

Article

On the Right to External Self-Determination: “Selfistans,” Secession, and the Great Powers’ Rule⁺

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I. INTRODUCTION

The notion of self-determination is not novel in modern international law. It stems back to the beginning of the 20th century, when world leaders in the wake of World War I realized that national peoples, groups with a shared ethnicity, language, culture, and religion, should be allowed to decide their fate—thus, to self-determine their affiliation and status on the world scene.¹ The same idea applied later in the same century to colonial peoples, and by the 1960s, it became widely accepted that oppressed colonized groups ought to have similar rights to

⁺ I respectfully borrow the term “selfistan” from novelist Salman Rushdie, who wrote (sarcastically) in *Shalimar the Clown*, “Why not just stand still and draw a circle round your feet and name that Selfistan?” SALMAN RUSHDIE, *SHALIMAR THE CLOWN* 102 (2005). I believe that Rushdie may have been incredibly prophetic in some respects: some groups (“peoples”) seem to be able to form their “selfistans” with the support of the most powerful nations (the “Great Powers”) on our planet. This article attempts to decipher who such peoples are, and why their struggles are viewed as legitimate and deserving of independence and statehood, while others have been denied the same quests.

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1. See, e.g., Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”? Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 *UCLA J. INT’L L. & FOREIGN AFF.* 361, 387–88 (2005) (describing the evolving philosophy of self-determination in the wake of World War I, as articulated by leaders like Woodrow Wilson and Vladimir Lenin).

auto-regulate and to choose their political and possibly sovereign status.² However, as decades passed by and as separatist minority groups throughout the world began challenging the concept of state territorial integrity, it became clear that the notion of self-determination had to be somehow confined.³ Thus, courts and scholars came up with two different forms of self-determination: internal and external.⁴ The former potentially applies to all peoples, and signifies that all peoples should have a set of respected rights within their central state.⁵ Minority groups should have cultural, social, political, linguistic, and religious rights and those rights should be respected by the mother state. As long as those rights are respected by the mother state, the “people” is not oppressed and does not need to challenge the territorial integrity of its mother state.⁶ The latter form of self-determination applies to oppressed peoples, whose basic rights are not being respected by the mother state and who are often subject to heinous human rights abuses.⁷ Such oppressed peoples, in theory, have a right to external self-determination, which includes a right to remedial secession and

2. See Joshua Castellino, *Territorial Integrity and the “Right” to Self-Determination: An Examination of the Conceptual Tools*, 33 BROOK. J. INT'L L. 503, 557 (2008) (describing the “wave of decolonization” in the second part of the 20th century, which involved several self-determination options for the decolonized people).

3. Scholars have already noted that the self-determination rhetoric has been of limited utility to most non-colonial oppressed peoples and that it has not helped such groups in their territorial claims and quests. *Id.* at 556–59 (noting that the concept of self-determination has had “limited utility in determining the fate of the territory historically inhabited by people of a nation or *ethnie*,” because the right to self-determination “offers little remedy to the dispossession of land.”). This implies that the right to self-determination seems at odds with the territorial integrity of any state or region.

4. See, e.g., *In re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.) (distinguishing between rights to internal versus external self-determination for the Quebecois within Canada); *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7/21/68/106 (1921) [hereinafter *Aaland Islands Report*] (deciding that the Aalanders, a small island group belonging to Finland and seeking to reunite with Sweden, had the right to cultural and ethnic autonomy, but not the right to separate from Finland); Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 379 (2003) (noting the different forms of self-determination available to a people, which include autonomy, self-government, free association, and ultimately, secession).

5. See *In re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

6. *Id.*; see also *Aaland Islands Report*, *supra* note 4.

7. See *In re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.); see also *Aaland Islands Report*, *supra* note 4 (concluding that the Aalanders would have the right to separate from Finland only if Finland disrespected their cultural rights).

independence.⁸

In theory, the distinction between internal versus external self-determination is easy to draw, and a scholar or a judge should have no difficulty deciding which minority groups should accrue the more drastic right to external self-determination. Simply look to the human rights record of the mother state, and if the record shows violations, then the minority group should be allowed to separate. In reality, the distinction is very difficult to draw. Numerous minority groups around the globe have been mistreated and have asserted their rights to external self-determination, only to find themselves rebuffed by the world community.⁹ On the other hand, some minority groups have found strong support in the eyes of external actors and have garnered sufficient international recognition to be allowed to separate.¹⁰ Why? What is so unique about some minority groups and about their quests for independence that would justify the authorization to remedially secede? When exactly—under what circumstances—does the right to external self-determination accrue?

In order to answer these complex questions, this Article will discuss, in Part II, the notion of self-determination, its history, and its recent applications. In Part III, this Article will describe how the theory of self-determination is linked to other international law concepts, such as statehood, recognition, sovereignty, and intervention. In Part IV, this Article will focus on several case studies to illustrate the discrepancy of results attached to the self-determination struggles by different peoples. This Article will describe the self-determination quests of East Timor,¹¹ Kosovo, Chechnya, South Ossetia, and

8. Scharf, *supra* note 4, at 381 (noting that modern-day international law has embraced the right of non-colonial people to secede from their mother state “when the group is collectively denied civil and political rights and subject to egregious abuses.”).

9. Castellino, *supra* note 2, at 557–59 (noting the limited value of self-determination rhetoric to some minority groups).

10. Successful examples of self-determination where minority groups were able to exercise their right to remedial secession include Kosovo, East Timor, Eritrea, Bangladesh, and the Baltic Republics. See Milena Sterio, *The Kosovar Declaration of Independence: “Botching the Balkans” or Respecting International Law?*, 37 GA. J. INT’L & COMP. L. 267, 275 (2009); see also JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 112 (2d ed. 2006).

11. As discussed in Part IV.A, East Timor gained independence in 2002. At that time, the state’s preferred English name became the Democratic Republic of Timor-Leste. However, because this Article refers to time periods both pre and post independence, I use the term East Timor for ease of reference. See CENTRAL

Abkhazia, and will show that while the first two entities achieved external self-determination, the latter three did not. Finally, in Part V, this Article will argue that each self-determination seeking entity needs to meet four different criteria in order to have its quest validated by the international community. These four criteria include a showing by the relevant people that it has been oppressed, that its central government is relatively weak, that it has been administered by some international organization or group, and that it has garnered the support of the most powerful states on our planet. This Article will conclude by positing that the fourth criterion is the most crucial one: that any self-determination seeking group must obtain the support of the most powerful states, which I (and other scholars) refer to as the "Great Powers." It is the Great Powers' support, or lack thereof, that determines the fate of numerous peoples on our planet struggling to gain independence. This Article will posit that the right to external self-determination accrues for different peoples if and when the Great Powers decide to recognize those peoples' causes. Ultimately, this Article will argue that such a result is unfortunate, as it inappropriately mixes the legal with the political realms, and that any rule by the Great Powers inherently challenges the notion of state sovereignty and equality.

II. NOTION OF SELF-DETERMINATION

The principle of self-determination has a long history and has been used and discussed throughout the 20th century. It has evolved to a norm of customary international law, and its contours represent a wide-ranging spectrum of alternatives for the minority group seeking to self-determine its fate.¹² Thus, self-determination rights for a minority group may involve simply political and representative rights within a central state, on the one hand, or may amount to remedial secession and ultimately independence on the other.¹³

INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2009 (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/tt.html>.

12. See *infra* Part II.A.

13. *Id.*

A. HISTORY OF SELF-DETERMINATION

Self-determination in international law is the legal right for a “people”¹⁴ to attain a certain degree of autonomy from its sovereign.¹⁵ As early as 1918–19, leaders like Vladimir Lenin and Woodrow Wilson advanced the philosophy of self-determination: the former based on violent secession to liberate people from bourgeois governments, and the latter based on the free will of people through democratic processes.¹⁶ Today, the principle of self-determination is embodied in multiple international treaties and conventions,¹⁷ and has “crystallized into a rule of customary international law, applicable to and binding on all states.”¹⁸

14. Although the term “people” is ambiguous and vague under international law, it typically refers to “people who live within the same state . . . or people organized into a state.” Zejnullah Gruda, *Some Key Principles for a Lasting Solution of the Status of Kosova: Uti Possedetis, The Ethnic Principle, and Self-Determination*, 80 CHI.-KENT L. REV. 353, 367 (2005). Thus, “people” is a legal rather than natural category. *Id.* Moreover, the term “people” has been purposely left undefined in international law, because if the right to self-determination were to be applied broadly to all conceivable groups, this could destabilize states and cause peace and security problems. Bartram S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosova*, 80 CHI.-KENT L. REV. 235, 249 (2005).

15. The principle of self-determination was first elevated to the international plane by President Woodrow Wilson, who included it in his infamous Fourteen Points. President Woodrow Wilson, Address Before the League of Nations to Enforce Peace (May 27, 1916), in CONG. REC. 8854 (May 29, 1916); see also Scharf, *supra* note 4, at 378. For a full discussion of the principle of self-determination, see Gruda, *supra* note 14, at 369–82.

16. Kelly, *supra* note 1, at 387–88.

17. The term “self-determination” stems from Article 1 of the United Nations Charter, which speaks of the “principle of equal rights and self-determination of peoples.” U.N. Charter art. 1, para. 2. Subsequent declarations voted by the U.N. General Assembly also refer to the term “self-determination.” See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶ 2, U.N. Doc. A/64 (Dec. 24, 1960) (“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”); 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), ¶ 1, U.N. Doc. A/64 (Oct. 24, 1970) (“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people.”).

18. Scharf, *supra* note 4, at 378; see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 31–32 (June 21); Western Sahara, 1975 I.C.J. 12, 31–33 (Oct. 16); Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 566–67 (Dec. 22); East Timor (Port. v. Austl.), 1995 I.C.J. 90, 265–68 (June 30).

Under the principle of self-determination, a group with a common identity and link to a defined territory is entitled to decide its political future in a democratic fashion.¹⁹ For a group to be entitled to exercise its collective right to self-determination, it must qualify as a “people.”²⁰ Traditionally, a two-part test has been applied to determine when a group qualifies as a people.²¹ The first prong of the test is objective and seeks to determine to what extent the group members “share a common racial background, ethnicity, language, religion, history, and cultural heritage,” as well as the “territorial integrity of the area the group is claiming.”²² The second prong of the test is subjective and examines “the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct ‘people,’” and “the degree to which the group can form a viable political entity.”²³

Once the determination has been made that a specific group qualifies as a people and thus has the right to self-determination, the relevant inquiry becomes whether the right to self-determination creates a right to secession and independence.²⁴ As mentioned above, the right to self-determination can take forms that are less intrusive on state sovereignty than secession.²⁵ Self-determination can be effectuated in different ways: self-government, autonomy, free association, or, in extreme cases, independence. Understandably, the international community views secession with suspicion,²⁶ and traditionally, the right to independence or

19. Scharf, *supra* note 4, at 379.

20. *Id.*

21. *Id.* Note however that the term “people” has been purposely left undefined under international law and that the tests seeking to determine when a group qualifies as a people have been flexibly applied. *See supra* note 14.

