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## Earned Sovereignty: Juridical Underpinnings

### Keywords

Judges, Sovereignty, Diplomacy, Freedom of Religion, International Law: History, International Relations, Religious Freedom

# EARNED SOVEREIGNTY: JURIDICAL UNDERPINNINGS

MICHAEL P. SCHARF\*

*Sovereignty either is or is not.*

— Stephen Leacock<sup>1</sup>

*It is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory.*

— Boutros Boutros-Ghali<sup>2</sup>

## I. INTRODUCTION

It has often been said that “the defining issue in international law for the 21<sup>st</sup> century is finding compromises between the principles of self-determination and the sanctity of borders.”<sup>3</sup> Today, there are some 140 self-determination movements world-wide.<sup>4</sup> Those aspiring to obtain self-determination often resort to terrorism or armed conflict. Most of the groups on the United States (U.S.) Department of State’s list of terrorist organizations are self-determination movements.<sup>5</sup> Meanwhile, there are currently secessionist conflicts under way in numerous countries including Anjouan, Azerbaijan, Bougainville, Chechnya, Georgia, Iraq, Israel, Kashmir, Moldova, Northern Ireland, Somaliland, Southern Sudan, Spain, Sri Lanka, Tibet, the island of Mindanao in the Philippines, and West Irian in Indonesia.

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1. G. C. FIELD, *POLITICAL THEORY* 60 (1956).

2. *INTERNATIONAL LAW: CASES AND MATERIALS* 18 (Louis Henkin et al. eds., 3d ed. 1993).

3. Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace,”* 6 *ILSA J. INT’L & COMP. L.* 455, 465 (2000).

4. Halim Moris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 *ILSA J. INT’L & COMP. L.* 201, 201 (1997).

5. U.S. Department of State, Office of Counterterrorism Fact Sheet: Foreign Terrorist Organizations (Aug. 9, 2002), available at <http://www.state.gov/s/ct/rls/fs/2002/12389.htm> (last visited Oct. 22, 2002).

This piece is the second in a trilogy of three simultaneously published articles in the *Denver Journal of International Law* that examine the emerging doctrine of "earned sovereignty," a concept that seeks to reconcile the principles of self-determination and humanitarian intervention with the principles of sovereignty and territorial integrity. This article sets forth the legal underpinnings for the doctrine, while the other two articles in the trilogy provide its policy foundations, and apply the doctrine to several modern case studies. Together, the three articles are the product of the Public International Law and Policy Group's "Intermediate Sovereignty Project," sponsored by a grant of the Carnegie Corporation.<sup>6</sup>

Traditionally, international lawyers have adhered to a rigid notion of sovereignty. Under this view, sovereignty is "monolithic" and "possessed in full or not at all."<sup>7</sup> As one author has stated, "'sovereign,' like 'unique,' cannot take certain qualifying adverbs."<sup>8</sup> An entity either was or was not sovereign.

This unyielding conception has hindered diplomats in their effort to craft creative means for resolving conflicts involving attempts at self-determination or secession. For example, "[t]here is little doubt that the collective inability of the Western powers to see beyond the statist/secessionist models was partly responsible for the collapse of Bosnia and the war in Krajina."<sup>9</sup> The adoption of extreme positions, dictated by the conventional view of sovereignty, from support for the sanctity of Yugoslavia to the recognition of the secession of its federal republics, was a recipe for disaster.<sup>10</sup> Conversely, where diplomats experimented with new conceptions of sovereignty without legal sanctification, the rule of law and role of international lawyers in the policy making process suffered.<sup>11</sup>

To remedy this, it is necessary for international lawyers to adopt a new view of sovereignty existing as a spectrum, and recognize a range of intermediate sovereign statuses as part of that spectrum. Intermediate sovereignty and the associated concepts of deferred sovereignty, conditional independence, and provisional statehood may take the form of heightened autonomy for a group, earned recognition, or phased recognition. The term is meant to describe an entity that is something less than a fully sovereign state, but more than a sub-state entity.

