

THE KOSOVAR DECLARATION OF INDEPENDENCE:  
“BOTCHING THE BALKANS”\* OR RESPECTING  
INTERNATIONAL LAW?

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\* I respectfully borrow the phrase “Botching the Balkans” from Carl Cavanagh Hodge, who used it in an article, *Botching the Balkans: Germany’s Recognition of Slovenia and Croatia*, 12 ETHICS & INT’L AFF. 1 (1998).

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## I. INTRODUCTION

On February 17, 2008, Kosovo unilaterally declared independence from its mother-state, Serbia.<sup>1</sup> Most western governments were quick to recognize Kosovo as a new state, despite strong Serbian protest and the potential precedential dangers that such recognized separatism represents for minority movements across the planet.<sup>2</sup> The Kosovar separation from Serbia is unique in the history of international relations: it represents a secession, which is heavily discouraged under traditional international law; it was peaceful, which is typically not the case in state break-ups; and it was politically supported by the West, which is traditionally critical of separatist movements as they undermine state borders and world stability.

What is thus so unique and special about Kosovo that can explain its success in achieving full independence so quickly and so relatively easily? Was Kosovo justified in unilaterally seceding from Serbia because its people had a right to self-determination? Does Kosovo fulfill the relevant criteria of statehood? What does its early recognition by many western states imply? Are there other legal theories that can justify the Kosovar separation from Serbia? Were there other viable options for Kosovo, short of full independence, that could have presented a better solution legally and politically?

In order to answer these complicated questions, this Article will examine in Part II the historic and political relationship between Kosovo and Serbia. This Article will, in Part III, focus on the international legal issues at stake, including state secession, statehood, and state recognition. Part IV will then apply the theories of secession, statehood, and state recognition to the Kosovar situation. Part V will discuss, and debunk, the relevant legal theories purporting to justify the Kosovar independence. Part V will also discuss some important political and legal issues that plague Kosovo in its near future as a new state. Finally, Part VI will conclude that other solutions besides independence could have provided more stability for Kosovo while respecting Serbian territorial integrity and avoiding encouragement to other separatist groups operating throughout the world.

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<sup>1</sup> *Kosovo Declares Independence from Serbia*, MSNBC, Feb. 18, 2008, <http://www.msnbc.msn.com/id/23203607>.

<sup>2</sup> *Serbia Steps Up Anti-Kosovo Pressure*, AUSTIN NEWS, Feb. 8, 2008, <http://www.nbcaustin.com/Global/story.asp?s=7889772>.

## II. BACKGROUND INFORMATION ON KOSOVO

Kosovo has a peculiar relationship with Serbia. It is the heart of the early Serbian civilization and empire, as well as the site of numerous Serbian monasteries and other religious sites, which causes it to have particular symbolic value to the Serbs in general.<sup>3</sup> On the other hand, it is poor, undeveloped, and predominantly inhabited by ethnic Albanians.<sup>4</sup> This paradox begs the question of why the Serbs wish to hold on to Kosovo with such fierce passion. In order to address this issue, this Article will discuss the history of Kosovo and its relationship with Serbia, as well as its significance to Serbia today.

### *A. History of Kosovo and Its Relationship with Serbia*

Kosovo had been an autonomous province of Serbia, one of the six republics within the Socialist Federal Republic of Yugoslavia (SFRY).<sup>5</sup> When the SFRY dissolved in the early 1990s, Kosovo remained a part of the Federal Republic of Yugoslavia (FRY), then made up of Serbia and Montenegro,<sup>6</sup> and when Montenegro broke away from the latter, Kosovo remained a part of the sole Serbian state.<sup>7</sup>

Until the late 1980s, Kosovo had the status of an autonomous province within the SFRY and exercised important regional self-governance functions.<sup>8</sup>

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<sup>3</sup> Henry H. Perritt, Jr., *Final Status for Kosovo*, 80 CHI.-KENT L. REV. 3, 6 (2005).

<sup>4</sup> Viola Trebicka, *Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination*, 32 YALE J. INT'L L. 255, 255 (2007) (noting that Kosovo has been underdeveloped economically); Zejnullah Gruda, *Some Key Principles for a Lasting Solution of the Status of Kosova: Uti Possidetis, the Ethnic Principle, and Self-Determination*, 80 CHI.-KENT L. REV. 353, 389 (2005) (noting that the ethnically predominant population of Kosovo is Albanian by all accounts).

<sup>5</sup> Bartram S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosovo*, 80 CHI.-KENT L. REV. 235, 238 (2005).

<sup>6</sup> See *id.* at 238–40 (discussing Serbia's retained control of Kosovo despite the breakup of the SFRY).

<sup>7</sup> See *id.*

<sup>8</sup> The 1974 SFRY Constitution granted Kosovo the status of an autonomous province within the country's federal structure. Gruda, *supra* note 4, 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

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, and the right to celebrate cultural holidays and to generally preserve its ethnic structure and belonging.<sup>9</sup> 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.<sup>10</sup> Thus, Kosovo's autonomous province status was removed, and the Albanian population was deprived of important civil and political rights.<sup>11</sup>

In 1999, when the former Serbian President Slobodan Milošević engaged in brutal tactics of oppression<sup>12</sup>—once again in response to ethnic upheavals in Kosovo staged by the Kosovo Liberation Army (KLA), a separatist movement operating in Kosovo<sup>13</sup>—the international community responded with force.<sup>14</sup> North Atlantic Treaty Organization (NATO) countries launched a series of air strikes on the territory of Serbia, which ultimately forced Milošević to sign a peace agreement with the Kosovars at Rambouillet, France in June 1999.<sup>15</sup> Under the terms of the Rambouillet Peace Agreement and

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government. *Id.*

<sup>9</sup> See Perritt, *supra* note 3, at 7 (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 4, at 387 (noting the various rights enumerated in the Constitution of 1974).

<sup>10</sup> See Perritt, *supra* note 3, at 8 (describing the measures undertaken by Slobodan Milošević beginning in 1989 and escalating in a campaign of ethnic cleansing by the later part of the 1990s to curb the Albanian upheaval).

<sup>11</sup> See Brown, *supra* note 5, at 263 (noting that amendments to Serbia's constitution in 1989 and 1990 negated the Kosovar autonomy).

<sup>12</sup> See Perritt, *supra* note 3, 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).

<sup>13</sup> See 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) (noting that as a result of Serbian oppression, “some 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 3, at 8 (noting that the KLA began attacking Serbian police and military facilities in Kosovo).

<sup>14</sup> Perritt, *supra* note 3, 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).

<sup>15</sup> See Enver Hasani, *Self-Determination Under the Terms of the 2002 Union Agreement*

subsequently United Nations Resolution 1244, the United Nations Mission in Kosovo (UNMIK), a United Nations provisional authority, was to administer Kosovo; its safety was to be guarded by a NATO-led military force, KFOR; and subsequent negotiations to decide the true fate of the province were to take place in the near future.<sup>16</sup>

Once Milošević stepped down as Serbia's president and leader, the Serbian outlook and its position toward the West changed.<sup>17</sup> Under the Milošević rule, Serbia largely ignored the West and leaned on its historical ally, Russia, for support. After Milošević was ousted from power, Serbia turned toward the West. It became clear that in order to join western Europe—and possibly become a member of the European Union (EU)—Serbia had to sacrifice Kosovo, or to at least refrain from using force in order to prevent it from breaking off.<sup>18</sup> The relevant players, including the Serbian leadership, the Kosovar representatives, and UN and EU representatives, negotiated several times, but because of strong differences about the future of Kosovo, they were never able to reach consensus.<sup>19</sup> In fact, Serbia, while pragmatically

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*Between Serbia and Montenegro: Tracing the Origins of Kosovo's Self-Determination*, 80 CHI.-KENT L. REV. 305, 320 (2005) (noting that the refusal of Serbia to agree to the Rambouillet Accords caused the NATO bombing campaign); see also Brown, *supra* note 5, at 240 (discussing NATO's bombing campaign "to compel the Milošević regime to stop the atrocities in Kosovo").

<sup>16</sup> See Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, U.N. Doc. S/1999/648 (June 7, 1999), available at [http://www.state.gov/www/regions/eur/ksvo\\_rambouillet\\_text.html](http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html). 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), UN Doc. S/RES/1244 (1999) (June 10, 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 15, at 323; see also Gruda, *supra* note 4, at 356 (noting that under Resolution 1244, Kosovo was administered by UNMIK). For a detailed discussion of the UN administrative regime over Kosovo under the terms of the Rambouillet Accords, see Hasani, *supra* note 15, at 323–25.

<sup>17</sup> Williams, *supra* note 13, at 415 (describing the political changes in Serbia as a result of Milošević's removal from office).

<sup>18</sup> 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 demonstrates that a portion of the Serbian population seems aware of the necessity of letting go of Kosovo in order to have access into Europe.

<sup>19</sup> See Trebicka, *supra* note 4, at 256–57 (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").

recognizing the need to accommodate Western demands,<sup>20</sup> maintained its position that Kosovo remain a territorial part of Serbia with strong regional autonomy.<sup>21</sup> Kosovo, on the other hand, insisted that it deserved independence.<sup>22</sup>

On February 17, 2008, backed by powerful countries like the United States, the United Kingdom, and France, the Kosovar Parliament voted for a declaration of independence.<sup>23</sup> 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.<sup>24</sup>

### *B. Kosovo's Importance to Serbia Today*

Kosovo is the cradle of the great Serbian medieval empire.<sup>25</sup> It holds tremendous symbolic value to the Serbs.<sup>26</sup> It is in Kosovo that Slobodan Milošević infamously called in the late 1980s for the “defence of the sacred rights of the Serbs,”<sup>27</sup> and victoriously proclaimed before thousands of angry

<sup>20</sup> 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 to a loss of a “gangrenous arm” and concluding that this is a “precondition for recovery”).