22. Scharf, *supra* note 4, at 379.

23. *Id.*

24. “Secession” under international law refers to separation of a portion of an existing state, whereby the separating entity either seeks to become a new state or to join yet another state, and whereby the original state remains in existence without the seceded territory. Successful secessions around the globe have been rare because secession seems inherently at odds with the principles of state sovereignty and territorial integrity, which have been core values of international law for centuries. DUNOFF ET AL., *supra* note 10, at 112.

25. Scharf, *supra* note 4, at 379.

26. *Id.* at 380 (noting that secession is “synonymous with the dismemberment of states”). Note the 1970 statement by then U.N. Secretary-General U. Thant:

As far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept

secession as a mode of self-determination has only applied to people under colonial domination or some kind of oppression.²⁷ However, modern-day international law has come to embrace the right of non-colonial people to secede from an existing state, “when the group is collectively denied civil and political rights and subject to egregious abuses.”²⁸ This right has become known as the “remedial” right to secession and has its origin in the 1920 Aaland Islands case.²⁹

The Aaland Islands were a small island nation situated between Finland and Sweden, belonging to the former and seeking to reunite with the latter.³⁰ The Aalanders claimed that they were ethnically Swedish, and that they wished to break off from Finland and to become a part of Sweden.³¹ In an advisory opinion, the second Commission of Rapporteurs operating within the auspices of the League of Nations held, first, that this issue was properly of international, not domestic jurisdiction, and second, that the Aalanders had a right to a cultural autonomy, which had to be exercised within Finland.³² Only if Finland disrespected their ethnic and cultural autonomy would the Aalanders’ right to separate from Finland be

and I do not believe it will ever accept the principle of secession of a part of its Member States.

Secretary-General’s Press Conferences, U.N. MONTHLY CHRON., Feb. 1970, at 34, 36.

27. Scharf, *supra* note 4, at 380. Note that under this view, the independence of a colony was not considered secession, because that term referred only to the separation from a state of a portion of its domestic territory. *Id.* Moreover, the international community has also leaned on the theory of “salt-water colonialism,” under which self-determination only applies to lands separated from the metropolitan mother state by oceans or seas. *Id.*

28. *Id.* at 381.

29. *Id.*

30. DUNOFF ET AL., *supra* note 10, at 118–19.

31. *Id.* at 119.

32. The League of Nations created an International Committee of Jurists to determine whether the League of Nations had jurisdiction over this issue and the Committee’s report generally held that the League of Nations had such jurisdiction. *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*, League of Nations Official Journal, Special Supp. No. 3, at 5–10 (1920). Then, the League of Nations appointed a Commission of Rapporteurs to recommend a solution to the Aaland Islands problem, and the Rapporteurs report held that “separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.” *Aaland Islands Report*, *supra* note 4, at 28.

triggered.³³

Similarly, the 1970 Declaration on Principles of International Law Concerning Friendly Relations preconditions the right of non-colonial people to separate from an existing state on the denial of the right to a democratic self-government by the mother state.³⁴ A similar clause, striking a balance between the right to self-determination and territorial integrity, was inserted in the 1993 Vienna Declaration of the World Conference on Human Rights, accepted by all United Nation (U.N.) member states.³⁵ Other U.N. bodies have also referred to the right to remedial secession, such as the 1993 Report of the Rapporteur to the U.N. Sub-Commission Against the Discrimination and the Protection of Minorities on Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities,³⁶ and the General Recommendation XXI adopted in 1996 by the Committee on the Elimination of Racial Discrimination.³⁷

B. RECENT APPLICATIONS OF SELF-DETERMINATION PRINCIPLES

Most recently, the Canadian Supreme Court dealt with the right to self-determination regarding the proposed separation of

33. *Aaland Islands Report*, *supra* note 4, at 34 (“[I]n the event that Finland . . . refused to grant the Aaland population the guarantees which we have just detailed . . . [t]he interests of the Aalanders . . . would then force us to advise the separation of the islands from Finland . . .”).

34. See G.A. Res. 2625 (XXV), ¶ 2, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) (“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”).

35. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 2, U.N. Doc. A/CONF.157/24 (Oct. 13, 1993), *reprinted in* 32 I.L.M. 1661 (1993). Note that the Vienna Declaration, unlike the 1970 Declaration on Friendly Relations, “did not confine the list of impermissible distinctions to those based on ‘race, creed or color,’ indicating that distinctions based on religion, ethnicity, language or other factors would also trigger the right to secede.” Scharf, *supra* note 4, at 382.

36. Comm’n on Human Rights, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, ¶ 84, U.N. Doc. E/CN.4/Sub.2/1993/34 (Aug. 11, 1993).

37. Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 51st Sess., Supp. No. 18 at 125-26, ¶ 11, U.N. Doc. A/51/18 (Sep. 30, 1996).

Quebec from Canada.³⁸ During the 1990s, a secessionist movement in the Canadian province of Quebec threatened the stability of Canada when the citizens of Quebec increasingly sought to separate from Canada and form their own independent state.³⁹ A popular referendum was organized in Quebec in 1995, in which more than 49% of the Quebecois expressed their desire to secede from Canada, and only a very small majority voted to stay within the mother state.⁴⁰ Because of the divided nature of the secession referendum results, the Canadian Supreme Court was asked to issue a decision on the question of whether Quebec had the right to secede from Canada and if so, under what circumstances. The Canadian Supreme Court issued its decision in 1998.⁴¹ Embracing the Aaland Islands precedent, the Canadian Supreme Court distinguished the right to internal self-determination from the right to external self-determination.⁴² While the former refers to a level of provincial autonomy within the existing state (Canada in this instance), including political, civic, cultural, religious, and social rights, the latter refers to the right to separate from the existing state in order to form a new, independent state.⁴³ The Canadian Supreme Court, like the League of Nations, held that a people has a right to internal self-determination first, and that only if that right is not respected by the mother state, the right to break off may accrue.⁴⁴ In other words, the right to separate is conditioned on the non-respect of the right to some form of provincial

38. See *In re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

39. DUNOFF ET AL., *supra* note 10, at 134.

40. *Id.*

41. *Id.*

42. See *In re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

43. *Id.* ¶ 126 (defining internal self-determination as “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state,” and defining external self-determination as potentially taking the form of secession and as arising “in only the most extreme of cases . . . under carefully defined circumstances.”); see also Gruda, *supra* note 14, at 380–81 (detailing the content of the right to external self-determination and of the right to internal self-determination).

44. *In re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶ 134 (Can.) (“[W]hen a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession . . .”). Note that the Canadian Supreme Court declined to answer the issue of under what circumstances such a right to secession accrues, as it determined that the population of Quebec is entitled to meaningful internal self-determination and thus not in a position to claim the right to external self-determination. DUNOFF ET AL., *supra* note 10, at 222.

autonomy.⁴⁵

Recent developments in international law may also lend credence to the idea that the right to remedial secession has crystallized as a norm. In the case of the former Yugoslavia, the republics of Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia were entitled to secede because they had been denied the proper exercise of their right to democratic self-government and, in some cases, had been subject to ethnic violence by the central government in Belgrade.⁴⁶

These authorities suggest that if a government is at the high end of the scale of representative government, the only modes of self-determination that will be given international backing are those with minimal destabilizing effect and achieved by consent of all parties. If a government is extremely unrepresentative and abusive, then much more potentially destabilizing modes of self-government, including independence, may be recognized as legitimate. In the latter case, the secessionist group would be fully entitled to seek and receive external aid, and third-party states and organizations would have no duty to refrain from providing support.⁴⁷

In addition to the above conclusion, I argue that all such groups have also been supported by some of the most powerful states in the world. As the discussion below on statehood and recognition will demonstrate, it is the support of the Great Powers that seems to enable minority groups to secede from their mother state. Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia were all supported by powerful European Union (EU) countries and the United States; their plight to external self-determination resulting in remedial secession was logistically, financially, economically, and politically supported by these countries. Thus, although the right to remedial secession for oppressed peoples may be evolving into a norm of customary law academically speaking, in practice this right

45. *In re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶¶ 134–38 (Can.) (noting that when “the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated,” only then does the right to external self-determination accrue).

46. DUNOFF ET AL., *supra* note 10, at 222. These former Yugoslav republics were successful in their quest to secede from their mother state because of the help and support of the Great Powers; thus, the Great Powers determined that these states were entitled to secede from the former Yugoslavia. See *infra* Part V for further discussion of the influence that the Great Powers have on self-determination movements across the globe.

47. Scharf, *supra* note 4, at 384.

accrues only if there is sufficient political support for the people seeking secession.

III. SELF-DETERMINATION AND OTHER THEORIES

If the breakaway entity is supported by the most powerful states, and if it exercises the right to external self-determination and declares its independence, it faces the legal challenge of proving that it qualifies as a state under international law. Moreover, it faces the political challenge of obtaining official recognition from the most relevant legal actors. In fact, an entity that has not met these burdens risks being shunned by the relevant international actors. Consequently, such an entity cannot engage in any meaningful form of international relations and will remain isolated, thereby undermining its chances of achieving viability. Thus, self-determination rights are closely connected to other legal theories, such as statehood and recognition. In order to exercise its right to external self-determination, the breakaway entity may need external support from powerful states in the form of intervention against the territorial sovereignty of its mother state, which may seek to prevent the breakaway entity from separating. The notion of self-determination is, therefore, closely connected to two other concepts: sovereignty and intervention.

A. SELF-DETERMINATION, STATEHOOD, AND RECOGNITION

Once an entity breaks off from its mother state and seeks to become recognized as a new state, the legal question that arises is whether that entity satisfies the relevant international legal criteria of statehood. According to the 1933 Montevideo Convention, an entity can achieve statehood if it fulfills four criteria: it has a defined territory, a permanent population, a government, and the capacity to enter into international relations.⁴⁸ Scholars have also elaborated additional criteria for statehood, including independence, sovereignty, permanence, willingness and ability to observe international law, a certain degree of civilization, and, in some cases, recognition.⁴⁹

48. Seventh International Conference of American States, Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 3802 L.N.T.S. 19, art. 1 [hereinafter Montevideo Convention].

49. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW passim* (1979).

Statehood is a legal theory that seeks to justify the attribution of statehood on objective criteria, which are at least, in theory, independent from the political reality underlying many attempts at secession or separation.⁵⁰

In practice, the theory of statehood has led to anomalous results.⁵¹ For example, the first criterion of the Montevideo Convention requires that an entity has a defined territory. Many entities that we routinely consider states have a disputed and often undefined territory.⁵² For example, Israel's territory is disputed by its Arab neighbors; the two Koreas have battled over their border for decades; potent rebel movements dispute the territories of Somalia and Sudan.⁵³ As to the second criterion, many entities that we view as states have unpermanent, migratory populations. The Democratic Republic of Congo, Sudan, and Iraq, to name a few, have all experienced significant refugee crises, resulting in shifts in their respective populations, without thereby losing their statehood on the international scene.⁵⁴ Other states have very small populations, like the Pacific island state of Nauru (10,000), or the city-state of San Marino (24,000), and yet such entities are still treated as states.⁵⁵ Regarding the third criterion, entities with collapsed governments have also remained "states" in the past. For example, Afghanistan throughout the 1990s did not have a stable government, and yet it was still treated as a state and retained its seat in all major international organizations.⁵⁶ Finally, as to the fourth criterion, many entities routinely considered states do not have the capacity to enter into international relations.⁵⁷ Small nations like Liechtenstein and Monaco depend on Switzerland and France respectively for their

50. In fact, article 3 of the Montevideo Convention states that "[t]he political existence of the state is independent of recognition by the other states." Montevideo Convention, *supra* note 48, art. 3.