This article begins with an examination of the history of the concept of sovereignty, revealing that numerous states are in fact less than fully sovereign. Next, it analyzes the evolving principle of self-determination, focusing in

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6. Bridging Self-Determination and Sovereignty: The Intermediate Sovereignty Project, available at [www.intermediatesovereignty.org](http://www.intermediatesovereignty.org) (last visited Oct. 25, 2002).

7. INIS L. CLAUDE, JR., NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 32 (The Pa. State Univ. Press 1995).

8. Steven Lee, *A Puzzle of Sovereignty: Sovereignty Either is or is Not*, 27 CAL. W. INT'L L.J. 241, 241 (1997).

9. Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT'L L. 255, 282 (1996).

10. *Id.*

11. At a workshop on "Failed States and the Collapse of Sovereign Authority" sponsored by the U.S. Department of State on May 17, 2002, one State Department official suggested that as a result of perceived narrow thinking on the part of Department's Office of the Legal Adviser, the members of the Office have been excluded from meetings in which they traditionally had participated.

particular on the emerging notion of a remedial right to secession. The concluding section explains how recognition of a more flexible and pragmatic conception of sovereignty and a remedial right to secession lays the legal foundation for application of the earned sovereignty concept.

## II. THE MEANING OF SOVEREIGNTY

There are several different meanings of the term sovereignty.<sup>12</sup> In the context of this article, sovereignty is concerned with establishing the status of a political entity in the international system. Under the conventional view, an entity qualified as a sovereign state if it had a territory, a population, a government and formal juridical autonomy.<sup>13</sup> If an entity did not qualify as a sovereign state, it was deemed a dependent or subordinate territory of a sovereign state. Thus, an entity was either sovereign or it was not. There was no such thing as an in between status such as “earned sovereignty.”

Sovereignty is perceived as a “ticket of general admission to the international arena.”<sup>14</sup> A sovereign state is accepted as a juridical equal of other States. It is entitled to political independence, territorial integrity, and virtually exclusive control and jurisdiction within that territory.<sup>15</sup> Its sovereign acts are generally immune from civil suit in other states, its representatives are entitled to diplomatic immunity from both civil and criminal actions, and its ruler is entitled to absolute head of state immunity.<sup>16</sup> It can enter into agreements with other States.<sup>17</sup> It can be a member of international organizations.<sup>18</sup> Dependent or subordinate territories, in contrast, do not customarily possess any of these rights in the international system.<sup>19</sup>

Contrary to the conventional view, since the dawn of the state system 355 years ago with the Peace of Westphalia, very few states have actually possessed full juridical autonomy.<sup>20</sup> Rather, most states in the world might more accurately

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12. STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 9-25 (1999) (of the four meanings of sovereignty that Krasner describes, we are concerned here with what Krasner labels “International Legal Sovereignty”).

13. *Id.* at 14-15.

14. MICHAEL ROSS FOWLER & JULIE MARIE BUNK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* 12 (1995).

15. KRASNER, *supra* note 12, at 20-21.

16. *Id.* at 17.

17. *Id.* at 16.

18. *Id.* at 17.

19. *Id.* at 16.

20. Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT’L L.J. 651, 652 (1997). The state system, characterized as an association of sovereign states, is widely believed to have originated with the Peace of Westphalia, which ended the thirty years war in 1648. The Peace of Westphalia was composed of two separate agreements: (1) the Treaty of Osnabruck concluded between the Protestant Queen of Sweden and her allies on the one side, and the Holy Roman Habsburg Emperor and the German Princes on the other; and (2) the Treaty of Munster concluded between the Catholic King of France and his allies on the one side, and the Holy Roman Habsburg Emperor and the German Princes on the other. The Conventional view of the Peace of Westphalia is that by recognizing the German Princes as sovereign, these treaties signaled the beginning

be characterized as quasi-sovereigns.

