force in June 2008, four months after the declaration of independence, and adopts in substance all the requirements of the Ahtisaari Proposal, using almost identical language in many key parts.[177] By doing so, Kosovo has satisfied the additional criteria, beyond basic statehood requirements, imposed by the international community.

Kosovar independence has not received what could be called broad support from established states. Many states are highly unlikely to recognize Kosovo in the foreseeable future due primarily to relevant political concerns. This is a symptom of the political nature of recognition rather than a strong legal argument. Kosovo appears poised, with international assistance, to overcome any ambiguities as to its qualification for statehood. States wishing to maintain a legally oriented approach to the issue by adopting a declarative recognition policy will, in time, be hard-pressed to deny Kosovo's de facto status as a sovereign state.

VI. CONCLUSION

The case for Kosovo's independence recognizes the right of self-determination of its people and the validity of secession to achieve self-determination in a diplomatic quagmire brought about by a forceful international response to illegal aggression and domination. While the remaining ambiguities in the law of secession add a level of complicating uncertainty to the legal case for recognizing Kosovo's independence, the argument for independence corresponds well with current trends in international law.

Countries withholding recognition out of concern for illegality or the lack of official U.N. approval will likely give great weight to the forthcoming opinion by the International Court of Justice (ICJ). The General Assembly has accepted Serbia's request for an advisory opinion on the legality of Kosovo's declaration of independence, and the Court agreed to decide the case within a year. While the Court's decision will not affect the positions of the United States or Russia in the Security Council, it is exactly what many countries who have not taken sides have hoped for. Ideally, the ICJ will provide definitive insight into the law of

176. *Ahtisaari Proposal*, *supra* note 57, art. 2.

177. *See, e.g.*, KUSHTETUTA E REPUBLIKËS SË KOSOVËS [CONST. OF THE REPUBLIC OF KOSOVO] art. 3 (2008), *available at* http://www.kushtetutakosoves.info/?cid=2,1; *Ahtisaari Proposal*, *supra* note 57, art. 1(1.1)-1(1.2).

secession by applying the principles of self-determination and territorial integrity to the current Kosovo conflict.

Meanwhile, those countries withholding recognition out of concern for the declaration's precedential value have received some justification for their hesitancy. Six months after Kosovo's declaration, world attention focused on the eruption of interstate violence between Georgia and Russia over the status of South Ossetia and Abkhazia.[178] Understandably, many observers related the conflict to the Kosovo situation, pointing to apparently contradictory positions by states on the two issues, and the ICJ should be highly concerned about such connections when it delivers its opinion on Kosovo.

International justice and stability will not be served by generalizations that fail to account for the international legal rights of peoples and of states. As the Canadian Supreme Court recognized, self-determination may be granted *internally*; it is for those seeking secession to show that no just or viable alternative remains. Ultimately, a law of secession that strikes the proper balance between self-determination and territorial integrity will promote the greatest stability by providing peaceful means to address ethnic disputes and bringing de facto independent pseudo-states into the light. The loss of its cultural heartland is a harsh consequence for Serbia's transgressions and, while it is little comfort to Serbia, other states may have learned a lesson along with them about the importance of human rights in the midst of ethnic tension.

Then again, the world has had over three hundred years to learn the lesson. When the American colonists sought to "dissolve the political bands" connecting them to England, they felt compelled by a "decent respect to the opinions of mankind" to make their case for secession to the world.[179] Thomas Jefferson wrote that while "[p]rudence . . . will dictate that Governments long established should not be changed for light and transient causes," people have the right, after "a long train of abuses and usurpations, . . . to throw off such government, and to provide new Guards for their future security."[180] It remains today for the world to decide the validity of secession, and international law must provide the mechanism to evaluate that decision. The message Kosovo's declaration sends to the world must not be that chaos rules but that international law

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178. Jeffrey Brown, *PBS Newshour: Soldiers Clash as Georgia, Russia Vie To Assert Power* (PBS television broadcast Aug. 8, 2008) (transcript *available at* http://pbs.org/newshour/topic/international/2008.html (follow "Soldiers Clash" hyperlink)).

179. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

180. *Id.* para. 2.

respects peoples' desires for independence if they will pick up their pens and submit their grievances to the world.