51. DUNOFF ET AL., *supra* note 10, at 115 (noting the flexible interpretation of the statehood criteria by "global elites").

52. *Id.* at 115–16.

53. *Id.* at 116.

54. Refugees International, DR Congo, <http://www.refugeesinternational.org/where-we-work/africa/dr-congo> (last visited on Oct. 14, 2009); Lydia Polgreen, *Refugee Crisis Grows as Darfur War Crosses a Border*, N.Y. TIMES, Feb. 28, 2006, at A1; Refugees International, Iraq, <http://www.refugeesinternational.org/where-we-work/middle-east/iraq> (last visited on Oct. 14, 2009).

55. DUNOFF ET AL., *supra* note 10, at 115.

56. *Id.* at 116.

57. *Id.*

national defense.⁵⁸ Several Pacific island nations, likewise, depend on the United States and New Zealand for their defense and have been dubbed “freely associated states.”⁵⁹ Other small nations depend on the United States, and/or other economically powerful nations, for trade and commercial relations.⁶⁰

The above examples demonstrate that the legal theory of statehood remains inconsistently applied in practice, and often it is the geopolitical reality of a given region that dictates whether an entity is treated as a state by the international community. Statehood in practice seems to hinge on recognition: in other words, an entity seems to be treated as a state only if the outside world, and specifically, the most powerful states (the Great Powers), wishes to recognize it as such.⁶¹ As I argue below in Part V, an entity will be recognized as a new state only if it garners the support of the most powerful states in the international legal arena.

There are two theories of recognition under international law: the declaratory view and the constitutive view.⁶² Under the former, recognition is seen as a purely political act having no bearing on the legal elements of statehood.⁶³ Outside states can choose to recognize the new state, or not, but that decision does

58. *Id.*

59. *Id.* (describing the special arrangements that Micronesia, Palau, the Cook Islands, and Niue—the co-called freely associated states—have with the United States and with New Zealand).

60. See DUNOFF ET AL., *supra* note 10, at 115–16 (describing the various dependent relationships that smaller and developing states sometimes have with larger, developed states).

61. A cynic might ask why international law cares about statehood at all. In other words, why would a newly independent state care for proving to anyone on the outside that it meets the requirements of statehood? If the people who live in a given country are happy with the achievement of independence, they should not have to worry about proving to the outside world that their home nation qualifies as a state under international law. However, the reality proves the opposite: a new “state” faces crucial challenges after its assertion of independence, such as economical and trade issues, developmental problems, security concerns, monetary hurdles, etc. Thus, an entity seeking to become a state on the international scene must first persuade external actors that it is a state in order to become fully engaged in international relations with such external actors, on which it often depends. The external actors on which virtually all new states depend are the most powerful states in the world, or, as described in this Article, the Great Powers. Thus, it is the Great Powers’ determination that an entity shall (or shall not) be recognized as a new state that often pre-determines the outcome of a separation struggle. See *infra* Part V.

62. DUNOFF ET AL., *supra* note 10, at 137–38.

63. *Id.* at 137.

not influence the legal determination of statehood.⁶⁴ Under the latter, recognition is seen as one of the main elements of statehood.⁶⁵ Thus, an entity cannot achieve statehood unless it is recognized by outside actors as a state.⁶⁶

While most academics would support the declaratory view,⁶⁷ the constitutive view has teeth in practice nonetheless. In fact, one of the four criteria of statehood—the capacity to enter into international relations—seems closely linked to recognition, because an entity claiming to be a state cannot conduct international relations with other states unless those states are willing to enter into such relations.⁶⁸ In other words, the conduct of international relations is a two-way street, involving the new “state” as well as outside actors that have to be willing to accept the new “state” as their sovereign partner.⁶⁹ No state can exist in a vacuum—a fact well established by international practice. When Southern Rhodesia (now Zimbabwe) decided to separate from Great Britain and to form an independent state in 1965, most of the world refused to recognize Southern Rhodesia as a state.⁷⁰ Consequently, Southern Rhodesia remained isolated from the world and was unable to conduct international relations.⁷¹ The non-recognition of Southern Rhodesia by outside actors prevented it from fully exercising the attributes of legal statehood.⁷² Thus, recognition, whether it is considered as a political or legal act, has a direct impact on the pragmatic determination of statehood: whether an entity will be able to

64. *Id.* (“An entity that meets the criteria of statehood immediately enjoys all the rights and duties of a state regardless of the views of other states.”).

65. *Id.* at 138.

66. *Id.* (“[T]he refusal by states to afford recognition would mean that the entity claiming statehood would not be entitled to the rights of a state.”).

67. *Id.*

68. *Id.* (arguing that “if states refuse to acknowledge that an entity meets these criteria . . . they might continue to treat the claimant as something less than a state;” thus, an unrecognized state may find that its passports are unacceptable to the immigration authorities of other states).

69. Thus, an important treatise states that “[r]ecognition, while declaratory of an existing fact, is constitutive in nature, at least so far as concerns relations with the recognizing state.” 1 OPPENHEIM’S INTERNATIONAL LAW 133 (Robert Jennings & Arthur Watts ed., 9th ed. 1992).

70. DUNOFF ET AL., *supra* note 10, at 138. Note that the U.N. Security Council condemned the Southern Rhodesia declaration of independence and declared that it had no legal validity. S.C. Res. 217, ¶ 3, U.N. Doc. S/RES/217 (Nov. 20, 1965).

71. DUNOFF ET AL., *supra* note 10, at 138 (noting that nearly all states refused to conclude treaties with Southern Rhodesia).

72. Note that the situation was resolved in 1978, following a peace accord which led to a majority government in Zimbabwe. *Id.*

truly act as a state on the international scene.

While international recognition is no longer widely considered to be a required element of statehood, in practice the ability to exercise the benefits bestowed on sovereign states contained in the Westphalian sovereignty package requires respect of those doctrines and application of them to the state in question by other states in the interstate system.⁷³

In addition to the declaratory and constitutive views, scholars have advanced a third, intermediary view on recognition. The intermediary view seeks to combine the declaratory and constitutive view while acknowledging what truly goes on in practice. It asserts that recognition is a political act independent of statehood, but that outside states have a duty to recognize a new state if that state objectively satisfies the four criteria of statehood.⁷⁴ “Recognition, while in principle declaratory, may thus be of great importance in particular cases. In any event, at least where the recognizing government is addressing itself to legal rather than purely political considerations, it is important evidence of legal status.”⁷⁵

Finally, another wrinkle to the international theory of recognition was added in the early 1990s, following the break-up of the former Soviet Union and the former Yugoslavia. At that time, the EU foreign ministers developed guidelines on the recognition of new states in Europe.⁷⁶ Concerned with the existence and maltreatment of minorities within the former Soviet Union and the former Yugoslavia, the EU foreign ministers announced that the criteria for recognition of new states within the EU would include respect for human rights, as well as the protection of minority rights.⁷⁷ Thus, an entity applying for statehood within the EU had to prove that it treated minority groups fairly and that it respected minority rights in its territory.⁷⁸

73. Kelly, *supra* note 1, at 382 (citing LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 15–16 (1995)).

74. *Id.* (citing LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 13–15 (1995)).

75. CRAWFORD, *supra* note 49, at 74.

76. European Community, Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,” 31 I.L.M. 1486, 1487 (1992) (requiring “respect for the provisions of the Charter of the United Nations . . . especially with regard to the rule of law, democracy and human rights,” and “guarantees for the rights of ethnic and national groups and minorities” in order for a new state to be recognized).

77. *Id.*

78. *See id.* at 1486.

While these criteria have not reached the status of international custom and do not bind states that are not members of the EU, they show nonetheless an evolution of international law in the field of recognition.⁷⁹ In fact, it seems that the international community today allows outside actors to impose additional requirements on entities striving for recognition.⁸⁰ Regional bodies, organizations, and states can precondition recognition on compliance with specific criteria that have nothing to do with the legal contours of statehood. This phenomenon illustrates once more the fact that powerful states or groups of states, like the EU, often dictate the fate of independence-seeking movements by choosing to legitimize their plights (or not) only under specific conditions.

In the context of the EU, such imposition of additional criteria of recognition was used several times by the Badinter Commission, an arbitral body of experts established to deal with the various issues arising out of the Yugoslav crisis in the 1990s.⁸¹ With respect to Macedonia, the Badinter Commission insisted that Macedonia undertake not to alter its frontiers by means of force and credited Macedonia for having amended its constitution to renounce all territorial claims against neighboring states.⁸² After Macedonia agreed to follow the Badinter Commission recommendations, the EU foreign ministers decided to impose yet an additional requirement on Macedonia by indicating that this new state would be recognized only if it used a name that did not include the term Macedonia.⁸³ This “requirement” resulted from a geopolitical

79. The Badinter Commission, an arbitral body of experts operating in the early 1990s to resolve legal issues arising from the Yugoslav dissolution, added a new criterion for recognition of new states, because “it embraced democratization and respect for human rights” as such criteria. Enver Hasani, *Self-Determination Under the Terms of the 2002 Union Agreement Between Serbia and Montenegro: Tracing the Origins of Kosovo’s Self-Determination*, 80 CHL-KENT L. REV. 305, 313 (2005).

80. For example, the EU set out the respect of human rights as a “fundamental prerequisite for recognition.” Brown, *supra* note 14, at 247 (citing European Community, Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union,” 31 I.L.M. 1486, 1486–87 (1992)).

81. DUNOFF ET AL., *supra* note 10, at 114–15.

82. Conference on Yugoslavia Arbitration Commission, On the Recognition of the Socialist Republic of Macedonia by the European Community and Its Member States, July 4, 1992, 31 I.L.M. 1507 (1992). Note that the debate over Macedonian recognition was sparked by Greek claims that Macedonia would have territorial claims against northern Greece, a region also known as Macedonia. See DUNOFF ET AL., *supra* note 10, at 142.

83. DUNOFF ET AL., *supra* note 10, at 143. Ultimately, this issue was resolved

grievance by EU member Greece, which was afraid that the new State of Macedonia would have territorial claims to a part of northern Greece that had also been known as Macedonia.⁸⁴ The use of such additional criteria for recognition by the EU signals a trend of conditioning recognition on the respect of fundamental rights and rules of international law, as well as on obedience to regional geopolitical equilibrium.⁸⁵ In other words, powerful decision-makers are telling new states that they will only be accepted as full players if they vow to respect the rule of law and to adhere to preserving regional stability and peace.