History is replete with examples of quasi-sovereign states, including the member states of the Federal State of Germany before the First World War, each of which retained the right to send and receive diplomats.<sup>21</sup> The reigning monarchs of these several component states of Germany were treated by foreign states as if they were the monarchs of fully independent entities.<sup>22</sup>

Several quasi-sovereign states were permitted to ratify treaties and participate alongside sovereign states as full members of international organizations. India, for example, was a member of the League of Nations and a signatory of the Versailles Treaty even though it was still a colony of Britain.<sup>23</sup> Later, both India and the Philippines were permitted to serve as founding members of the United Nations (U.N.) even though they did not become formally independent from Britain and the United States until 1946 and 1947 respectively.<sup>24</sup> Andorra, which is a tiny territory nestled in the Pyrenees between France and Spain, became a member of the United Nations in 1993 and the Council of Europe in 1994 even though France and Spain have control over its security affairs and retain the right to appoint two of the four members of its Constitutional Tribunal.<sup>25</sup> The "freely associated states" of Micronesia, the Marshall Islands, and Palau have each attained U.N. membership although the United States continues to maintain control of their national security policy.<sup>26</sup> And Hong Kong, at the time a British Colony and currently part of China, became a founding member of the World Trade Organization.<sup>27</sup>

On the other side of the spectrum are states that have ceded away portions of their juridical autonomy through treaties. Thus, the member states of the European Union can be deemed quasi-sovereign, in that the decisions of the European Court of Justice and the European Court of Human Rights have supremacy and direct effect within their territory. Similarly, any state that borrows money from an international financial institution such as the International Monetary Fund or the

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of a new era. But in fact, the power to conclude alliances formally recognized at Westphalia was not unqualified, and was in fact a power that the German Princes had already possessed for almost half a century. Furthermore, although the treaties eroded some of the authority of the Habsburg Emperor, the Empire remained a key actor according to the terms of the treaties. For example, the Imperial Diet retained the powers of legislation, warfare, and taxation, and it was through Imperial bodies, such as the Diet and the Courts, that religious safeguards mandated by the Treaty were imposed on the German Princes. See Stephane Beaulac, *The Westphalian Legal Orthodoxy - Myth or Reality?* 2 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 148 (2000). For the full text of the Osnabruck and Munster Treaties, in both their Latin and English versions, see C. Parry (ed.), *Consolidated Treaty Series*, Vol. 1 (Dobbs Ferry, U.S.: Oceana Publications, 1969), at 119 and 270.

21. OPPENHEIM'S INTERNATIONAL LAW 250 n.9 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

22. OPPENHEIM, *supra* note 21, at 250 n. 9.

23. KRASNER, *supra* note 13, at 15.

24. *Id.* at 15.

25. *Id.* at 229-30.

26. See United Nations Web Site, List of Member States at <http://www.un.org/overview/unmember.html> (last visited Jan. 27, 2003).

27. KRASNER, *supra* note 13, at 16.

World Bank is subject to conditionality requirements that involve issues of what the World Bank terms "good governance."<sup>28</sup> Although these international commitments may be viewed as a manifestation of the exercise of sovereignty, the ultimate effect is in fact a diminution of the traditional attributes of sovereignty.

Also relevant are states that have been stripped of their autonomy at the conclusion of international armed conflict. For instance, under the terms of the occupation statute that created the West German state in 1949, the allied powers retained authority over foreign trade and exchange, demilitarization, and foreign affairs including international agreements made on behalf of Germany.<sup>29</sup> The German state established in 1949 did not attain independent status until 1955, and even then it did not exercise full autonomy.<sup>30</sup> Similarly, after the Second World War, the basic constitutional structures and policies of the eastern European states, with the exception of Yugoslavia and Albania, were determined by the Soviet Union.<sup>31</sup> Through force or threat of force, Soviet Premier Joseph Stalin imposed dependent communist regimes throughout Eastern Europe, transforming a dozen states in the region into Soviet controlled satellites, which were nonetheless granted membership in the United Nations.<sup>32</sup> Most recently, in 2003 the United States and United Kingdom invaded Iraq, overthrew the regime of Saddam Hussein, and established an occupation government to administer the country during a phased transition to sovereignty.

While the proposed recognition of the status of intermediate sovereignty has not yet been extensively accepted in international law, the quasi-sovereign character of many of the states in the contemporary international system and many states in the past, suggests that solutions to issues of self-determination should not require rigid conformity with the principles that are conventionally and misleadingly associated with sovereignty.