<sup>21</sup> Ban Ki-moon Urges Restraint by All Sides after Kosovo Declares Independence, UN NEWS CENTRE, Feb. 18, 2008, <http://www.un.org/apps/news/story.asp?NewsID=25659&Cr=Kosovo&Cr1=>. In fact, the day after the Kosovar declaration of independence, the Serbian President, Boris Tadić, appealed to the UN Security Council to declare Kosovo’s “unilateral and illegal” declaration of independence “null and void” because Kosovo’s separation violates Resolution 1244 which reaffirms Serbia’s sovereignty and territorial integrity. *Id.*

<sup>22</sup> See Trebicka, *supra* note 4, at 255 (observing that the Kosovar Albanians have demanded their right to self-determination, which would lead to secession).

<sup>23</sup> *Serbia Steps Up Anti-Kosovo Pressure*, *supra* note 2.

<sup>24</sup> For example, as of February 18, 2008, the United States, the United Kingdom, France, and Germany had all expressed support for the new state of Kosovo. 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, *U.S. and Much of Europe Recognize Kosovo, Which Also Draws Expected Rejection*, N.Y. TIMES, Late Ed., Feb. 19, 2008, at A10.

<sup>25</sup> See Perritt, *supra* note 3, at 6 (noting that Serbs have traditionally “viewed Kosovo as an historic part of Serbian land . . . since the ninth century”).

<sup>26</sup> See *id.* (noting that Serbs have viewed Kosovo as a “historic part of Serbian land, at least since the ninth century”).

<sup>27</sup> NOEL MALCOLM, KOSOVO: A SHORT HISTORY 341–42 (1998). In fact, Milošević used the political and civil unrest in Kosovo as a political platform that helped him rise to the presidency of the Serbian communist party in late 1987. Williams, *supra* note 13, at 395–96.

Kosovar Serbs, "No one should dare to beat you!"<sup>28</sup> It is a symbol of Serbian civilization and culture,<sup>29</sup> a place as sacred as Jerusalem is to the Jews and to Christians, and as Mecca is to the Muslims.

Kosovo today, however, can only hold symbolic historical value for Serbia. The population is predominantly ethnic Albanian,<sup>30</sup> with the remaining Serbian population living isolated in the northern part of Kosovo<sup>31</sup>—which is heavily guarded by UN, NATO, and EU troops—as well as in Serbian enclaves found in the southern part of Kosovo.<sup>32</sup> Moreover, Kosovo remains extremely poor: the unemployment rate hovers at more than fifty percent overall, more than seventy percent for youth,<sup>33</sup> the economy remains the poorest in Europe outside the former Soviet Union,<sup>34</sup> and the average monthly salary does not exceed \$250.<sup>35</sup> One in six Albanians lives in poverty.<sup>36</sup> In addition, Kosovo

<sup>28</sup> KING & MASON, *supra* note 14, at 36. In the same speech, Milošević also reassured the Kosovar Serbs that Belgrade would protect their rights:

You should stay here, both for your ancestors and your descendants . . . But I do not suggest you stay here suffering and enduring a situation with which you are not satisfied. On the contrary! It should be changed, together with all progressive people here, in Serbia and in Yugoslavia . . . Yugoslavia does not exist without Kosovo! Yugoslavia would disintegrate without Kosovo! Yugoslavia and Serbia are not going to give up Kosovo.

*Id.*

<sup>29</sup> See Perritt, *supra* note 3, at 6 (noting that Kosovo was "the heart of 'Old Serbia,' where the Serbian Orthodox Church, acting through monasteries still standing in Kosovo, organized Serb and Christian resistance to the spread of Islam under Ottoman domination").

<sup>30</sup> See Gruda, *supra* note 4, at 389–90 (describing the disagreement over the total number of ethnic Albanians living in Kosovo versus the ethnic Serbs living there, but concluding that "[b]y any account, the dominant ethnic group in Kosovo is Albanian").

<sup>31</sup> Trebicka, *supra* note 4, at 258 (noting that northern Kosovo is Serb-dominated).

<sup>32</sup> Anes Alic & Igor Jovanovic, *Kosovo: Worst Still to Come*, ISN, Mar. 18, 2008, <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?id=54188&lng=en>. In fact, sixty-five percent of the Serbs remaining in Kosovo live south of the Ibar river, in Serbian enclaves surrounded by Kosovar Albanian villages. *Id.*

<sup>33</sup> See also Kulish & Chivers, *supra* note 24 (observing that the average unemployment rate in Kosovo is around sixty percent but noting that varying estimates place the figure as high as seventy percent); Daša Fasčnik, *The Labour Market and Youth Unemployment in Kosovo 7–9* (Dec. 2007) (unpublished diploma paper, University of Ljubljana), [http://www.cek.ef.uni-lj.si/u\\_diplome/farcnik3120.pdf](http://www.cek.ef.uni-lj.si/u_diplome/farcnik3120.pdf) (estimating unemployment rates for youth aged fifteen to twenty-four years old is seventy percent and the figure for teens is approximately eighty percent).

<sup>34</sup> KING & MASON, *supra* note 14, at 17.

<sup>35</sup> Kulish & Chivers, *supra* note 24. The official GDP per capita in Euros was at 1,150 per year as of November–December 2007, and there were 331,056 registered job-seekers on the market as of March 2007. FATON BISLIMI ET AL., UNITED NATIONS DEVELOPMENT PROGRAMME, *EARLY WARNING REPORT KOSOVO: REPORT NO. 19*, at 6 (2008), <http://www.kosovo.undp.org>;



remains socially and culturally underdeveloped. Modes of traditional lifestyle are still respected throughout its villages, and the justice system, until recent UN-imposed reforms, reflected a notion of medieval eye-for-an-eye justice.<sup>37</sup> Only a small number of Serbs—mostly those left without other viable options—are interested in living in Kosovo.<sup>38</sup>

Under such dire circumstances, one must wonder why Serbia cares so much about Kosovo. If the Serbian claim to Kosovo is purely symbolic or historic, does this somehow justify the Kosovar decision to separate from Serbia by negating the valid legal basis upon which Serbia could hold on to this disputed province? In order to address this important question, in Part III, this Article will turn to international law as a guide to shed light on the complexity of this separation.

### III. INTERNATIONAL LAW ISSUES AT STAKE

Three international law theories are pertinent to the issue of the Kosovar separation from Serbia: secession, statehood, and recognition. In other words, does Kosovo have an international legal right to secede from Serbia? If so, does it satisfy the relevant requisites of statehood? Finally, does recognition by Kosovo as a new state (or its absence) impact the place of Kosovo on the global scene?

#### A. Secession

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 another state, and the original state remains in existence without the separating territory.<sup>39</sup> Successful secessions around the globe have been rare,<sup>40</sup>

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*see also* Trebicka, *supra* note 4, at 255 (noting that Kosovo suffers from severe economic and financial uncertainty, causing unemployment and a lack of foreign investment).

<sup>36</sup> KING & MASON, *supra* note 14, at 17.

<sup>37</sup> *See id.* at 23 (noting that “an Al Capone-like combination of violence and corruption continues to colour public life”).

<sup>38</sup> On a recent trip to Serbia, I heard the following statement about the Serbs’ attitude toward Kosovo: Serbs will do just about anything for Kosovo except go live there!

<sup>39</sup> JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 112 (2d ed. 2006).

<sup>40</sup> *Id.* (describing the few successful secessions in international law, which include the secession of Bangladesh from Pakistan in 1971, of Eritrea from Ethiopia in 1993, and of the three Baltic States from the former Soviet Union in 1990).

because secession seems inherently at odds with the principles of state sovereignty and territorial integrity,<sup>41</sup> which have been core values of international law for centuries.<sup>42</sup>

The most relevant legal issue pertaining to secession is under what circumstances a minority group seeking to separate from its mother country has the legal right to do so. The legal right for a "people"<sup>43</sup> or a minority group to attain a certain degree of autonomy from its sovereign has been referred to as "self-determination" in international law.<sup>44</sup> The principle of self-determination is embodied in multiple international treaties and conventions.<sup>45</sup>

<sup>41</sup> See Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 373 (2003) (noting that a determinative issue in international law has been reconciling the principle of self-determination with the inviolability of state borders). But see Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 *passim* (1991) (arguing that secessionist claims involve disputed claims to territory rather than an incompatibility with territorial integrity).

<sup>42</sup> George A. Critchlow, *Stopping Genocide Through International Agreement When the Security Council Fails to Act*, 40 GEO. J. INT'L L. 311, 311–12 (2009) (identifying state sovereignty as a "core international law value[ ]"); Siobhan Wills, *Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations*, 9 J. CONFLICT & SECURITY L. 387, 391 (2004) ("[S]tate sovereignty remains a core principle of international law. . .").

<sup>43</sup> 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." Gruda, *supra* note 4, at 367. 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. Brown, *supra* note 5, at 249.

<sup>44</sup> The principle of self-determination was first elevated to the international plane by President Woodrow Wilson, who included it in his infamous Fourteen Points. See Scharf, *supra* note 41, at 378. For a full discussion of the principle of self-determination, see Gruda, *supra* note 4, at 369–82.