Moreover, the use of the additional criteria for recognition described above demonstrates the leverage and power that the Great Powers have on the international scene. Entities seeking to become recognized as new states must garner the support and help of the most powerful states. As a corollary, entities seeking to become recognized as new states must, at times, accept the rules set forth by the super-states, as Macedonia did when it sought to separate from the former Yugoslavia. The acceptance of these new recognition rules by the weaker states demonstrates their acquiescence in the new global order of sovereign, more sovereign, and less sovereign states. Whether an entity ultimately acquires the right to self-determine its fate and whether it is ultimately recognized as a new state correlates directly to whether that entity enjoys the support of the most powerful sovereign states.

B. SELF-DETERMINATION, SOVEREIGNTY, AND INTERVENTION

The principle of self-determination is also closely linked to the notions of state sovereignty and intervention.⁸⁶ State

when Macedonia was admitted to the U.N. under the name of "The Former Yugoslav Republic of Macedonia" pending settlement of the name issue with Greece. *Id.* The United States government decided in 2004 to refer to the country as the Republic of Macedonia. *Id.*

84. *Id.*

85. The latter proposition of conditioning recognition on the respect of the regional geopolitical equilibrium is well illustrated by the Greek opposition to the recognition of Macedonia if the new entity wanted to be called by that name. In fact, nothing in the international legal doctrine on recognition authorizes states to require new entities to change their name if they wish to be recognized; yet, in practice, such results are possible and have occurred at least once in Europe, as the Macedonian example demonstrates.

86. In fact, the earned sovereignty theory also supports this view of qualified state sovereignty, as it perceives sovereignty as "a bundle of authority and functions which may at times be shared by the state and sub-state entities as well as international institutions." See James R. Hooper & Paul R. Williams, *Earned*

sovereignty, in its Westphalian form, typically includes: an equality of states within the international community, a general prohibition on foreign interference with internal affairs, a territorial integrity of the nation-state, and an inviolability of international borders.⁸⁷ However, as early as the mid-19th century, scholars noticed a “sliding scale of sovereign equality” among states by linking “the degree of sovereignty a state has to the degree of equality it enjoys on the international stage.”⁸⁸ The notion of unequal state sovereignty was further enhanced through the creation of the United Nations and its Security Council structure, giving veto power to five super-states: the United States, Russia, France, Great Britain, and China. Scholars and historians have dubbed such powerful states the “Great Powers.” Membership in this evolving club of super-sovereign states varies, because the status of any country as a Great Power depends on the other states’ willingness to admit the existence of yet another super power. Nonetheless, most would agree that the Great Powers club currently also includes three other G-8 countries: Germany, Italy, and Japan.⁸⁹ The Great Powers possess greater sovereignty attributes than other states because they have enhanced decision-making authority in the institutional context, as well as in the economic realm.⁹⁰

Because the Great Powers are essentially more “sovereign” than other states, they may engage in interventions and cross other states’ borders, in the name of preserving some higher ideals. In the modern world, Great Powers can “cross theoretically unbreachable frontiers either individually or collectively,” in a variety of differently justified state interventions.⁹¹ One of such forms of intervention, when Great Powers breach frontiers to avoid human suffering and tragedy, has been termed “humanitarian intervention.”⁹² A self-determination seeking people may be aided by the Great Powers’ decision to organize a humanitarian intervention to prevent a central government from oppressing that people. Conversely, the Great Powers may decide not to help a struggling minority movement, by refusing to stage an

Sovereignty: The Political Dimension, 31 DENV. J. INT'L L. & POL'Y 355, 357 (2003).

87. Kelly, *supra* note 1, at 376.

88. *Id.* at 377 (citing HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 33 (3d ed. 1866)).

89. *Id.* at 365.

90. *Id.* at 365–66.

91. *Id.* at 381.

92. *Id.*

intervention and by implicitly turning a blind eye to the oppressive policies of the governing regime.

Some American presidents have embraced this intervention theory, and have even attempted to stretch its contours by constructing a so-called “involuntary sovereignty waiver” justification for the application of intervention. Thus, Richard Haass, the former Director of Policy Planning for the State Department in the G. W. Bush administration and the current President of the Council on Foreign Relations, advanced the idea that countries constructively waive their traditional sovereignty shield and invite international intervention when they undertake to massacre their own people, harbor terrorists, or pursue weapons of mass destruction.⁹³ According to Haass, state sovereignty does not enjoy absolute protection in the modern world and has been eroded through the forces of globalization; thus, we need to adjust our way of thinking to account for “weak states” and “outlaw regimes” which jeopardize their sovereignty “by pursuing reckless policies fraught with danger for their citizens and the international community.”⁹⁴ Haass further reasoned that “sovereignty is not a blank check,” and considered that Great Powers have unique intervention rights with respect to rogue regimes that have forfeited their sovereign privileges and their immunity from external, armed intervention.⁹⁵ According to Haass, there are three circumstances that justify intervention: 1) where a state commits or fails to prevent genocide or crimes against humanity in its territory; 2) where countries find it necessary to take action to protect their nationals against other states that harbor international terrorists; and 3) where states pursue weapons of mass destruction.⁹⁶

93. Haass constructed this theory initially in 2002, with respect to States which commit atrocities against their people or harbor terrorists. Nicholas Lemann, *The Next World Order*, *NEW YORKER*, Apr. 1, 2002, at 45–46. Haass then amended this theory in 2003, when he included States that pursue weapons of mass destruction. See Richard N. Haass, Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University: Sovereignty: Existing Rights, Evolving Responsibilities (Jan. 14, 2003), in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, 698–99 (Henry J. Steiner et al. eds., 3d ed. 2008), available at <http://www.iwar.org.uk/news-archive/2003/01-15.htm> [hereinafter Georgetown Speech].

94. See Kelly, *supra* note 1, at 403 (citing RICHARD N. HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD 13 (rev'd ed. 1999)).

95. Georgetown Speech, *supra* note 93, at 698; see Kelly, *supra* note 1, at 403.

96. Kelly, *supra* note 1, at 404.

These three exceptions to the norm against intervention are justified, according to Haass, because sovereignty is conditional, and “[w]hen states violate minimum standards by committing, permitting, or threatening intolerable acts against their own people or other nations, then some of the privileges of sovereignty are forfeited.”⁹⁷ Under this theory, it can no longer be asserted that a state may internally do whatever it wishes, as such actions necessarily impact other states,⁹⁸ and thus give rights to other states to intervene. In other words, when a state engages in a particular kind of offensive behavior, it has involuntarily “waived” its sovereignty.⁹⁹ The involuntary waiver of sovereignty theory illustrates another example of the dominance exercised by the Great Powers on the international scene. Under this theory, the Great Powers have expanded rights to intervene in the affairs of another, less sovereign, country anytime that the Great Powers see the other country’s behavior as troublesome. Thus, the Great Powers, and not the United Nations or any other global body, acquire global decision-making authority under the involuntary sovereignty waiver theory when it comes to intervention within any other country, anywhere in the world, at any time. The Great Powers rule, and hegemony, over the rest of the world becomes dangerously potent if one adopts the involuntary sovereignty waiver theory without any reservations or restrictions.

The theory of involuntary sovereignty waiver has been advanced in the recent decades to justify different types of intervention against different “rogue” regimes. For example, in 1991, a U.N.-sanctioned intervention on behalf of the Kurds in northern Iraq was justified on the grounds that the Kurds were suffering severe human rights deprivations inflicted by the Iraqi government.¹⁰⁰ More recently, the North Atlantic Treaty Organization (NATO) intervention in Kosovo in 1999 exemplifies the notion of humanitarian intervention justified on the grounds of involuntary sovereignty waiver. Serbia engaged in a campaign of human rights violations in Kosovo; by doing so, under this theory it waived its sovereignty over the Kosovar region and “invited” outside actors to intervene.¹⁰¹ Thus,

97. *Id.* at 405 (citing RICHARD N. HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD 13 (rev'd ed. 1999)).

98. Kelly, *supra* note 1, at 404–05.

99. *Id.* at 402 (citing Lemann, *supra* note 93, at 42).

100. Scharf, *supra* note 4, at 383.

101. See *infra* Part V (discussing the idea of an involuntary sovereignty waiver

outside actors were legally justified in encouraging and providing for the Kosovar independence because Serbia's claim to territorial sovereignty was not absolute and remained subject to external influences.¹⁰² In other words, because of the Serbian government's oppressive policies in Kosovo, Serbian sovereignty over Kosovo diminished to such a minimal level that the notion of territorial sovereignty became trumped by the necessity of humanitarian intervention or other kinds of outside interference.¹⁰³

The idea of self-determination, in the modern world, seems closely linked to state sovereignty and intervention. Because states are only "conditionally" sovereign, they may not suppress legitimate self-determination movements indefinitely. If states choose to oppress self-determination movements, then such movements may seek help from external actors, typically the Great Powers, which may intervene to help the struggling movement achieve some form of self-determination. As in the case of Kosovo, the Great Powers may intervene to assist the struggling movement in achieving the most drastic form of external self-determination, namely, remedial secession and independence.¹⁰⁴ The presence of the Great Powers on the international legal scene has eroded the sovereignty of other, "lesser" states. Thus, the sovereignty of the lesser states has become conditional. Moreover, the Great Powers have indicated their willingness to intervene in the affairs of such lesser states

by rogue states and regimes, whereby such rogue states and regimes involuntarily waive their sovereignty and invite external interference to remedy their own wrongdoing).

102. Several influential authors have supported external intervention in Kosovo on humanitarian grounds. See generally Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23 (1999); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847 (1999); Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857 (1999); Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828 (1999). Other authors have supported NATO actions against the FRY with reservations, arguing that the Kosovo case should not set a precedent for the future but should be considered an exception due to regional considerations after the dissolution of Yugoslavia. See W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 860 (1999).

103. See Reisman, *supra* note 102, at 860–62 (arguing that human rights violations in Kosovo effectively eliminated the defense of domestic jurisdiction and merited military action).

104. In the case of Kosovo, the Great Powers intervened through NATO by engaging in a series of air strikes on the territory of Kosovo's then mother-state, the Federal Republic of Yugoslavia. See *infra* Part IV.C.

to aid independence-seeking movements, when such movements are viewed as legitimate by the Great Powers.¹⁰⁵ The notion of self-determination has therefore become intertwined with the notions of state sovereignty and intervention, and all three are intrinsically linked with the presence of the Great Powers.

IV. CASE STUDIES

Several case studies illustrate the link between self-determination, state sovereignty, and intervention described above. These studies include East Timor, Chechnya, Kosovo, and Georgia. In each of these countries a “people” struggled for self-determination and ultimately independence. Yet, only the Timorese and the Kosovars were successful in their plight for self-determination, primarily because the Great Powers determined that their cause was legitimate. The Chechens, and the South Ossetians and Abkhazians, were not as lucky: their struggles for self-determination remained unsupported by the Great Powers and these regions still remain governed by the same central regimes.

A. EAST TIMOR

East Timor forcibly became a part of Indonesia in 1976, when Indonesia claimed East Timor as its 27th Province.¹⁰⁶ Prior to 1976, East Timor had been colonized and administered by Portugal.¹⁰⁷ The international community was swift in its condemnation of Indonesia following the 1976 takeover and the United Nations continued to recognize Portugal as East Timor’s official administrator.¹⁰⁸ The Indonesian rule over East Timor “imposed a military force that viciously led to human rights and humanity violations,”¹⁰⁹ and was often marked by extreme violence and brutality. Estimates of the number of East Timorese who died during the occupation vary from 60,000 to

105. As will be discussed below, the examples of East Timor and Kosovo illustrate the idea of minority movements aided by the world community in their quest for independence. See *infra* Parts IV.A, IV.C.