### III. EVOLVING NOTIONS OF SELF-DETERMINATION

#### A. *International Recognition of the Principle of Self-Determination*

Traditionally, international law viewed the formation of new sovereign entities as purely a political matter. International law came into play only after the *de facto* existence of the new state.<sup>33</sup> During the period of decolonization (in which more than 100 new sovereign countries were recognized), however, the creation of states was for the first time subject to international law in the form of the principle of self-determination.

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28. *Id.* at 225-26.

29. *Id.* at 210.

30. *Id.* at 210 (of the four meanings of sovereignty that Krasner analyzes, we are concerned here with what Krasner labels "International Legal Sovereignty.").

31. KRASNER, *supra* note 21, at 212.

32. *Id.*

33. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 47-48 (1979).

President Woodrow Wilson was responsible for elevating the principle of self-determination to the international level when, in 1916, he included it in his Fourteen Points.<sup>34</sup> But President Wilson's call for self-determination was not so much intended to apply to the global empires of the victorious European powers as it was an effort to ensure that the vanquished empires of Europe did not rise again and to extend American commercial interests to new parts of the world.<sup>35</sup>

The principle of self-determination is included in Articles 1, 55, and 73 of the United Nations Charter.<sup>36</sup> The right to self-determination has also been repeatedly recognized in a series of resolutions adopted by the U.N. General Assembly, the most important of which is Resolution 2625 (XXV) of 1970.<sup>37</sup> While these resolutions are not in themselves binding, they do constitute an authoritative interpretation of the U.N. Charter and may represent *opinio juris* respecting customary international law.<sup>38</sup> In a series of cases, including the *Namibia Case* in 1970,<sup>39</sup> the *Western Sahara case* in 1975,<sup>40</sup> the *Frontier Dispute case* in 1986,<sup>41</sup> and the *Case Concerning East Timor* in 1995,<sup>42</sup> the International Court of Justice held that the principle of self-determination crystallized into a rule of customary international law, applicable to and binding on all states.

The principle of self-determination was further codified in the Universal Declaration on Human Rights,<sup>43</sup> the International Covenant on Civil and Political Rights, and in the International Covenant on Economic, Social, and Cultural Rights, which together are considered to constitute the international "Bill of Rights."<sup>44</sup> The vast majority of countries of the world are party to the two

34. President Woodrow Wilson, Address before the League of Nations to Enforce Peace (May 27, 1916), in 53 CONG. REC. 8854 (May 29, 1916) ("We believe these fundamental things: First that every people have a right to choose the sovereignty under which they shall live. . .").

35. C. Lloyd Brown-John, *Self-Determination, Autonomy and State Secession in Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 572 (1999).

36. U.N. Charter art. 1, para. 2; See also U.N. Charter arts. 55, 73 (while the term "self-determination" does not occur within Article 73 of the U.N. Charter, the terms "self-government" and self-government. . . political aspirations. . . and progressive development of. . . free political institutions" do occur).

37. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter G.A. Res. 2625].

38. HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 45 (1990).

39. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31-32 (June 21).

40. *Western Sahara*, 1975 I.C.J. 12, 31-33 (Oct. 16).

41. *Concerning the Frontier Dispute (Burk. Faso v. Rep. of Mali)*, 1986 I.C.J. 554, 566-567 (Dec. 22) [hereinafter *Frontier Dispute Case*].

42. *Concerning East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 265-68 (June 30).

43. Universal Declaration of Human Rights, Dec. 10, 1948, art. 22.

44. Article 1, common to both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reads:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;
2. The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with



Covenants, which constitute binding treaty law.