<sup>45</sup> 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 on 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/RES/1514(XV) (Dec. 14, 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 Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), at 124 U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/2625(XXV) (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 constitute modes of implementing the right of self-determination by that people.").

Moreover, the International Court of Justice has also dealt with the issue of self-determination, and has ruled in a series of cases that the principle has "crystallized into a rule of customary international law," binding on all states.<sup>46</sup>

Under the principle of self-determination, groups with a common identity and link to a defined territory are allowed to determine their political future in a democratic fashion.<sup>47</sup> Self-determination of such groups can be effectuated in different ways: through self-government, autonomy, free association, or, in extreme cases, independence.<sup>48</sup> For a group to be entitled to exercise its collective right to self-determination, it must qualify as a people.<sup>49</sup> Traditionally, a two-part test has been applied to determine when a group qualifies as a people.<sup>50</sup> First, the test looks to objective elements of the group to determine the extent to which its 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."<sup>51</sup> Second, the test looks to subjective elements to examine "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."<sup>52</sup>

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, for purposes of secession, becomes whether the right to self-determination creates a right to secession and independence. In other words, as mentioned above, the right to self-determination can take different forms, such as autonomy, self-government, or free association, that are less intrusive on state sovereignty than secession.<sup>53</sup> Understandably, the international community views

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<sup>46</sup> Scharf, *supra* note 41, at 378; see East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102–06 (June 30); Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 566–67 (Dec. 22); Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31–33 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Afr.) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31–32 (June 21).

<sup>47</sup> Scharf, *supra* note 41, at 379.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *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 43.

<sup>51</sup> Scharf, *supra* note 41, at 379.

<sup>52</sup> *Id.*

<sup>53</sup> See *id.*

secession with suspicion,<sup>54</sup> and traditionally, the right to independence or secession as a mode of self-determination has only applied to people under colonial domination or some kind of oppression.<sup>55</sup> 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."<sup>56</sup> This right has become known as the "remedial" right to secession, and has its origin in the infamous 1920 Aaland Islands case.<sup>57</sup>

The Aaland Islands were a small island nation situated between Finland and Sweden, belonging to the former and seeking to reunite with the latter.<sup>58</sup> In fact, the Aalanders claimed that they were ethnically Swedish, and that they wished to break off from Finland and become a part of Sweden.<sup>59</sup> In an advisory opinion, the second Commission of Rapporteurs, operating within the auspices of the League of Nations, held that this issue was properly of international, not domestic, jurisdiction, and that the Aalanders had a right to a cultural autonomy, which had to be exercised within Finland.<sup>60</sup> Only if

<sup>54</sup> *Id.* at 380 (noting that secession is "synonymous with the dismemberment of states"). Note the 1970 statement by then UN Secretary-General U. Thant:

[A]s far as the question of secession of a particular section of a Member State is concerned, the United Nation's attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.

Secretary-General's Press Conference, 7 U.N. MONTHLY CHRON. No. 2, at 36 (Feb. 1970); *see also* Scharf, *supra* note 41, at 380.

<sup>55</sup> Scharf, *supra* note 41, at 380. Note that under this view, the independence of a colony was not considered a 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 applied to lands separated from the metropolitan mother-state by oceans or seas. *Id.*

<sup>56</sup> *Id.* at 381.

<sup>57</sup> *Id.*

<sup>58</sup> DUNOFF ET AL., *supra* note 39, at 118-19.

<sup>59</sup> *Id.* at 119.

<sup>60</sup> *Report Presented by the Commission of Rapporteurs on the Aaland Islands Question*, League of Nations Doc. B7.21.68.106 (1921) [hereinafter Aaland Islands Report]. 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 over this issue. *Report of the Int'l Comm. of Jurists on the Legal Aspects of the Aaland Islands Question*, League of Nations Official Journal, Special Supp. No. 3, at 3-14 (1920). Then, the League of Nations appointed a Commission of Rapporteurs to recommend a solution to the Aaland Islands problem, and the Rapporteurs report

Finland disrespected their ethnic and cultural autonomy would the Aalanders' right to separate from Finland be triggered.<sup>61</sup>

Similarly, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States strikes a balance between the right to self-determination and territorial integrity by conditioning 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.<sup>62</sup> A similar clause was inserted in the 1993 Vienna Declaration of the World Conference on Human Rights, accepted by all UN member states.<sup>63</sup> Other UN documents have also referred to the right to remedial secession, such as the 1993 Report of the Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems

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held that

[t]he 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.

Aalands Islands Report, *supra*.

<sup>61</sup> Aaland Islands Report, *supra* note 60 (holding that "in 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 . . .").

<sup>62</sup> Ga. Res. 2625, *supra* note 45, at 121–41.

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 colour.

*Id.* at 124.

<sup>63</sup> World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 2, U.N. Doc. A/CONF.157/23 (July 12, 1993), reprinted in 32 I.L.M. 1661 (1993); see also Scharf, *supra* note 41, at 382. 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 the distinctions based on religion, ethnicity, language or other factors would also trigger the right to secede." Scharf, *supra* note 41, at 382.

Involving Minorities,<sup>64</sup> and the General Recommendation XXI adopted in 1996 by the Committee on the Elimination of Racial Discrimination.<sup>65</sup>

Most recently, the Canadian Supreme Court dealt with the right to remedial secession regarding the proposed separation of Quebec from Canada.<sup>66</sup> Embracing the Aaland Islands precedent, the Canadian Supreme Court distinguished the right to internal self-determination from the right to external self-determination.<sup>67</sup> 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.<sup>68</sup> 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 same people's right to break-off may accrue.<sup>69</sup> In other words, the right to separate is conditioned on the non-respect of the right to some form of provincial autonomy.<sup>70</sup>

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<sup>64</sup> See 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*, ¶ 48, U.N. Doc. E/CN.4/Sub.2/1993/34 (Aug. 10, 1993) (prepared by Asbjørn Eide) (stating that the most extreme claim by minorities in secession by either joining another State or establishing a new State on part of the State in which they currently live).

<sup>65</sup> Comm. on the Elimination of Racial Discrimination, *Report of the Comm. on the Elimination of Racial Discrimination, General Recommendation XXI*, 125-26, ¶ 11, U.N. GAOR, 51st Sess., Supp. No. 18, U.N. Doc. A/51/18 (Sept. 30, 1996).

<sup>66</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

<sup>67</sup> *Id.* at 282.

<sup>68</sup> *Id.* (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 4, at 380-81 (detailing the content of the right to external self-determination and of the right to internal self-determination).

<sup>69</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at 285 ("[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 address 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. See *id.* at 295.

<sup>70</sup> See *id.* at 285-86 (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).

Recent developments in international law may also lend credence to the idea that the right to remedial secession has crystallized as a norm. As an example, in 1991, a UN-sanctioned intervention on behalf of the Kurds was justified on the grounds that the Kurds in northern Iraq were suffering severe human rights deprivations by the Iraqi government.<sup>71</sup> Moreover, 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.<sup>72</sup>

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.<sup>73</sup>

Once the break-away entity exercises its rights to external self-determination and declares its independence, it then faces the challenge of persuading other international actors that it qualifies as a state under international law. In fact, an entity that has not met this burden risks being shunned by all relevant international actors. Consequently, such an entity cannot engage in any meaningful form of international relations.

### *B. Statehood*

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

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<sup>71</sup> Scharf, *supra* note 41, at 383.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 384.

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.<sup>74</sup> Moreover, scholars have 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.<sup>75</sup> Statehood is a legal theory that seeks to justify the attribution of statehood on objective criteria, which at least in theory are independent from the political reality underlying many attempts at secession or separation.<sup>76</sup>

In practice, the theory of statehood has led to anomalous results.<sup>77</sup> For example, as to the first criterion, many entities that we view as states have impermanent, migratory populations. The Democratic Republic of Congo, Sudan, and Iraq, to name a few, have all experienced a significant refugee crisis, resulting in shifts in their respective populations, without thereby losing their statehood on the international scene.<sup>78</sup> 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.<sup>79</sup> The second 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.<sup>80</sup> For example, Israel's territory is disputed by its Arab neighbors; the two Koreas have battled over their border for decades; and Somalia and Sudan's territories are disputed by potent rebel movements. 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 remained treated as a

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<sup>74</sup> Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

<sup>75</sup> See, e.g., JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 62–95 (2d ed. 2006) (discussing independence as a criterion for statehood).

<sup>76</sup> See Montevideo Convention, *supra* note 74, art. 3 (stating that "[t]he political existence of the state is independent of recognition by the other states").

<sup>77</sup> DUNOFF ET AL., *supra* note 39, at 115 (noting the flexible interpretation of the statehood criteria by "global elites").

<sup>78</sup> See Lydia Polgreen, *Refugee Crisis Grows as Darfur War Crosses a Border*, N.Y. TIMES, Feb. 28, 2006, <http://www.nytimes.com/2006/02/28/international/africa/28border.html>; Refugees International, DR Congo, <http://www.refugeesinternational.org/where-we-work/africa/dr-congo> (last visited on Mar. 21, 2009); Refugees International, Iraq, <http://www.refugeesinternational.org/where-we-work/middle-east> (last visited Mar. 21, 2009).

<sup>79</sup> DUNOFF ET AL., *supra* note 39, at 115.