106. Jani Purnawanty, *Various Perspectives in Understanding the East Timor Crisis*, 14 TEMP. INT'L & COMP. L.J. 61, 65 (2000).

107. *Id.* at 62 (noting that the Portuguese first colonized East Timor in 1533).

108. Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo and East Timor*, 34 VAND. J. TRANSNAT'L L. 455, 465 & n.36 (2001).

109. Purnawanty, *supra* note 106, at 68–69.

200,000.¹¹⁰

In 1999, the East Timorese people voted in a United Nations-organized referendum to separate from Indonesia.¹¹¹ Indonesia protested the referendum results and was accused of backing violent militias to attack and intimidate the East Timorese populations.¹¹² The United Nations Security Council, in Resolution 1264, established the International Force for East Timor, a peacekeeping force to safeguard the country.¹¹³ East Timor was then administered by the United Nations, with substantial support from other countries. East Timor became the first new sovereign state of the 21st century by obtaining independence on May 20, 2002 when United Nations Secretary-General Kofi Annan handed over authority of the country to the new government.¹¹⁴ A few months later, East Timor joined the United Nations as a new, independent state.¹¹⁵ Sporadic outbreaks of violence have plagued East Timor since its independence, but the constant military involvement by the international community has managed to halt the spread of violence.¹¹⁶

The East Timorese struggle for independence illustrates perfectly the paradigm of how the Great Powers' support, or lack thereof, influences the result of such a self-determination struggle. The East Timorese people fought for independence during several decades. During the Cold War era, however, their struggle was unsupported by some of the Great Powers, and the East Timorese were not able to assert independence from Indonesia on their own, as they lacked the political, economic, and military capability to do so. After the end of the

110. See Joe Nunes, *East Timor: Acceptable Slaughters*, <http://chss.montclair.edu/english/furr/nunestimor.html> (last modified Sept. 8, 1999).

111. Purnawanty, *supra* note 106, at 67.

112. See, e.g., *id.* ("In fact, the Indonesian Military has been accused of arming, funding and preparing local militias for a guerrilla movement in case a pro-independence group should emerge as a winner of the conflict."); see also Jean d'Aspremont, *Post-Conflict Administration as Democracy-Building Instruments*, 9 CHI. J. INT'L L. 1, 9 (2008) (noting that violence ensued after the United Nations organized referendum).

113. Purnawanty, *supra* note 106, at 70.

114. *East Timor: Birth of a Nation*, BBC NEWS WORLD EDITION, May 19, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/1996673.stm> [hereinafter *East Timor, Birth*]; see also *Timor-Leste: UN Admits Newest Member State*, UN NEWS CENTRE Sept. 27, 2002, <http://www.un.org/apps/news/infocusRel.asp?infocusID=27> (declaring East Timor the first new country of the millennium).

115. UN NEWS CENTRE, *supra* note 114.

116. *East Timor, Birth*, *supra* note 114.

Cold War, the Great Powers began supporting the East Timorese, which was reflected in the Security Council decision-making process, when virtually all Security Council members agreed that the East Timorese should no longer remain governed by Indonesia.¹¹⁷ Thus, the United Nations Security Council authorized the deployment of peacekeepers to East Timor and helped organize the popular referendum and elections, which ultimately paved the way to Timorese independence.¹¹⁸ Absent the global and the Great Powers' support in the post Cold War period, it is doubtful that East Timor would have gained independence from Indonesia as easily.

B. CHECHNYA

Chechnya existed until the early 1990s as part of the former Soviet Union.¹¹⁹ Following the collapse of the Soviet Union in 1991, Chechnya obtained de facto independence after the so-called First Chechen War with Russia.¹²⁰ During this period, Chechnya became a "center of criminal activities of extraordinary proportions" and generally failed to build any representative institutions of a viable state.¹²¹ In fact, after the First Chechen War, parliamentary and presidential elections took place in January 1997, and the newly elected government in Chechnya, while seeking to maintain Chechen sovereignty, appealed to Moscow for help.¹²² Chechnya needed to rebuild itself, as its infrastructure and economy were heavily

117. See Sreeram Chaulia, *A World of Selfistans?*, GLOBAL POLICY FORUM, Mar. 13, 2008, <http://www.globalpolicy.org/component/content/article/171-emerging/29875.html> ("As long as General Suharto [the Indonesian leader] was necessary for the West's Cold War agenda, the United States, Britain, and Australia helped Indonesia to annex and control East Timor. Once Indonesia lost the support of the great powers, these same states ganged up to recognize East Timor's right to self-determination and acted as midwives for its birth as an independent state.").

118. Scholars have already noted the support of the United Nations for the East Timorese struggle for independence. See, e.g., d'Aspremont, *supra* note 112, at 8–10.

119. See Freedom House, *Chechnya [Russia] (2003)*, http://www.freedomhouse.org/modules/mod_call_dsp_country-fiw.cfm?year=2003&country=2593 (last visited on Oct. 14, 2009).

120. Charney, *supra* note 108, at 462–63 & n.27.

121. *Id.* at 463; see also James Marson, *The Price of Chechnya's Peace*, GUARDIAN, Apr. 17, 2009, <http://www.guardian.co.uk/commentisfree/2009/apr/17/chechnya-russia-withdrawal-moscow> (noting that Chechnya had de facto independence after the First Chechen War).

122. See Freedom House, *supra* note 119.

undermined by the war.¹²³ Russia sent money for the rehabilitation of the Chechen State, but most of these funds were stolen by Chechen authorities and distributed between favored warlords.¹²⁴ Chechnya also faced a refugee crisis; almost half a million people had been internally displaced and lived in refugee camps or overcrowded villages.¹²⁵ Fearing further violence, Russian military troops remained stationed in Chechnya.¹²⁶

In September 1999, Moscow accused the Chechens with involvement in a series of apartment bombings, which took place in several Russian cities.¹²⁷ As a retaliatory measure, Russia initiated a prolonged air campaign of military strikes against Chechnya, followed by a ground offensive in October 1999.¹²⁸ The latter effectively started the Second Chechen War.¹²⁹ Because the second war had been much better organized and planned than the first Chechen War, Russian military forces were quickly able to re-establish control over most Chechen regions.¹³⁰ In February 2000, Russian forces recaptured Grozny, the Chechen capital, and the pro-independence Chechen regime crumbled.¹³¹ In the following years, Russia was successful in installing a pro-Russia Chechen regime, and the most prominent separatist leaders died.¹³² Nonetheless, violence still occurs in the North Caucasus and Chechnya remains a troubled and potentially explosive region.¹³³

Chechnya illustrates the idea of a struggling minority group, seeking self-determination rights from the central government (Russia), unaided by the Great Powers.¹³⁴ Alone,

123. *See id.* (noting that Chechnya pressured Moscow for help after the war because its "economy and infrastructure were virtually destroyed").

124. *See id.* (noting that reconstruction efforts have been plagued by corruption).

125. ALEX GOLDFARB WITH MARINA LITVINENKO, *DEATH OF A DISSIDENT: THE POISONING OF ALEXANDER LITVINENKO AND THE RETURN OF THE KGB 95* (2007).

126. *See* Freedom House, *supra* note 119 (noting that the 1996 peace deal called for the withdrawal of most Russian forces from Chechnya).

127. *Id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *Id.*

132. *Id.*

133. *See id.*

134. Scholars have already noted the lack of international support for Chechnya, attributing it to the fact that Russia was a major military and economic power, holding veto power on the U.N. Security Council. *See* Charney, *supra* note 108, at 459.

Chechnya could not face the Russian military power and could not undertake the economic challenges of achieving viability as an independent state. Some have suggested that it is the Chechen inability to build democratic institutions and peace during its de facto independence, in between the two Chechen Wars, which caused the Great Powers to refuse to recognize Chechnya as a legitimate self-determination seeking entity.¹³⁵ However, I posit that it is the Russian membership in the Great Powers, and precisely, the Russian veto power on the Security Council, which directly caused the lack of international involvement in Chechnya.¹³⁶ Unlike the situation in East Timor and in Kosovo, as will be discussed directly below, the Great Powers had no incentive to help Chechnya achieve independence and statehood. One of the Great Powers, Russia, was directly opposed to any Chechen form of sovereignty because Russia managed to reacquire control over Chechnya and has always viewed it as a territory of Russia.¹³⁷ I argue that the other Great Powers, including the United States, have simply not had enough geopolitical clout and stamina to engage in a full-blown diplomatic, and possibly military, altercation with Russia over the Chechen situation. Thus, while the other Great Powers were sympathetic to the Chechen cause and outraged by human rights violations in Chechnya, their rhetoric remained relatively mild and none of them chose to formally oppose Russia. Chechnya could not and cannot achieve independence alone.

C. KOSOVO

Kosovo had been an autonomous province of Serbia, one of the six republics within the Socialist Federal Republic of Yugoslavia (SFRY).¹³⁸ When the SFRY dissolved in the early 1990s, Kosovo remained a part of the SFRY successor, the Federal Republic of Yugoslavia (FRY) first, then a part of Serbia and Montenegro, and when Montenegro broke away from the

135. *Id.* at 462–63.

136. Even scholars like Charney, who advances the idea that the Chechens' inability to build democratic institutions contributed to the lack of international support for their cause, freely admit that it is at least possible that Russia's tremendous power as a state may have prevented the Chechens from garnering significant international support. *Id.* at 459.

137. See Freedom House, *supra* note 119.

138. Brown, *supra* note 14, at 238.

latter, Kosovo remained a part of the sole Serbian State.¹³⁹

Until the late 1980s, Kosovo had the status of an autonomous province within the SFRY and exercised important regional self-governance functions.¹⁴⁰ More importantly, its predominantly ethnic Albanian population enjoyed multiple rights, such as the right to education in the Albanian language, the right to Albanian language media, the right to celebrate cultural holidays, and the right to generally preserve its ethnic structure and belonging.¹⁴¹ However, in response to ethnic Albanian uprising movements throughout Kosovo, staged by guerilla-like paramilitary groups, the Serbian leadership undertook draconian measures in the late 1980s to curb the upheaval.¹⁴² Thus, Kosovo's autonomous province status was removed and the Albanian population was deprived of important civil and political rights.¹⁴³

In 1999, when the former Serbian president Slobodan Milosevic engaged in a brutal campaign of oppression¹⁴⁴—once again in response to ethnic upheavals in Kosovo staged by the Kosovo Liberation Army (KLA), a separatist movement operating in Kosovo¹⁴⁵—the international community responded

139. *Id.* at 238–40.