<sup>80</sup> *Id.* at 115–16.



state and retained its seat in all major international organizations.<sup>81</sup> Finally, as to the fourth criterion, many entities routinely considered states do not have the capacity to enter into international relations.<sup>82</sup> Small nations like Liechtenstein and Monaco depend on Switzerland and France, respectively, for their national defense.<sup>83</sup> Several Pacific Island nations, likewise, depend on the United States and New Zealand for their defense and have been dubbed “freely associated states.”<sup>84</sup> Other small nations depend on the United States or other economically powerful nations for trade and commercial relations.<sup>85</sup>

The above examples demonstrate that the legal theory of statehood remains inconsistently applied in practice, and that often the geopolitical reality of a given region dictates whether an entity is treated as a state by the international community. Thus, 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 wishes to recognize it as such.<sup>86</sup>

### C. Recognition<sup>87</sup>

There are two theories of recognition under international law: the declaratory view and the constitutive view.<sup>88</sup> Under the former, recognition is

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<sup>81</sup> *Id.* at 116.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (describing the special arrangements that Micronesia, Palau, the Cook Islands, and Niue—the so-called freely associated states—have with the United States and New Zealand).

<sup>85</sup> The so-called “dependency theory” describes this problem as the notion that the international division of labor between rich core countries and poor periphery countries was the “primary reason for third-world underdevelopment.” Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 *BROOK. J. INT’L L.* 405, 412 n.25 (2008).

<sup>86</sup> 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.

<sup>87</sup> Note that recognition of new states is a totally separate legal issue from the recognition of new governments. For a discussion of the latter, see DUNOFF ET AL., *supra* note 39, at 157–58.

<sup>88</sup> *Id.* at 137.

seen as a purely political act having no bearing on the legal elements of statehood.<sup>89</sup> Under this view, outside states can choose to recognize the new state, or not, but that decision does not influence the legal determination of statehood.<sup>90</sup> Under the latter, recognition is seen as one of the main elements of statehood.<sup>91</sup> Thus, an entity cannot achieve statehood unless it is recognized by outside actors as a state.<sup>92</sup>

While most academics would support the declaratory view,<sup>93</sup> the constitutive view has teeth in practice nonetheless. In fact, one of the four criteria of statehood—the capacity of the entity seeking to prove statehood 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 other states are willing to enter into such relations with that entity.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> Consequently, Southern Rhodesia remained isolated from the world and was unable to conduct international relations.<sup>97</sup> The non-recognition of Southern Rhodesia by outside actors prevented it from fully exercising the attributes of legal statehood.<sup>98</sup> Thus,

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<sup>89</sup> *Id.*

<sup>90</sup> *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.”).

<sup>91</sup> *Id.* at 138.

<sup>92</sup> *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.”).

<sup>93</sup> *Id.*

<sup>94</sup> *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.).

<sup>95</sup> 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 recognising state.” 1 OPPENHEIM’S INTERNATIONAL LAW 133 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

<sup>96</sup> DUNOFF ET AL., *supra* note 39, at 138. Note that the UN 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).

<sup>97</sup> DUNOFF ET AL., *supra* note 39, at 138 (noting that nearly all states refused to conclude treaties with Southern Rhodesia).

<sup>98</sup> Note that the situation was resolved in 1978, following a peace accord which led to a

recognition, whether considered as a political or legal act, has a direct impact on the pragmatic determination of statehood: whether an entity will be able to truly act as a state on the international scene.

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 views while acknowledging what truly goes on in practice. It asserts that recognition is a political act independent of statehood, but outside states have a duty to recognize a new state if that state objectively satisfies the four criteria of statehood.<sup>99</sup> "Recognition, while in principle declaratory, may thus be of great importance in particular cases. At least where the recognizing government is not acting in a merely opportunistic way, recognition is important evidence of legal status."<sup>100</sup>

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 SFRY. At that time, the EU foreign ministers developed guidelines on the recognition of new states in Europe. The EU foreign ministers, concerned with the existence and maltreatment of minorities within the former Soviet Union and the SFRY, announced that one of the criteria of recognition of new states within the EU would be the respect of human rights, as well as the protection of minority rights.<sup>101</sup> 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.<sup>102</sup>

While these criteria have not reached the status of international custom and do not bind states which are not members of the EU, they show nonetheless an evolution of international law in the field of recognition.<sup>103</sup> In fact, it seems

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majority government in Zimbabwe. *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> CRAWFORD, *supra* note 75, at 93.

<sup>101</sup> See Press Release, European Community, Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" (Dec. 16, 1991), reprinted in 31 I.L.M. 1485, 1486-87 (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).

<sup>102</sup> *Id.*

<sup>103</sup> In fact, 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. Hasani, *supra* note 15, at 307-13.

that international law today allows outside actors to impose additional requirements on entities striving for recognition.<sup>104</sup> Regional bodies, organizations, and states can thus choose to require that the entity seeking recognition comply with specific criteria that have nothing to do with the legal contours of statehood.

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.<sup>105</sup> With respect to Macedonia, the Badinter Commission recommended that Macedonia not be recognized as a new state unless it agreed to insert a clause in its constitution promising not to claim additional territory against neighboring states.<sup>106</sup> After Macedonia agreed to follow the Badinter Commission recommendations, the EU foreign ministers decided to impose an additional requirement on Macedonia by indicating that this new state would be recognized only if it used a name which did not include the term Macedonia.<sup>107</sup> This "requirement" resulted from a geopolitical 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 centuries ago.<sup>108</sup> The use of such additional recognition criteria by the EU signals a regional trend of conditioning recognition on the respect of fundamental rights and rules of international law, as well as on obedience with the regional geopolitical equilibrium.<sup>109</sup> In other words, regional authorities are telling new states that

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<sup>104</sup> For example, the EU set out the respect of human rights as a "fundamental prerequisite for recognition." Brown, *supra* note 5, at 247.

<sup>105</sup> DUNOFF ET AL., *supra* note 39, at 114–15.

<sup>106</sup> R. Badinter, Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and Its Member States, in Conference on Yugoslavia Arbitration Commission, 31 I.L.M. 1507, 1509 (1992) [hereinafter Badinter Opinion No. 6]. 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. DUNOFF ET AL., *supra* note 39, at 142.

<sup>107</sup> DUNOFF ET AL., *supra* note 39, at 143. Ultimately, this issue was resolved when Macedonia was admitted to the UN 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.*

<sup>108</sup> *Id.*

<sup>109</sup> 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

they will only be accepted as full players if they vouch to respect the rule of law and to adhere to preserving regional stability and peace.

#### IV. APPLICATION OF INTERNATIONAL LAW TO KOSOVO

In order to assess the legal validity of the Kosovar declaration of independence, this Article will examine the three core issues described above—secession, statehood, and recognition—under international law as it applies to Kosovo.

##### A. Secession

The core legal issue relating to the Kosovar declaration of independence is whether Kosovo has the right to secede from Serbia under international law. To properly analyze this question, this Article will turn to the right of self-determination and its contours under modern international law. As stated by several different precedents, a “people” has a right to so-called external self-determination only if its rights to internal self-determination are not being fulfilled by its central government.<sup>110</sup> In the case of Kosovo, it is certainly true that Kosovar Albanians are a people: they share a common ethnicity, culture, language, religion, and social values that distinguish them clearly from the Serbs.<sup>111</sup> Moreover, it is clear that their rights to internal self-determination had not been respected by the Milošević-led Serbia.<sup>112</sup> Yet, it is also clear that

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to be recognized; yet, in practice, such results are possible and have occurred at least once in Europe.

<sup>110</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 282–83, 287 (Can.) (citing Declaration on the Principles of International Law Concerning Friendly Relations G.A. Res. 2625 (XXV), at 121, U.N. Doc. A/8082 (Oct. 24, 1970); World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 37, U.N. Doc. A/CONF. 158/23 (June 12, 1993); Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, G.A. Res. 50/6, U.N. Doc. A/Res/50/6 (Nov. 9, 2005)); see also Gruda, *supra* note 4, at 366 (noting that the right to self-determination belongs to peoples).

<sup>111</sup> See *supra* note 43. As mentioned above, the term people is purposely vague in international law. One definition views people as “a social group governed by a people that does not belong to that social group,” like the Kosovar Albanians were governed by the Serbs. See Gruda, *supra* note 4, at 367. Another way to determine whether a group qualifies as a people is to use a combination of an objective and a subjective test. See *supra* Part III.A.

<sup>112</sup> Williams, *supra* note 13, at 396–97 (noting that from 1989 on, the Kosovar Albanians “were denied the ability to exercise any sovereign authority or functions or even to participate in the federal government,” and that they were subjected to “a systematic denial of their basic human rights”).

their rights to internal self-determination were respected in the pre-Milošević era.<sup>113</sup> In other words, the 1974 Constitution of the SFRY specifically granted autonomous status to Kosovo, and Kosovo thus became a fully functional province operating in the federal structure of the former Yugoslavia.<sup>114</sup> Finally, it is possible that following the NATO intervention in Serbia and the ousting of the Milošević regime, the new, more democratically inclined government of Serbia would respect the Kosovar rights to internal self-determination. Therefore, while it is certain that the Kosovars' right to internal self-determination had not been respected by the Milošević regime, it is true that those rights had been respected in the past by the SFRY, and it is at least plausible that those rights would be respected by Serbia in the future.

If we were to conclude that the Kosovar rights to internal self-determination will be fulfilled in the future, our analysis would stop here because thereunder, the Kosovars would have no right to external self-determination, like Quebec, and thus no right to secede from Serbia. On the other hand, if we were to conclude that it is not likely that Serbia would respect the Kosovar rights to internal self-determination in the future, then the Kosovars would have the right to external self-determination and thus the right to secede from Serbia. Interestingly, although most of the Western world recognized Kosovo as a new state in the weeks that followed its declaration of independence, none of those outside recognizing actors invoked the legal theory of secession to justify Kosovo's separation from Serbia.<sup>115</sup> This question will be analyzed in Part IV.B below.