140. The 1974 SFRY Constitution granted Kosovo the status of an autonomous province within the country's federal structure. Gruda, *supra* note 13, at 387. Under the terms of the 1974 Constitution, Kosovo had the following rights: the right to adopt and change its constitution; the right to adopt laws; the right to exercise constitutional judicial functions and to have a constitutional court; judicial autonomy and the right to a Supreme Court; the right to decide on changes of its territory; the right to ratify treaties that were concluded with foreign states and international bodies; the right to have independent organs and ministries within the local government. *Id.*

141. Henry H. Perritt Jr., *Final Status for Kosovo*, 80 CHI.-KENT L. REV. 3, 7 (2005) (noting that Kosovar Albanians were allowed to open an Albanian-language university in Pristina in 1969, and that the institutional changes under the 1974 SFRY Constitution resulted “in the growing Albanization of educational, political, and legal institutions”); *see also* Gruda, *supra* note 13, at 387 (noting the significant political and legal autonomy granted to Kosovo by the 1974 SFRY Constitution).

142. Perritt, *supra* note 141, at 8 (describing the measures undertaken by Slobodan Milosevic beginning in 1989 to curb the Albanian upheaval).

143. Brown, *supra* note 14, at 263 (noting that amendments to Serbia's constitution in 1989 and 1990 negated the Kosovar autonomy).

144. Perritt, *supra* note 141, at 8 (describing the Serbian campaign of ethnic cleansing in Kosovo, accompanied by massive violence against the Kosovar Albanians by Serbian paramilitary, military and police forces).

145. Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y 387, 397 (2003) (“[S]ome elements of the Kosovar Albanian population formed the Kosovo Liberation Army [KLA], which murdered members of the Serbian police and military forces and perceived Kosovar Albanian collaborators.”); *see also* Perritt, *supra* note 141, at 8

with force.¹⁴⁶ NATO countries launched a series of air strikes on the territory of Serbia, which ultimately forced Milosevic to sign a peace agreement with the Kosovars at Rambouillet, France, in June 1999.¹⁴⁷ Under the terms of the Rambouillet Peace Agreement and, subsequently, United Nations Resolution 1244, Kosovo was to be administered by a United Nations provisional authority, the United Nations Mission in Kosovo (UNMIK). Its safety was to be guarded by a NATO-led military force, KFOR, and subsequent negotiations were to take place in the near future, to decide about the true fate of the province.¹⁴⁸

Once Milosevic stepped down as Serbia's president and leader, the Serbian outlook and its position toward the West changed and Milosevic's nationalist rule was replaced by a more "Western-focused government."¹⁴⁹ It became clear that in order to join Western Europe—and possibly become a member of the EU—Serbia had to sacrifice Kosovo, or to at least refrain from using force in order to prevent it from breaking off.¹⁵⁰ The

(noting that the KLA began attacking Serbian police and military facilities in Kosovo).

146. Perritt, *supra* note 141, at 8 (indicating that NATO began its bombing campaign "aimed at ending ethnic cleansing and protecting human rights in Kosovo"); *see also* IAIN KING & WHIT MASON, PEACE AT ANY PRICE: HOW THE WORLD FAILED KOSOVO 43–45 (2006) (describing the events leading up to the NATO air strikes in the former Yugoslavia).

147. Hasani, *supra* note 79, at 320 (noting that the refusal of Serbia to agree to the Rambouillet Accords caused the NATO bombing campaign); *see also* Brown, *supra* note 14, at 240 (noting how the NATO bombing campaign was successful in forcing the Yugoslav government to agree to terms of peace).

148. *See* Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, U.N. Doc. S/1999/648 (June 7, 1999), *available at* http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html [hereinafter Rambouillet Accords]. Moreover, Security Council Resolution 1244 directly references the Rambouillet Accords for the purpose of determining Kosovo's future status. S.C. Res. 1244, ¶ 11(e), U.N. SCOR 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999) [hereinafter Resolution 1244]. Thus, Resolution 1244 represents the legal foundation upon which "the civilian and military branches of the international administration in Kosovo are based." Hasani, *supra* note 79, at 323; *see* Resolution 1244; *see also* Gruda, *supra* note 14, at 356 (noting that Resolution 1244 provides for the civil administration of Kosovo). Under Resolution 1244, Kosovo was occupied by a multilateral force (KFOR) and administered by a United Nations Mission in Kosovo (UNMIK). *See* Hasani, *supra* note 79, at 323–25 (providing a detailed discussion of the U.N. administrative regime over Kosovo under the terms of the Rambouillet Agreement).

149. Williams, *supra* note 145, at 415 (describing the political changes in Serbia as a result of Milosevic's removal from office).

150. For example, during a recent trip to Serbia, in March 2008, I witnessed a peaceful political protest on the streets of Novi Sad, the capital of the northern province of Vojvodina, where protesters were carrying banners with signs reading: "We have a right to the European future" and "Don't let Kosovo slow us down." This

relevant players, including the Serbian leadership, the Kosovar representatives, and U.N. and EU representatives, negotiated several times, but because of strong differences about the future of Kosovo, they were never able to reach consensus.¹⁵¹ In fact, Serbia, while pragmatically recognizing the need to accommodate western demands,¹⁵² maintained its position that Kosovo remain a territorial part of Serbia with strong regional autonomy.¹⁵³ Kosovo, on the other hand, insisted that it deserved independence.¹⁵⁴

On February 17, 2008, backed by powerful world countries like the United States, the United Kingdom, and France, the Kosovar Parliament voted on a declaration of independence.¹⁵⁵ In the few days following the Kosovar declaration of independence, the United States, as well as about twenty EU countries, formally recognized Kosovo as a new state.¹⁵⁶ Thus, Kosovo illustrates a situation similar to that of East Timor: a struggling minority group, seeking self-determination is aided by the Great Powers and is ultimately able to achieve independence from its central government, in this case, Serbia. Without the help of the Great Powers, and precisely, the

demonstrates that a portion of the Serbian population seems aware of the necessity to let go of Kosovo in order to have access into Europe.

151. Viola Trebicka, *Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination*, 32 YALE J. INT'L L. 255, 256–58 (2007) (describing the so-called status talks on the future of Kosovo and the fact that a “brokered political agreement . . . has proven much more elusive than was first thought”).

152. Timothy Garton Ash, *This Dependent Independence is the Least Worst Solution for Kosovo*, GUARDIAN, Feb. 21, 2008, <http://www.guardian.co.uk/world/2008/feb/21/kosovo> (comparing the loss of Kosovo for Serbia as a loss of a “gangrenous arm” and concluding that this is a “precondition of recovery”).

153. In fact, the day after the Kosovar declaration of independence, the Serbian President, Boris Tadic, “appealed to the UN Security Council to declare Kosovo’s ‘unilateral and illegal’ declaration of independence ‘null and void,’” because Kosovo’s separation “violates Security Council Resolution 1244 which reaffirms Serbia’s sovereignty and territorial integrity.” *Ban Ki-moon Urges Restraint by All Sides After Kosovo Declares Independence*, UNMIK NEWS COVERAGE, Feb. 18, 2008, http://www.unmikonline.org/archives/news02_08full.htm.

154. Trebicka, *supra* note 151, at 255 (observing that the Kosovar Albanians have demanded their right to self-determination, which would lead to secession).

155. See UNMIK NEWS COVERAGE, *supra* note 153.

156. For example, as of February 18, 2008, the United States, the United Kingdom, France and Belgium had all expressed support for the “new state of Kosovo.” *Id.* Note, however, that several states expressed their opposition to the Kosovar independence, including Spain, Russia, China, Indonesia, and Sri Lanka. Nicholas Kulish & C.J. Chivers, *Kosovo is Recognized but Rebuked by Others*, N.Y. TIMES, Feb. 19, 2008, <http://www.nytimes.com/2008/02/19/world/europe/19kosovo.html>.

military intervention staged by the Great Powers through NATO, the Kosovars would not have been able to secede from Serbia.¹⁵⁷ Moreover, without the political support of the Great Powers and the Great Powers' willingness to recognize Kosovo as a new state, the Kosovars would not have been able to assert their independence from Serbia as easily as they did in February 2009.

D. GEORGIA

South Ossetia and Abkhazia are breakaway provinces within the former Soviet republic of Georgia.¹⁵⁸ These two provinces have functioned as de facto states in recent years, and spurred international controversy during the summer of 2008, when Russia decided to support the two provinces by sending military troops to Georgia.¹⁵⁹ The Russian intervention evolved into war between Georgia on one side and Russia, South Ossetia and Abkhazia on the other.

In August 2008, when the Georgian armed forces pushed into South Ossetia, Russia accused Georgia of genocide, claiming that thousands of South Ossetian civilians were killed by the Georgian troops.¹⁶⁰ In response, Russia sent troops into South Ossetia and launched air strikes on Georgian territory.¹⁶¹ After a few days of heavy fighting, Georgian troops were ejected from South Ossetia.¹⁶² Meanwhile, the Russian military troops

157. In fact, in October 2008, the U.N. General Assembly agreed to the request of Serbia to have the ICJ legally examine the validity of the Kosovar secession. *Kosovo Blunder Goes to Court*, BOSTON GLOBE, Oct. 12, 2008, at K8. Thus, it will be interesting to read the World Court's legal pronouncement on the case of Kosovo—whether the World Court offers a legal justification for the separation will be indicative of whether the separation was legally versus politically justified.

158. See Nikolai Pavlov, *Russia, Georgia Seek Control of South Ossetia Capital*, REUTERS (Aug. 8, 2008), <http://www.reuters.com/article/worldNews/idUSL768040420080808?pageNumber=2&virtualBrandChannel=0>. See also 1 COUNCIL OF THE EUROPEAN UNION, INDEP. INT'L FACT-FINDING MISSION ON THE CONFLICT IN GEOR., at 7, 17 (2009), available at <http://www.ceiig.ch>.

159. See *id.*; see also 1 COUNCIL OF THE EUROPEAN UNION, *supra* note 158, at 13.

160. Tom Parfitt, *Russia Exaggerating South Ossetian Death Toll, Says Human Rights Group*, GUARDIAN, Aug. 13, 2008, <http://www.guardian.co.uk/world/2008/aug/13/georgia>; see also 1 COUNCIL OF THE EUROPEAN UNION, *supra* note 158, at 10, 21.

161. See Mikhail Barabanov, *The August War Between Russia and Georgia*, MOSCOW DEFENSE BRIEF, #3, 2008, available at <http://www.mdb.cast.ru/mdb/3-2008/item3/article1/> (last visited Oct. 14, 2009); see also 1 COUNCIL OF THE EUROPEAN UNION, *supra* note 158, at 10.

162. See Barabanov, *supra* 161; see also 1 COUNCIL OF THE EUROPEAN UNION, *supra* note 158, at 10–11 (detailing the invasion of South Ossetia by Georgian troops, and Russia's role in stopping the advance of Georgian forces).

stationed in Abkhazia began marching into Georgia; this advance into Georgia was accompanied by reports of widespread looting, burning, and killing of civilians by Ossetian militia.¹⁶³ On August 12, the Russian president ordered a halt to Russian military operations in Georgia, and a peace plan was brokered by the EU which Russia, Georgia, as well as the South Ossetian and Abkhazian separatist leaders signed and endorsed.¹⁶⁴

Yet, Russia has refused to withdraw its military troops from Georgia. Russia has also signaled no intention to end its military presence in the disputed Georgian regions of Abkhazia and South Ossetia.¹⁶⁵ In fact, on August 25, 2008, Russia recognized these as independent states.¹⁶⁶ Russia now says that its troops stationed in Abkhazia and South Ossetia are guests of the newly-born nations, and their status is not regulated by the above-mentioned peace plan.¹⁶⁷

Currently, the status of South Ossetia is being negotiated between the central government of Georgia and the Russian-supported separatist government of South Ossetia.¹⁶⁸ Recently,

163. Luke Harding & James Meikle, *Georgian Villages Burned and Looted as Russian Tanks Advance*, *GUARDIAN*, Aug. 13, 2008, <http://www.guardian.co.uk/world/2008/aug/13/georgia.russia6>; see also 1 COUNCIL OF THE EUROPEAN UNION, *supra* note 158, at 27 (adding gender-related crime including rape, assault, hostage-taking, and arbitrary arrests to the list of offenses committed by the Southern Ossetians).

164. See Andrew E. Kramer, *A French-Brokered Peace Offers Russia a Rationale to Advance*, *N.Y. TIMES*, Aug. 14, 2008, at A1 (explaining the points of the peace deal); *Russian President Orders Halt to Military Operations in Georgia*, *RADIO FREE EUROPE/RADIO LIBERTY*, Aug. 12, 2008, http://www.rferl.org/content/Russian_Planes_Renew_Attacks_On_Gori/1190334.html. *But cf.* 1 COUNCIL OF THE EUROPEAN UNION, *supra* note 158, at 22 (stating that while a ceasefire was brokered, the Russian and South Ossetian forces reportedly continued their advances for some days after and occupied additional territories, including the Akhagori district).

165. See Kramer, *supra* note 164.

166. See Gregory L. White & John W. Miller, *Russia Raises Ante on Separatist Georgia Regions*, *WALL ST. J.*, Aug. 26, 2008, at A9; 1 COUNCIL OF THE EUROPEAN UNION, *supra* note 158, at 37 (explaining that this assertion by Russia greatly hinders the possibility of resolution). Nicaragua and Venezuela are the only two other countries to recognize the states. *Venezuela's Foreign Policy: Dreams of a Different World*, *ECONOMIST*, Sept. 17, 2009; Gregory Dubinsky, *The Exceptions That Disprove the Rule? The Impact of Abkhazia and South Ossetia on Exceptions to the Sovereignty Principle*, 34 *YALE J. INT'L L.* 241, 241 (2009).

167. See generally Kramer, *supra* note 164 (stating that Russia is defining the continued presence as a peacekeeping measure); 2 COUNCIL OF THE EUROPEAN UNION, *supra* note 158, at 188–89 (expressing the Russian viewpoint that its troops in those regions have always been peacekeepers and its action during the conflict were simply in self-defense of the peacekeepers).

168. See White & Miller, *supra* note 166, at A11.

these negotiations have broken down in light of Russia's decision to reinforce the region militarily and give Russian passports to South Ossetians.¹⁶⁹ The government of Georgia has expressed that it views these moves as attempts by Russia to effectively annex the region.¹⁷⁰ The Georgian government levels the same criticism against Russian involvement in Abkhazia, which currently remains a province of Georgia, but which operates as a de facto state.¹⁷¹ Most recently, the Georgian government has accused Russia of attempting to stage a brief military mutiny in Georgia in an effort to thwart NATO military exercises in Georgia.¹⁷²

Most of the western Great Powers have expressed their support of Georgia and have refused to recognize the independence of South Ossetia and Abkhazia.¹⁷³ Even Russia, although it officially supports such independence, is rumored to in fact want to annex these two regions.¹⁷⁴ South Ossetia and Abkhazia therefore illustrate examples of unsuccessful self-determination struggles, where a minority group or a people is unsupported by the Great Powers and is thus unable to achieve independence. In fact, the South Ossetian leader has recently expressed his frustration at this lack of support by the Great Powers, by complaining that his country has not been able to become independent, although it has a better legal case for independence than Kosovo, which did become independent.¹⁷⁵

V. APPLICATION OF SELF-DETERMINATION RIGHTS IN THE MODERN WORLD

From the above discussion and case studies, it is clear that the right to self-determination for different minority groups or

169. See Damien McElroy, *South Ossetian Police Tell Georgians to Take a Russian Passport, or Leave Their Homes*, DAILY TELEGRAPH, Aug. 30, 2008, at 17.

170. *Id.*

171. See, e.g., *West Condemns Russia Over Georgia*, BBC NEWS, Aug. 26, 2008, <http://news.bbc.co.uk/2/hi/europe/7583164.stm>.

172. See Olesya Vartanyan & Ellen Barry, *On Eve of NATO Exercise, Georgia Says It Foiled Mutiny*, N.Y. TIMES, May 6, 2009, at A10.

173. Most NATO countries would prefer that Georgia remain intact, as they have been exploring the possibility of Georgia joining NATO. See Steven Erlanger, *NATO Duel Centers on Georgia and Ukraine*, N.Y. TIMES, Dec. 1, 2008, at A8.

174. See *id.*

175. *Bush Warns Moscow Over Breakaway Autonomy*, CNN.COM, Aug. 25, 2008, <http://www.cnn.com/2008/WORLD/europe/08/25/russia.vote/index.html> ("We have more political-legal grounds than Kosovo to have our independence recognized . . .").

peoples varies from region to region.¹⁷⁶ While the Timorese and the Kosovars were able to fully exercise their rights to the most extreme form of self-determination, leading toward remedial secession, the Chechens, the South Ossetians, and the Abkhazians have been denied such rights.¹⁷⁷ Arguably, the latter three peoples have been denied any form of self-determination, and many have asserted that these peoples' rights are routinely oppressed by their mother states.¹⁷⁸ What does this suggest about the modern-day contours of the right to self-determination? What are the modern-day criteria a people must fulfill in order to be able to legitimately gain some degree of self-determination?

I argue that a people must satisfy the following four criteria: it has to show that it has been oppressed; that its central government is relatively weak; that it has already been administered in some form by some international organization; and that it has the support of the Great Powers.

First, the people seeking to exercise its right to self-determination must prove that they have been subject to oppression and have faced harsh human rights abuses and violations. Typically, a people attract global attention only when it can demonstrate how horrifically it is being treated and how abusive its central government is. Instances of mild human rights violations generally do not attract the same level of international political and media scrutiny, and central governments that commit minor minority group abuses typically go unnoticed.¹⁷⁹ Thus, peoples that have managed to showcase their struggles have always been able to demonstrate a high

176. See *supra* Part IV.

177. See *supra* Part IV.

178. On the oppression of Chechnya by its mother-state, Russia, see *supra* Part IV.B. On the independence struggles of South Ossetia and Abkhazia, see *supra* Part IV.D.

179. The suffering of many minority groups has remained isolated, garnering no or little support from the international community. The Rwandan genocide was not prevented by the world community. Kelly, *supra* note 1, at 381 (mentioning the "unchecked genocide in Rwanda"). The Kurds have been left on their own. *Id.* at 396 (describing the world inaction when the Iraqi president Saddam Hussein used chemical weapons against Kurdish people in Iraq in 1988). In addition to these groups' struggles, there are many other self-determination seeking groups around the globe that have been fighting for their cause in relative obscurity. Examples of such groups include the Kashmiris fighting for independence from India, the Basque and the Catalan (from Spain), the Liberation Tigers of Tamil Eelam (from Sri Lanka), and the Moro Islamic Liberation Front (from the Philippines). See Chaulia, *supra* note 117.

level of suffering and a consistent policy of harsh abuse by the central government. Second, the same people must show that its central government—the “rogue” regime committing abuses—is relatively weak and cannot properly administer the people’s province or region. In fact, none of the peoples across the globe that have succeeded in asserting their rights to self-determination have been governed by strong, powerful governments.¹⁸⁰ Typically, self-determination seeking groups have been able to demonstrate that their central government, although claiming that it wants to govern such groups, is really militarily, politically, or structurally unable to assert proper control. Many breakaway regions have been marred by civil unrest and violence that have further contributed to the idea that these peoples or groups, in order to have any kind of civic stability, must be allowed to separate.¹⁸¹ Third, the self-determination seeking people must show that some form of international administration of its region has been needed in the recent years, and that international authorities have had to govern because of the brutality and inefficacy of the central government.¹⁸² This criterion is linked to the second one: peoples seeking self-determination have successfully shown that their central governments were weak, causing violence and unrest, and that international authorities have needed to step in to preserve or reestablish peace. Thus, international organizations and groups have been involved in virtually all self-determination seeking regions.¹⁸³ Finally, the self-determination-seeking people must prove that external actors, including the Great Powers, view its struggle as legitimate and are ready to embrace it as a new sovereign partner. I allege that this ultimate criterion is the most important one, and that it routinely determines the fate of various peoples struggling for the recognition of their rights across the globe.

180. The Indonesian rule over East Timor had been weakened by the time the Timorese asserted their independence rights, and the same was true of the Serbian reign over Kosovo. *See supra* Parts IV.A, IV.C.

181. *See supra* Parts IV.A, IV.C.

182. Audio tape: Panel on International Law, Politics and the Future of Kosovo, held by the American Society of International Law Annual Meeting (Apr. 9–12, 2008), available at <http://www.asil.org/events/am08post/selectaudio.html> (explaining that international administration was a component of Kosovo’s achievement of independence).

183. East Timor had been guarded by a U.N. force, *see East Timor, Birth, supra* note 114; Kosovo had been administered by a U.N. force called UNMIK, *see Sterio, supra* note 10, at 272.

Whether the Great Powers decide to legitimize a people's struggle for self-determination is crucial for the outcome of such a struggle. First, the Great Powers control hugely important media outlets and the global access to information.¹⁸⁴ If the Great Powers decide not to give media coverage to a struggling people or region, that people will remain unnoticed on the global scene, and its suffering will attract no significant external involvement. Alternatively, its suffering will be downplayed by the Great Powers and will be discarded as not warranting true intervention. Second, the Great Powers have, throughout the years, provided key military and logistic support to states across the globe. Some central governments have been able to retain control over portions of their territories simply because of support by the Great Powers.¹⁸⁵ Conversely, some central governments have lacked such support and have not been able to control breakaway regions and popular movements within their territories.¹⁸⁶ Thus, it is the Great Powers that contribute toward the stability, or lack thereof, of central governments across our planet. Third, the Great Powers control the United Nations system through their veto powers on the Security Council.¹⁸⁷ It is only when the Great Powers agree that the

184. See, e.g., Stephen J. Rapp, *Achieving Accountability for the Greatest Crimes—the Legacy of the International Tribunals*, 55 *DRAKE L. REV.* 259, 272 (2007) (discussing the powerful role of the media in inciting the Rwandan genocide); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 *ROGER WILLIAMS U. L. REV.* 79, 101 (1998) (discussing the power over national media that the U.S. President has in the United States); Joshua D. Reader, Note, *The Case Against China Establishing International Liability for China's Response to the 2002–2003 SARS Epidemic*, 19 *COLUM. J. ASIAN L.* 519, 557 n.253 (2006) (discussing the deliberate policy of media control that the Chinese government undertakes). These examples illustrate the important role that the media plays domestically and internationally, and the importance of control asserted by powerful governments over their national media.