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<sup>113</sup> Compare Gruda, *supra* note 4, at 381 (discussing the general content of the right to internal self-determination, which includes the right of people to determine their political and social regime, the right of people to freely dispose of their natural resources and pursue economic development, and the right to solve all matters under domestic jurisdiction), with Gruda, *supra* note 4, at 387 (discussing the rights conferred on the Kosovar Albanians by the 1974 SFRY Constitution, which included, among other things, the right to adopt laws and a constitution, and the right to have judicial autonomy and a Supreme Court). Thus, it is clear that the 1974 SFRY Constitution enabled Kosovo and its citizens to exercise full internal self-determination.

<sup>114</sup> Gruda, *supra* note 4, at 387.

<sup>115</sup> Audio: Panel on International Law, Politics and the Future of Kosovo, held by the American Society of International Law (Apr. 9–12, 2008) [hereinafter ASIL Panel] (on file with author).

### B. Statehood

If Kosovo claims that it is a new state, independent from Serbia, it has to prove that it satisfies the four legal criteria of statehood: that it has a defined territory, a permanent population, a government, and the capacity to enter into international relations.<sup>116</sup> All four of these criteria seem difficult to fulfill in the case of Kosovo.

First, Kosovo's territory is heavily disputed by Serbia, which claims Kosovo is part of Serbia and historically, Kosovo has always been Serbian land.<sup>117</sup> Moreover, Albania has also laid claims to the Kosovar territory in the past, as the Kosovars are ethnically Albanian and had moved to Kosovo from Albania centuries ago.<sup>118</sup> Thus, Kosovo's territory is far from being undisputed. Second, Kosovo does not have a permanent population because of the heavy flows of both Serbian and Albanian refugees that move in and out of Kosovo.<sup>119</sup> Third, Kosovo does have a government, but its stability depends on protection assured first by the UN, and now by the EU.<sup>120</sup> Without the international presence and monitoring of this region, the Kosovar government would be susceptible to attacks by the Serbian minority living in Kosovo as well as the central Serbian government. Thus, the Kosovar government, absent

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<sup>116</sup> Montevideo Convention, *supra* note 74, art. 1.

<sup>117</sup> Perritt, *supra* note 3, at 6 ("Serbs, meanwhile, viewed Kosovo as an historic part of Serbian land, at least since the ninth century. Today's Kosovo was the heart of 'Old Serbia,' where the Serbian Orthodox Church, acting through monasteries still standing in Kosovo, organized Serb and Christian resistance to the spread of Islam under Ottoman domination."). This was reinforced by the Serbian President Boris Tadic in his emergency address before the UN Security Council one day after Kosovo declared its independence. See Ban Ki-moon *Urges Restraint by All Sides after Kosovo Declares Independence*, *supra* note 21.

<sup>118</sup> The Kosovar Albanians claim that they were in Kosovo first, before the Serbs, in the form of Illyrians, an ethnic group speaking a proto-Albanian language and living in the Roman province of Dardania. KING & MASON, *supra* note 14, at 25–26. The Kosovar Albanian desire to rejoin Albania can be traced back to the late nineteenth century Prizren League, a political movement that attempted to persuade diplomats meeting at the Congress of Berlin that Albanian-inhabited territories (including present-day Albania and Kosovo) should be reunited. *Id.* at 29–30. Recognizing this historic claim, the present-day international community specifically requested in the 1998 Public International Law and Policy Group report and in the Goldstone Commission Proposal II that Kosovo refrain from seeking reunification with Albania. See Williams, *supra* note 13, at 417.

<sup>119</sup> For example, as of August 1998, the UNHCR estimated that there were 260,000 displaced people within Kosovo, and another 200,000 outside it. KING & MASON, *supra* note 14, at 43.

<sup>120</sup> Kosovo, since UN Resolution 1244, has been policed by a NATO-led force, KFOR. See *supra* note 16 and accompanying text. In the near future, its stability will be assured by EU-led forces. Alic & Jovanovic, *supra* note 32.

international involvement, is unstable at best. Finally, Kosovo can only enter into international relations because of the international community's involvement within it. In other words, Kosovo has been administered by the UN and its internal security has been guarded by international forces, which ensure that Kosovo has access to the outside world; that it can trade, import, and export goods; and that its political leaders can travel abroad.<sup>121</sup> Without this support, Kosovo would not be able to enter into international relations with any outside actors because its internal borders would be subject to Serbian interference, and it would likely be blocked off from the outside world by Serbian forces. Thus, Kosovo's capacity to enter into international relations seems heavily dependent on the presence of UN and EU forces in this region.

It is true that arguments regarding Kosovo's fulfillment of statehood criteria can be made on the other side, and moreover, that many states exist on our planet which are fully recognized and treated as states, but which do not satisfy the four objective criteria of statehood.<sup>122</sup> However, most of those entities were seemingly able to fulfill the criteria of statehood at the time of their independence and were thwarted by civil war and instability, which in turn have played a role on their attributes of sovereignty. Kosovo, on the other hand, seems not to have even satisfied the four criteria of statehood at its birth, thereby raising questions about the legal validity of its quick ascension into the realm of statehood.

### *C. Recognition*

Under the declaratory view of recognition—described in Part III—outside actors would be free to recognize or deny recognition of Kosovo, but such political decisions would not affect Kosovo's legal status as a state.<sup>123</sup> Thus, the fact that most of the Western world has recognized Kosovo as a state would have no bearing on the legal question of whether Kosovo has achieved statehood. Under the constitutive view, however, recognition of Kosovo by outside actors is one of the elements of its statehood.<sup>124</sup> Under this view, then, the fact that so many countries have chosen to recognize Kosovo would

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<sup>121</sup> As mentioned previously, Kosovo has been administered by UNMIK, a UN-led civil administration, and its borders and stability in general have been assured by KFOR, a NATO-led force. *See supra* note 16 and accompanying text.

<sup>122</sup> *See supra* Part III.B.

<sup>123</sup> *See supra* Part III.C.

<sup>124</sup> *See supra* Part III.C.



indicate that at least one of the criteria of Kosovar statehood has been fulfilled. However, Kosovo would still need to prove that it satisfies the four other criteria of statehood. Under the intermediary view, outside actors would have a duty to recognize Kosovo as a new state if it fulfilled the four objective criteria of statehood.<sup>125</sup> However, as discussed above, it is questionable whether Kosovo fulfills those four criteria and whether outside actors would thus have a duty to recognize Kosovo.

In practice, how does the Kosovar situation compare to others, where a new entity with dubious qualities of statehood has sought recognition by outside actors? Within the context of the former Yugoslavia, many outside actors quickly recognized Croatia after it declared independence, although its fulfillment of statehood criteria was dubious at best and its fulfillment of the Badinter Commission requirement of respect of minority rights was more than questionable.<sup>126</sup> On the opposite end of the spectrum, EU member states refused to recognize Macedonia after it declared independence despite the fact that Macedonia very clearly satisfied the four criteria of statehood<sup>127</sup> and that the Badinter Commission recommended that Macedonia be recognized as a new state.<sup>128</sup> Recently, two Georgian break-away provinces, South Ossetia and Abkhazia, have provoked much international concern over their “unrecognized” status within the international community. South Ossetia and Abkhazia have declared independence from Georgia in a de facto manner and are supported by Russia.<sup>129</sup> The Russian parliament has voted a unanimous declaration of recognition of these two regions, has provided military support to them, and has even sent troops into Georgia.<sup>130</sup> However, South Ossetia and

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<sup>125</sup> See *supra* Part III.C.

<sup>126</sup> In fact, the Badinter Commission specifically conditioned the recognition of Croatia on a reform of its constitution to offer strong protection of minorities. R. Badinter, Opinion No. 5 on the Recognition of the Republic of Croatia by the European Community of the European Community and Its Member States, in Conference on Yugoslavia Arbitration Commission, 31 I.L.M. 1503, 1505. Despite this Badinter Commission Opinion, Germany chose to recognize Croatia as soon as Croatia declared independence. See Carl Cavanagh Hodge, *Botching the Balkans: Germany's Recognition of Slovenia and Croatia*, 12 ETHICS & INT'L AFF. 1 (1998) (asserting that Germany's unilateral recognition in 1991 of the secessionist states of Slovenia and Croatia was an act of irresponsible diplomacy).

<sup>127</sup> Floudas, Demetrius Andreas, *A Name for a Conflict or a Conflict for a Name? An Analysis of Greece's Dispute with FYROM*, J. POL. & MIL. SOC., Winter 1996, available at [http://findarticles.com/p/articles/mi\\_qa3719/is\\_199601/ai\\_n8752910/?tag=content;coll](http://findarticles.com/p/articles/mi_qa3719/is_199601/ai_n8752910/?tag=content;coll).

<sup>128</sup> Badinter Opinion No. 6, *supra* note 106, at 1511.

<sup>129</sup> *Bush Warns Moscow Over Breakaway Autonomy*, CNN, Aug. 25, 2008, <http://www.cnn.com/2008/WORLD/europe/08/25/russia.vote/index.html> [hereinafter *Bush Warns Moscow*].

<sup>130</sup> *Id.*

Abkhazia are not internationally recognized as independent states.<sup>131</sup> Georgia considers them part of its own territory, and the United States has insisted that they both remain a part of Georgia.<sup>132</sup> Their status, as of today, remains uncertain.