185. For example, throughout the Cold War, Indonesia was able to retain control over East Timor with the help of some of the Great Powers, namely, the United States, Great Britain, and Australia. Chaulia, *supra* note 117. Similarly, Turkey has been able to “ward off claims of a separate Kurdistan, thanks to Ankara’s six-decades-long closeness to Washington.” *Id.* Finally, Israel has been able to ignore Palestinian claims for independence for decades, also with “American blessings.” *Id.*

186. For example, Indonesia has not been able to retain its grip over the East Timor province, nor has Serbia been able to do so over Kosovo. See *supra* Parts IV.A, IV.C. In both cases, the central governments (Indonesia and Serbia) were unaided by the Great Powers and in both cases, the minority groups (the East Timorese and the Kosovars) were supported by the Great Powers in their self-determination quests. See Chaulia, *supra* note 117.

187. See Kelly, *supra* note 1, at 394. While it is true that some Great Powers, like Germany, Italy, and Japan, do not have veto power on the Security Council, these countries nonetheless have powerful and important allies on the Security

Security Council can authorize the deployment of military troops, peacekeepers, or international administrators to a troubled region.¹⁸⁸ Thus, peoples whose struggles are not viewed as legitimate by the Great Powers will never be able to garner Security Council support for the creation of some form of an international administration within their region.¹⁸⁹ Finally, if peoples are seeking to separate from a Great Power, as in the case of Chechnya struggling to gain independence from Russia, their quest for self-determination will most likely fail. Great Powers themselves have potent militaries to quash dissent within or close to their borders, like in the case of Russia intervening in Chechnya and in Georgia, and no other countries want to run the risk of offending a Great Power by supporting a minority, independence seeking group within the Great Power's territory. The Great Powers seem to be immune from pressures of self-determination, and their borders are unlikely to yield to secessionist movements.

Even the very notion of humanitarian intervention remains inextricably linked with approval by the Great Powers.¹⁹⁰ Humanitarian intervention is always organized, structured, financed, and led by some of the Great Powers; other countries simply do not have enough power, leverage, or resources on the international scene to engage in such intervention. Even proponents of the above-described involuntary waiver of sovereignty theory acknowledge that it is up to the Great Powers to determine when a country has so waived its sovereignty. Haass, when questioned about the issue of who decides when a state is committing atrocious actions that would trigger intervention, seemed to imply that the United States, and possibly the other Great Powers, should decide.¹⁹¹

Council and can exercise significant influence in its deliberations.

188. *See id.*

189. Basically, peoples that struggle for independence from strong, powerful countries, will not succeed because “[l]arge and powerful countries with stable polities such as Russia, China, and India can defend their territorial integrity and are unlikely to become candidates for Kosovo-type challenges.” Chaulia, *supra* note 117. Moreover, peoples that struggle for independence from countries that are backed by the Great Powers are also unlikely to succeed. “States like Israel and Turkey are proving that, as long as they enjoy American blessings, they can see through secessionism and even undertake cross-border raids on militants threatening their sovereignty.” *Id.*

190. *See supra* Part III.B.

191. Richard N. Haass, *Pondering Primacy*, 4 GEO. J. INT'L AFF. 91, 92–93 (2003) (“[T]here is no single source of authority or legitimacy. . . . [T]he United Nations is not yet at the point where it alone can decide what is legitimate and what

According to Haass, the Great Powers should act multilaterally to stop genocide, terrorists, and WMD, even outside of the U.N. collective security apparatus, and the Great Powers should have flexibility (read: decision-making authority) to engage in intervention across the globe.¹⁹² Thus, it is the Great Powers' support, or lack thereof, toward a people's struggle for self-determination that determines the outcome of such a struggle. As the above-described case studies demonstrate, all peoples that have successfully exercised some form of self-determination have been supported by the Great Powers.¹⁹³ The converse is equally true: all peoples that are still living as part of an oppressive, central regime have been unable to garner the support of the Great Powers.¹⁹⁴

Another important issue that merits discussion is what motivation drives the Great Powers in their decision to support, or not, a struggling self-determination movement or people. In other words, why were the Great Powers supportive of East Timor and Kosovo, and not of Chechnya and the Georgian provinces? As I have demonstrated above,¹⁹⁵ the Great Powers seem intent on helping groups, movements and states when it is in their geopolitical interest to do so. The Great Powers may deem that they have a strong regional partner in State X; if that is the case, they may help State X government economically, politically, and militarily. Consequently, State X will have a strong central government and any opposition and minority movements will be severely quashed, with the help of the Great Powers. During the Cold War, this is what took place in Indonesia and East Timor: the former was viewed as an important political ally to the West against the Soviet bloc, and thus received aid as well as financial and military support, and East Timor was ignored in its struggle for independence.¹⁹⁶ Similarly, Kosovo may be viewed as an important potential

is not. Well then, who decides? Is it the United States or some other government? The answer is that you have to look at the case at hand and you have to try to make a case in the court of international public opinion. . . . [Y]ou have to base your actions on norms.”)

192. Kelly, *supra* note 1, at 409.

193. See *supra* Part IV.

194. Examples of such peoples include the Chechens, the South Ossetians and the Abkhazians, as well as Tibetans. See *supra* Parts IV.B, IV.D; see also Chaulia, *supra* note 117 (describing that Tibet has been ruled and oppressed by China over the last 40 years).

195. See *supra* Part IV.

196. See *supra* Part IV.A; see also Chaulia, *supra* note 117.

partner to the West in its opposition to any dangerous Serbian expansion; thus, Kosovar independence was favored by the Great Powers over Serbian territorial integrity.¹⁹⁷

The Great Powers may also prefer not to offend other Great Powers and may choose not to support a struggling group. In the case of Chechnya, the Great Powers chose not to engage in a political, diplomatic or military scuffle with Russia and they turned a blind eye to the Chechen pleas for independence.¹⁹⁸ The case of the Georgian provinces illustrates the geopolitical motivations of the Great Powers as well. The western Great Powers view Georgia as an important ally against Russia and have thus opposed independence movements that threaten Georgian territorial integrity. These Great Powers have opposed South Ossetian and Abkhazian independence. Russia, on the contrary, has recognized South Ossetia and Abkhazia because it dislikes Georgia and would like to strengthen its own political and military situation in the Caucasus by embracing regional allies like the two breakaway provinces.¹⁹⁹ The Great Powers conduct affairs on the international scene by focusing on their own strategic interests first, and by choosing to support a group or not in light of those same interests. The right to external self-determination can be easily placed in this dynamic. The Great Powers embrace the principle, but choose to support it in real situations only when their own interests are served by such exercise of external self-determination by a specific people.

The right to external self-determination has become entrenched in the notion of the rule by the Great Powers, which has in turn modified traditional ideas about statehood, recognition, sovereignty, and intervention. As described above, an entity seeking to exercise its external self-determination rights must prove to the outside actors, and today, the Great Powers, that it qualifies as a state. As described above, because the Great Powers are essentially more sovereign than all other states, they may engage in interventions across the globe, and such interventions may aid an independence-seeking people, or may directly impede its struggle for independence. Thus, the Great Powers' rule has directly affected concepts like statehood, recognition, sovereignty, and intervention, and has shaped external self-determination struggles in a particularly political manner. In other words, it is only when a people is supported

197. See *supra* Part IV.C.

198. See *supra* Part IV.B.

199. See *supra* Part IV.D.

politically by the Great Powers that it will manage to acquire independence and statehood through the exercise of external self-determination. The legal criteria for external self-determination have become somewhat mooted by the necessity to obtain the political support of the Great Powers for any struggling people on our planet.²⁰⁰

One may wonder about the soundness of this rule by the Great Powers. After all, it can be argued that if several key states agree on something or disagree on something, their consensus should play a crucial role in the decided issue.²⁰¹ For example, if the most important states on our planet agree that Kosovo ought to become independent, perhaps their independence is a good solution. However, I believe that the rule by the Great Powers inherently undermines state equality and the entire sovereignty-based system of global international relations.²⁰² While a decision by the Great Powers may be politically appropriate and important for the Great Powers, it should not have any bearing on the legality of any potential separation. Thus, I believe that it is unfortunate that the right

200. A perfect example of this assertion would be the different treatment by the world community of the Kosovars versus the Chechens in these respective groups' plights for self-determination. See Charney, *supra* note 108, at 458–59 (“While in Kosovo the international community essentially endorsed the Albanian Kosovar’s claims to self-determination, in Chechnya the reactions were more muted, essentially focusing on opposition to the violence used by the Russians against the Chechens without reference to their possible right to self-determination, within or without Russia. This distinction may be easily dismissed by experts in international relations due to the fact that the Federal Republic of Yugoslavia (FRY) is a relatively poor country that was run by a person already indicted by the ICTY for international crimes—Slobodan Milosevic—and his supporters. On the other hand, Russia despite its troubles was a significant military power with substantial economic resources. . . . Furthermore, it is a permanent member of the UN Security Council, holding the veto right.”).

201. This is what Haass advocates: a concert of Great Powers, working together outside of the confines of the U.N. system, as the world’s policemen. Kelly, *supra* note 1, at 409.

202. For example, scholars have already noted the uneven application of the involuntary sovereignty waiver theory, asserting that this theory only applies:

[T]o states that can physically withstand the intervention (China and Russia—which are abusing minority ethnic groups within their borders, or North Korea —pursuing WMD) or those states that are on otherwise friendly terms with the proposed interveners (Pakistan—pursuing WMD, or, although not rising to the level of genocide, Mexico—abusing indigenous nationals in Chiapas, and Turkey—repressing its Kurdish population). Consequently, the policy only operates against countries such as Serbia, Afghanistan, and Iraq that cannot resist American power.

Kelly, *supra* note 1, at 413.

to self-determination in the modern-day world entails not only legal, but also political criteria. This topic, however, shall remain the subject of a future article.

VI. CONCLUSION

A people under modern-day international law accrues the right to some form of self-determination if it can demonstrate that it has been subjected to harsh oppression, that it has a relatively weak central government, that some type of international administration of its region has already taken place, and that it has garnered the support of the most sovereign states on our planet, the so-called Great Powers. It is my conclusion that the last criterion tends to be the most important one and that it directly influences the outcome of most self-determination struggles in the modern world. In fact, recent history demonstrates that self-determination seeking groups are able to exercise their independence option only if they enjoy the Great Powers' support. All of the other criteria for self-determination, as I have argued throughout this Article, seem to have been absorbed into the question of whether the struggling people has succeeded in persuading the Great Powers that its cause is worthy of independence. It is the Great Powers that control the outcome of most self-determination struggles in today's world, through their military, political, financial, and economic dominance, exercised in international organizations and directly through concepts such as humanitarian intervention and involuntary sovereignty waiver. We have thus witnessed a return of the Great Powers' rule. "Selfistans" will be successful in their struggle to become states if the Great Powers determine that they are worthy of being treated as sovereigns on the world stage.

Thus, in today's world, the right to self-determination seems to entail a mixture of legal and political criteria, with the latter often prevailing over the former. While I believe that this situation, termed the rule by the Great Powers, is inherently at odds with the idea of state sovereignty and equality, this observation remains to be explored in a future academic endeavor.