These examples indicate that recognition truly is a political act, and that the geopolitical reality of a given region dictates whether an entity will be recognized as a new state.<sup>133</sup> This conclusion also seems to indicate that the recognition of Kosovo was political rather than legal; politically, outside actors determined that it would be best to accept Kosovo as a new sovereign partner, but that such actors chose to ignore the dubious legality of the separation. In fact none of the recognizing nations evoked any legal basis to justify the Kosovar separation, and no country in the world relied on self-determination or secession grounds.<sup>134</sup> This leads us to explore why Kosovo should be a recognized state, and what the lessons of such recognition there are for the future.

#### V. ISSUES SURROUNDING THE KOSOVAR INDEPENDENCE

Numerous legal and political issues plague the Kosovar independence. Namely, what legal theories can be offered to justify such independence in the first place, and what kinds of problems does this troubled region face in its near future as a new state?

##### *A. Theories to Justify Kosovar Independence*

Besides the political willingness to accept Kosovo as a new sovereign state and the strategic calculus concluding that another state in the Balkans is a desirable outcome, why should Kosovo qualify as a state? Despite the dubious legality under positive international law of its separation from Serbia, are there other evolving theories of independence that would justify the Kosovar break-off?<sup>135</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> One scholar has noted that "[i]n the past, recognition, or nonrecognition, has been dependent upon the recognizing state's assessment both of whether the above conditions have been met de facto, and of whatever political considerations it might also care to consider." Brown, *supra* note 5, at 261–62.

<sup>134</sup> See ASIL Panel, *supra* note 115.

<sup>135</sup> It should be noted that scholars in the past had advocated various models for Kosovar

One such theory would focus on so-called “earned sovereignty”—an idea that a break-away entity does not merit recognition as a new state immediately after its separation or quest to separate from its mother-state, but that such an entity needs to earn its sovereignty.<sup>136</sup> Earned sovereignty is a conflict resolution theory that consists of six elements.<sup>137</sup> The first three core elements include shared sovereignty, institution building, and final status determination of the break-away entity, and the latter three elements, which are optional, include phased sovereignty, conditional sovereignty, and constrained sovereignty.<sup>138</sup> The first core element, shared sovereignty, refers to the shared exercise of sovereignty by the mother-state and the break-away entity, or between an international institution and the break-away entity.<sup>139</sup> The second core element, institution building, refers to the idea that the break-away entity “undertakes to construct institutions for self-government and to build institutions capable of exercising increas[ed] sovereign authority and functions.”<sup>140</sup> The third core element, the determination of final status for the break-away entity, involves either a referendum to determine such final status, or a negotiated settlement between the mother-state and the break-away entity, with the help of international mediation.<sup>141</sup> The first optional element, phased sovereignty, “entails the accumulation by the sub-state entity of increasing sovereign authority and functions over a specified period of time prior to the determination of final status.”<sup>142</sup> The second optional element, conditional sovereignty, refers to the fact that the break-away entity must meet certain benchmarks, such as protecting human rights, developing democracy, respecting the rule of law, and supporting regional stability, before its

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autonomy, one of which consisted of granting Kosovo a type of autonomy similar to the status of Kosovo under the 1974 SFRY Constitution, and the other proposed making Kosovo, in addition to Serbia and Montenegro, another federal unit within the FRY (prior to the dissolution of the FRY). See Dimitrios Triantaphyllou, *Kosovo Today: Is There No Way Out of the Deadlock?*, 5 EUR. SECURITY 279, 291–93 (1996); Zoran Lutovac, *Options for Solution of the Problem of Kosovo*, 48 REV. INT’L. AFF. 1056, 10–12 (1997). Note, however, that no documents had ever envisioned any substantial autonomy for Kosovo prior to the Rambouillet Accords. Hasani, *supra* note 15, at 324.

<sup>136</sup> See generally James R. Hooper & Paul R. Williams, *Earned Sovereignty: The Political Dimension*, 31 DENV. J. INT’L L. & POL’Y 355 (2003).

<sup>137</sup> *Id.* at 356.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

sovereignty may be increased.<sup>143</sup> Finally, the third optional element, constrained sovereignty, "involves continued limitations on the sovereign authority and functions of the new state," which may involve international military and administrative presence and other territorial limitations on the break-away entity.<sup>144</sup>

The general idea of the earned sovereignty approach is that the break-away entity must demonstrate to the outside world that it is capable of functioning as an independent state, would be a reliable sovereign partner, and is worthy of recognition.<sup>145</sup> Moreover, the break-away entity will often need to go through a transitional stage, during which it is administered by an international agency, like the UN in the case of Kosovo, which serves as a buffering stage between full dependence and full independence.<sup>146</sup> This intermediary step of international administration is often needed because break-away entities tend to be poor, underdeveloped, and dependent on western aid for economic survival.<sup>147</sup> Thus, the international administrator helps the break-away entity develop proper industry, economy, and infrastructure so that it can function as a viable state once the international administration comes to an end.<sup>148</sup> Kosovo, under this theory, may have earned its sovereignty because it was administered by the UN, and because during this time, it demonstrated to the

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> For example, Michael Steiner, the Special Representative of the Secretary-General to Kosovo, had proposed a formula called "standards before status," whereby Kosovo would have to fulfill a number of standards as a prerequisite to international recognition. Gruda, *supra* note 4, at 357. According to this proposal, Kosovo would be governed in a system of political trusteeship in the meantime, in order to advance the local population politically, economically, socially and educationally. *Id.* See also Perritt, *supra* note 3, at 9 (describing the "standards before status" doctrine).

<sup>146</sup> See, e.g., Gruda, *supra* note 4, at 355 (noting that one of the solutions to the status of Kosovo would be a "step-by-step" solution whereby Kosovo would be administered by an international organization first, followed by local elections, a plebiscite, and then the implementation of whatever status resulted from the plebiscite, the goal being to facilitate a peaceful separation).

<sup>147</sup> *Id.* at 357 (noting that the intermediary step during which Kosovo would be governed as a political trusteeship would serve the purpose of advancing the local population politically, economically, socially, and educationally).

<sup>148</sup> See Brown, *supra* note 5, at 253 (discussing the idea of "an international protectorate moving towards self-government" in the context of Kosovo, and noting that UNMIK "has made progress in its stated goals of providing transitional administration, ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, and overseeing the development of democratic provisional institutions of self-government").

outside world that it was ready and capable of functioning as an independent state.<sup>149</sup>

Another theory of independence that may justify the Kosovar break-off is that of qualified state sovereignty.<sup>150</sup> Under this theory, state sovereignty does not enjoy absolute protection in international law and has been eroded through the forces of globalization, which include the notion of interconnectivity across the planet.<sup>151</sup> Thus, under this theory, what a state does within its own territory affects many other states, so that it can no longer be asserted that a state may internally do whatever it wishes, as such actions necessarily impact other states.<sup>152</sup>

Translated to Kosovo, what this means is that once Serbia decided to engage in a repressive campaign of ethnic cleansing in Kosovo, this decision impacted outside actors, who then earned the right to intervene in Serbia on humanitarian grounds and to decide the future fate of Kosovo. Thus, 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.<sup>153</sup> Under this view, it can also be asserted that Serbia no longer had any valid legal basis to hold onto

<sup>149</sup> The Public International Law and Policy Group (PILPG) had advocated the application of the earned sovereignty conflict resolution tool to the Kosovar crisis as early as 1998. Williams, *supra* note 13, at 390.

<sup>150</sup> 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 Hooper & Williams, *supra* note 136, at 357.

<sup>151</sup> See Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 240 (2008).

<sup>152</sup> See *id.* at 231–32.

<sup>153</sup> Several influential authors have supported external intervention in Kosovo on humanitarian grounds. See Thomas M. Franck, Editorial Comments, *NATO's Kosovo Intervention: Lessons of Kosovo*, 93 AM. J. INT'L L. 857 (1999); 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, Editorial Comments, *NATO's Kosovo Intervention: Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847 (1999); Louis Henkin, Editorial Comments, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Ruth Wedgwood, Editorial Comments, *NATO's Kosovo Intervention: 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 (European) considerations. See, e.g., W. Michael Reisman, Editorial Comments, *NATO's Kosovo Intervention: Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999).

Kosovo, as its reign of this province became purely symbolic.<sup>154</sup> In other words, the Serbian sovereignty over Kosovo had diminished to such a minimum that the notion of territorial sovereignty became trumped by the necessity of humanitarian intervention or other kinds of outside interference.

Finally, one last theory of Kosovar independence may be that advocated by the U.S. State Department: that Kosovo is *sui generis* and that no legal precedent has been created by its independence.<sup>155</sup> Under this theory, the combination of unique circumstances in Kosovo justified its independence, but such independence creates no new precedent and does not foreshadow the evolution of any new theories of independence for the future.

Yet, the above theories purporting to justify Kosovar independence are flawed in one major respect. They start with the premise that Kosovo is entitled to full independence, and then seek to invent or invoke legal theories that would justify such independence. In other words, instead of asking what the Kosovar Albanians' rights are in light of the delicate political situation in Kosovo, the above theories start by claiming that Kosovar independence is the solution, and continue by offering legal justifications to support this outcome. None of the above theories involve discussions of secession, statehood, or recognition, the fundamental issues of international law that are relevant to all state separations and break-ups. Moreover, none of the political leaders or legal scholars who have supported the Kosovar separation have ever discussed issues of secession, statehood or recognition, or have ever claimed that Kosovo can be independent because its people have a right to external self-determination.<sup>156</sup> The above three theories justifying Kosovar independence certainly bring up interesting issues and present novel views of sovereignty

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<sup>154</sup> See Gruda, *supra* note 4, at 389–90. This idea of qualified state sovereignty embraces another principle referred to as the “ethnic principle,” which supports Kosovar independence by the sole fact that Albanians are the dominant ethnic group in Kosovo. *Id.*

<sup>155</sup> See *Serbia Steps up Anti-Kosovo Pressure*, *supra* note 2. The United States Secretary of State, Condoleezza Rice, noted immediately after the United States recognized Kosovo as a new state, that Kosovo was *sui generis* and thus not precedent-setting for any other minority group or region in the world. *Id.* (arguing that the “unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia’s breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of U.N. administration—are not found elsewhere and therefore make Kosovo a special case”). John Bellinger, a U.S. Department of State attorney, also argued that Kosovo was *sui generis* at the recent American Society of International Law Annual Meeting in Washington, D.C., in April 2008. ASIL Panel, *supra* note 115. In addition, scholars have noted the *sui generis* nature of the Kosovo issue. See, e.g., Gruda, *supra* note 4, at 353.

<sup>156</sup> ASIL Panel, *supra* note 115.

under modern international law. However, they seem to circumvent the basics of international law by avoiding discussion of the most difficult issues thereof and by offering pragmatic, politically inclined solutions instead. The latter observation brings us to the next point, which is an evaluation of the political and legal future of Kosovo as a new state.

### *B. Lessons for the Future*

The near future of the new Kosovar state is precarious at best. The relevant issues that will puzzle officials and administrations involved in this region involve Kosovar viability as a state, the looming threat of civil war and violence against the Serbian minorities, and the precedent that is being set by Kosovo for other separatist groups around the globe.

#### *1. Viability of Kosovo as a State*

Even if Kosovo were to be recognized as a new state by most of the world community, its long-term viability remains questionable.<sup>157</sup> In other words, if international administrators were to withdraw from Kosovo now, it would most likely crumble as a state: it would be unable to militarily defend its borders; to politically sustain its government; to protect its population; to maintain a sound economic and commercial policy; or to explore its natural resources.<sup>158</sup> It is uncertain how long Kosovo will remain dependent on such extensive international aid, but it is clear that such aid will be necessary in the foreseeable future.

Thus, it seems that Kosovo is an independent-dependent state—an entity that is officially recognized as a state but that cannot in reality function as a state absent strong international support. Is it truly desirable to create such independent-dependent states?<sup>159</sup> Does this precedent fit into the paradigm of

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<sup>157</sup> See, e.g., Perritt, *supra* note 3, at 14–15 (discussing the unstable outlook of Kosovo).

<sup>158</sup> A Kosovo that becomes independent though unilateral action would be challenged to build a sustainable economy, to maintain public order, to extend its writ into areas now under the practical control of parallel institutions taking their direction from Belgrade, as in north Mitrovica, and, no doubt, to protect its borders against military encroachments—all without international assistance.

*Id.* at 15.

<sup>159</sup> See Ash, *supra* note 20 (discussing the Kosovar “internationally coordinated declaration of dependent independence”).

earned sovereignty whereby international dependence is simply a step toward independent statehood that will ultimately come about, or is this a perfect model for inciting state failure? An independent-dependent state may never achieve full independence and may fall apart as soon as the international aid plug is pulled. The creation of independent-dependent states may be the perfect recipe for state failure.

## 2. *Threat of Civil War and Threat to Serbian Minorities*

Another issue posed by the Kosovar independence is the threat that such independence poses to the significant Serbian minorities living in Kosovo.<sup>160</sup> Serbs in Kosovo live either in the south, in Serbian enclaves and villages, where they are unprotected by international peacekeepers but maintain their safety by staying within their own communities, or in the north, where they are protected by UNMIK/KFOR.<sup>161</sup> Nonetheless, Serbs in Kosovo have already been subject to Albanian attacks during the UN administration of the province, most notably in March 2004.<sup>162</sup> Such attacks show the volatility of the region and the difficulty of maintaining peace and stability.<sup>163</sup>

Now, after the Kosovar independence, one has to wonder about the fate of Serbs in Kosovo.<sup>164</sup> While Serbs may remain protected during the transitional

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<sup>160</sup> Note also that the Kosovar independence poses a significant issue regarding the various Serbian Orthodox monuments and shrines in Kosovo as well. Fred L. Morrison, *Between a Rock and a Hard Place: Sovereignty and International Protection*, 80 CHL-KENT L. REV. 31, 42 (2005).

<sup>161</sup> See Perritt, *supra* note 3, at 14.

<sup>162</sup> *Id.* at 9 (noting that in March 2004, thousands of Kosovar Albanians rioted while “focusing their rage on Serb ‘enclaves’ and ‘religious symbols’ ”); see also KING & MASON, *supra* note 14, at 9–16 (describing the March 2004 Kosovar Albanian attacks against the Kosovar Serbs in detail).

<sup>163</sup> See, e.g., Perritt, *supra* note 3, at 9 (indicating that during the March 2004 Albanian riots, international police proved incapable of stopping the violence and NATO forces “performed unevenly at best”).

<sup>164</sup> One scholar has already noted the mutual mistrust between the ethnic Serbs and Albanians in Kosovo, and the fact that the Serbian minority would be reluctant to rely on any constitutional protections in the new Kosovar Constitution for the protection and enforcement of its minority rights. Morrison, *supra* note 160, at 43–44. It should also be noted that the Rambouillet Accords—possibly anticipating problems between the Albanian majority and the Serbian minority in Kosovo—specifically provided for the protection of human rights in Kosovo: by incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its Protocols, into Kosovar law; by creating an Ombudsman office to monitor the protection of minority and human rights in Kosovo; and by specifying rights such as “the use of



period of independent-dependence, which will entail heavy international monitoring and peacekeeping, it is uncertain whether they will be able to safely remain in Kosovo thereafter.<sup>165</sup> Moreover, applying the secessionist logic from above, one could draw an equally appealing argument that Serbs in the north of Kosovo should now be able to secede from Kosovo and to rejoin Serbia.<sup>166</sup> After all, it is unclear whether their rights to internal self-determination will be respected by the independent Kosovar government, and they are ethnically, socially, culturally, and religiously different from the Albanian majority, forming a people that may have external self-determination rights. Finally, even if the Kosovar Serbs remain in Kosovo, it is plausible that a civil war between the two groups may erupt in the short- or long-term future.<sup>167</sup>

### 3. *Precedent for Other Separatist Groups*

Although politicians have tried to claim that Kosovar independence is not precedent-setting and that Kosovo is *sui generis*,<sup>168</sup> separatist groups throughout the world were quick to rely on the Kosovar independence to justify their own secessionist claims.<sup>169</sup> Thus, in the days following the Kosovar declaration of independence, separatist groups in Moldova and Georgia cited this “precedent” and reaffirmed their claims for independence.<sup>170</sup> Moreover, pro-Russian separatist provinces in Georgia, South Ossetia and

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national community symbols, language, cultural and religious association, and the right to be free from discrimination.” Williams, *supra* note 13, at 402–03.

<sup>165</sup> Scholars have already raised concerns about the treatment of minorities in an independent Kosovo. See, e.g., Brown, *supra* note 5, at 251 n.85 (arguing that minorities have inalienable rights that must be respected).

<sup>166</sup> In fact, Serbs in the north of Kosovo live predominantly in the town of Mitrovica, which is a “microcosm for all of Kosovo,” because its “division and unresolved political status reinforce its social and economic crisis and fuel ethnic tensions.” Perritt, *supra* note 3, at 26. Thus, scholars have advocated the partition of Kosovo along the “Mitrovica line,” whereby the northern part of Mitrovica and the territory north of the Ibar River would become part of Serbia, and the territory south of the Ibar River would remain part of the independent state of Kosovo. Williams, *supra* note 13, at 405.

<sup>167</sup> See Perritt, *supra* note 3, at 14 (cautioning against outbreaks of violence in Kosovo).

<sup>168</sup> See *supra* note 155.

<sup>169</sup> Ash, *supra* note 20 (noting that leaders in South Ossetia and Transnistria “are muttering about following the example of the American-backed Kosovans,” and that “Basque and Catalan separatists take note”).

<sup>170</sup> Kulish & Chivers, *supra* note 24 (noting that separatist leaders in Abkhazia and South Ossetia, two Georgian provinces, have announced their intention to seek recognition as independent states, backed by Russia).

Abkhazia, were looking for ways to lean on the Kosovar independence to justify their own separation.<sup>171</sup> Recently, in the aftermath of the Russian military intervention in Georgia in support of South Ossetia, and Abkhazia South Ossetia's President, Eduard Kokoity, stated his region had "more political-legal grounds than Kosovo to have [its] independence recognized."<sup>172</sup> It is also interesting to note that most countries that have refused to recognize Kosovo as a new state have important minority groups in their territories and are afraid of the historical precedent that this separation could spur.<sup>173</sup>

Because the Kosovar declaration of independence raises many difficult legal as well as pragmatic issues, Part VI will now turn to an examination of other solutions short of independence that could have been envisioned and implemented in Kosovo.

## VI. OTHER SOLUTIONS SHORT OF INDEPENDENCE

Because the Kosovar independence poses significant regional stability issues and challenges to traditional international law, other solutions to the Kosovar crisis should have been envisioned by the international community. Even Albanian scholars have recognized that solutions to the Kosovo issue other than complete independence exist and have been on the bargaining table.<sup>174</sup> Some such solutions include the creation of an international protectorate, conditional independence, and the division of Kosovo along ethnic lines.<sup>175</sup>

First, Kosovo could have remained an international protectorate. Resolution 1244 effectively placed Kosovo under UN supervision and authorized civil and security presence.<sup>176</sup> As conceived in 1999, when the international protectorate of Kosovo was created, this solution was only temporary, and the people of Kosovo would be allowed at some point to decide

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<sup>171</sup> *Serbia Steps Up Anti-Kosovo Pressure*, *supra* note 2.

<sup>172</sup> *Bush Warns Moscow*, *supra* note 129.

<sup>173</sup> In fact, scholars have noted that the desire to avoid encouraging secessionist groups throughout the world from being able to rely on the Kosovo precedent might have driven the international community to deny Kosovo independence and statehood until now. *See, e.g.*, Hasani, *supra* note 15, at 321 (arguing that the Belgrade regime may have been given "assurances regarding the unconditional inviolability of Serbia's borders" in the 1990s in light of realpolitik concerns that considered "an international desire to avoid encouraging secessionist movements in Northern Ireland, Tibet, Chechnya, Quebec, Bosnia, and Macedonia").

<sup>174</sup> *See* Gruda, *supra* note 4, at 353–59.

<sup>175</sup> *Id.* at 356–58.

<sup>176</sup> *Id.* at 353.

on the final status.<sup>177</sup> However, nothing in the relevant legal documents surrounding Kosovo and its international protectorate status mandated the end of such protectorate status in 2008. Moreover, nothing in such legal documents prevented the creation of another type of protectorate status for Kosovo, such as a trusteeship or an associated state.<sup>178</sup> While the continuation of protectorate status for Kosovo may not be perfect, its downfalls should have been carefully weighed against the advantages gained by independence.

For example, while it may be true that protectorate status in Kosovo deterred foreign investment, as investors were reluctant to insert capital into this region because of such “limbo” status and uncertainty linked to the Kosovar future,<sup>179</sup> it can also be argued that more definite and long-lasting protectorate status for Kosovo would lend itself better to foreign investment. Investors, knowing that Kosovo would be administered by an international authority for decades to come, could very well choose to invest in this region, which would in turn help rebuild the Kosovar economy. Compared to independence, the protectorate option does not look as grim as had been argued by some.<sup>180</sup> In fact, if Kosovo were to remain a protectorate, some of the problems caused by independence including the lack of economic and military viability, the threat to the Serbian minorities, and the precedent it sets for other separatist groups could be avoided.<sup>181</sup> By the same token, the creation of a stable, long-lasting international protectorate could attract foreign investment to Kosovo and could contribute toward the rebuilding of a sustainable Kosovar economy and a peaceful multi-ethnic society.

Second, conditional independence “recognizes the right of the people of Kosov[o] to decide on their future and addresses the legitimate concerns of the international community regarding the fact that Kosov[o] is still not ready for

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<sup>177</sup> *Id.* at 356.

<sup>178</sup> See, e.g., Resolution 1244, *supra* note 16, ¶ 11(e) (providing for the “political process . . . to determine Kosovo’s future status,” rather than a specific timeline).

<sup>179</sup> Trebicka, *supra* note 4, at 255 (noting that Kosovo has a “suspended legal status” and continues to suffer from “economic, financial, and social uncertainty, which in turn breeds unemployment and lack of foreign investment”).

<sup>180</sup> See, e.g., Gruda, *supra* note 4, at 359–61 (arguing against any protectorate-like options, while advocating that only three solutions would be possible for Kosovo— independence, conditional independence, and independence combined with decentralization—because “by defending the principle of legitimacy and exalting formal retention of Serbian sovereignty over Kosova, [the international community] den[ies] all of the positive developments in international law to Kosova, especially the right to self-determination”).

<sup>181</sup> See *supra* Part V.B for a detailed discussion of these problems.

full independence.”<sup>182</sup> Conditional independence is one of the elements of the earned sovereignty theory,<sup>183</sup> and it has been used by the EU, which conditioned recognition of new states in Eastern Europe and the former Soviet Union on the fulfillment of specific criteria, such as the observation of minority rights and the recognition of existing borders.<sup>184</sup> Conditional independence is in fact linked to the above discussed international protectorate option because it seeks to preserve the status quo (or some variation thereof) until Kosovo is ready to become a state. Thus, the international protectorate option and the conditional independence option could be combined, so that Kosovo would remain an international protectorate as long as it is unable to fulfill some of the “conditions.”

For example, the Kosovar Parliament has promised to respect minority rights in its February 17, 2008 Declaration of Independence.<sup>185</sup> However, it is dubious that such promises can be trusted and will be trusted by the Serbs, in light of the troublesome interethnic relations in Kosovo.<sup>186</sup> Thus, under the conditional independence approach, Kosovo would remain a protectorate until its interethnic relations were resolved. Moreover, although Kosovo has borders on paper, its northern part remains policed by EU-led forces which have been ensuring the safety of the Serbian population living in the north.<sup>187</sup> Thus, Kosovo would remain an international protectorate until it could fulfill the condition of becoming militarily viable on its own. Finally, Kosovo would remain a protectorate until its economy became viable and sustainable absent significant international involvement. Conditional independence for Kosovo recognizes that full independence is premature now but encourages Kosovo to work toward that goal in the future. Thus, this option avoids the creation of another dependent-independent state now, while encouraging the entity seeking to become a state to work toward fulfilling all the criteria needed for true independence.

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<sup>182</sup> Gruda, *supra* note 4, at 357.

<sup>183</sup> See *supra* Part V.A. See generally Williams, *supra* note 13, at 397–401.

<sup>184</sup> Gruda, *supra* note 4, at 357.

<sup>185</sup> Ash, *supra* note 20 (arguing that the Kosovar declaration of independence was drafted with heavy Western influence and direct involvement: “[y]ou can almost hear the western adviser dictating over the Kosovan draughtsman’s shoulder”).

<sup>186</sup> See generally KING & MASON, *supra* note 14, at 2–3 (describing “serious hostilities” between the two groups and nothing “the rift between Serbs and Albanians in Kosovo was deeper than that between any of the other nationalities in Yugoslavia” in the late 1990s).

<sup>187</sup> Alic & Jovanovic, *supra* note 32.

Finally, the division of Kosovo along ethnic lines is a solution that would use ethnic criteria to divide Kosovo.<sup>188</sup> In fact, some of the French KFOR members operating in Kosovo have already suggested that Kosovo be divided along the Ibar River, so that its north, inhabited mostly by the Serbs, would revert to Serbia, and most of its south would remain in Kosovo.<sup>189</sup> This solution takes into account the fact that significant Serbian minorities living in Kosovo may have a right to self-determination, to the same extent that Kosovar Albanians had a right to self-determination within Serbia.<sup>190</sup> Moreover, this solution parallels the ethnic principle, which accords the right to an independent state to ethnic groups.<sup>191</sup> This solution also takes into account the fact that the Kosovar north functions as a *de facto* separate state already: it is policed by international forces and has shadow structures independent of the central Kosovar government.<sup>192</sup> Although this solution does not solve the problem of the Serbian enclaves and villages in the south of Kosovo, which would remain in Kosovo and not revert to Serbia, it resolves the problem of the Kosovar north. This solution also provides an option for the Serbs living in the south of Kosovo to move a relatively short distance to the Kosovar north, as opposed to forcing them to move much farther north in Serbia or elsewhere.

The division of Kosovo along ethnic lines simply recognizes that interethnic relations in this region are too troublesome. Thus, instead of forcing the ethnic groups to mix and thereby risking civil unrest and violence,<sup>193</sup> this option envisions new borders that would offer each ethnic group a representative state.<sup>194</sup> The division of Kosovo along ethnic lines rejects idealistic notions of a multiethnic society and accepts a more realistic vision of Kosovo as an already divided society.

The above three solutions for Kosovo: the creation of a protectorate, conditional independence, and the division along ethnic lines, represent alternatives to independence. This Article argues that such alternatives may

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<sup>188</sup> Gruda, *supra* note 4, at 358.

<sup>189</sup> See KING & MASON, *supra* note 14, at 18.

<sup>190</sup> See *supra* Part V.B.

<sup>191</sup> Gruda, *supra* note 4, at 366, 389–90.

<sup>192</sup> Alic & Jovanovic, *supra* note 32.

<sup>193</sup> Scholars have already noted that “Kosovo’s demographics point towards . . . mono-ethnicity,” and that once the present generation in Kosovo dies, “the ghost of multi-ethnicity will go with them.” KING & MASON, *supra* note 14, at 263.

<sup>194</sup> See Gruda, *supra* note 4, at 357–58.

avoid many of the problems caused by the sudden Kosovar independence while offering just and durable solutions for this volatile region.

## VII. CONCLUSION

The Kosovar declaration of independence represents a fascinating case in international law. It poses important questions regarding the modern day understanding of the international legal theories of secession, statehood, and recognition. Moreover, it challenges scholars to assert new theories as justification for such unilateral separation of an entity from its mother-state. It raises issues about the future of this troubled region, as many wonder about its long-term viability and true independence from Western military and economic support. Finally, it poses concerns over its precedent-setting secessionist ideology. In light of these challenging issues and questions, other solutions to the Kosovar problem, such as the creation of an international protectorate, conditional independence, and the division along ethnic lines should have been envisioned and seriously considered before full independence of Kosovo was embraced by the West.