Under the principle of self-determination, all self-identified groups with a coherent identity and connection to a defined territory are entitled to collectively determine their political destiny in a democratic fashion and to be free from systematic persecution.<sup>45</sup> For such groups, the principle of self-determination may be effectuated by a variety of means, including self-government, substantial autonomy, free association, or arguably, in certain circumstances, outright independence/full sovereignty.<sup>46</sup>

#### B. *Who is Entitled to Self-Determination?*

For a group to be entitled to a right to collectively determine its political destiny, it must possess a focus of identity sufficient for it to attain distinctiveness as a people.<sup>47</sup>

The traditional two-part test examines first “objective” elements of the group to ascertain the extent to which its members share a common racial background, ethnicity, language, religion, history and cultural heritage.<sup>48</sup> Another important objective factor is the territorial integrity of the area the group is claiming.<sup>49</sup>

The second “subjective prong” of the test requires an examination of the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct “people.”<sup>50</sup> It necessitates that a community needs to explicitly express a shared sense of values and a common goal for its future. Another subjective factor is the degree to which the group can form a viable political entity.<sup>51</sup>

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the provisions of the Charter of the United Nations.

International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, 999 U.N.T.S. 171, 173; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 5.

45. G.A. Res. 2625, *supra* note 37, at 123-124.

46. *Id.*

47. The United Nations Economic and Social Cooperation Organization (UNESCO) defines “people” as individuals who relate to one another not just on the level of individual association, but also based upon a shared consciousness, and possibly with institutions that express their identity. UNESCO considers the following indicative characteristics in defining people: (a) a common historical tradition; (b) religious or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; and (g) common economic life. See Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION 101-104 (Christian Tomuschat ed., 1993).

48. Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT’L L. 257, 276 (1981).

49. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177, 178-79 (1991).

50. See Nanda, *supra* note 48, at 276.

51. *Id.*

C. *Does Self-Determination Create a Right to Secession and Independence?*

All nations carry within their territories other nations, and since secession is synonymous with the dismemberment of states, the international community understandably views it with suspicion. "If each group within a state can claim the right to self-determination and succeed, self-destruction of virtually every state could result."<sup>52</sup> Thus, at the time the U.N. Charter was formed, the drafters made it clear that the right to self-determination did not give rise to a right to secession under any circumstances.<sup>53</sup> In this regard, one may note the 1970 statement of U.N. Secretary-General U. Thant to justify the inactivity of the U.N. during the secessionist conflict in Biafra:

As far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member States.<sup>54</sup>

Traditionally, the right to pursue independence as an exercise of the principle of self-determination was applied only to people under "colonial domination," "alien domination," or "racist oppression," and under the principle known as *uti possidetis* states were permitted to become independent only within their former colonial boundaries.<sup>55</sup> This was not characterized as an exception to the general rule rejecting the right of secession because the independence of a colony was not considered "a secession," as that term was reserved for situations involving the separation from a State of a portion of its domestic territory.<sup>56</sup>

Until recently, the international community subscribed to a theory of "salt-water colonialism," under which self-determination could only apply to territories which were separated from their metropolitan parent by oceans or high seas. In this way, overland acquisitions such as those made by China and the Soviet Union were excluded from consideration. Also excluded were the ethnic groups within a colonial territory who regarded the majority rule as alien or oppressive. Thus, it is said that in the post-colonial world, "the right to self-determination is rarely recognized until it is won through a bloody conflict."<sup>57</sup>

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52. Ediberto Roman, *Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 53 U. MIAMI L. REV. 943, 958-959 (1999).

53. The United Nations Conference on International Organization, UNCIO Doc. 343, Vol. VI, at 296 (1945) (during the works of the Committee I/1 at the Conference of San Francisco, it was agreed that "the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right to secession.").

54. Secretary-General's Press Conferences, in 7 U.N. MONTHLY CHRONICLE 36 (Feb. 1970).

55. See *Frontier Dispute Case*, *supra* note 41, at 565. In the *Frontier Dispute Case*, the International Court of Justice acknowledged an "apparent contradiction" between the principles of *uti possidetis* and self-determination. *Id.* at 567. But the Court did not elaborate on this statement because it was limited by an agreement of the parties to resolve their dispute on the basis of the "principle of intangibility of frontiers inherited from colonization." *Id.* at 565.

56. *Id.* at 565.

57. See Simpson, *supra* note 9, at 263.

However, the modern trend, evidenced by the writing of numerous scholars,<sup>58</sup> U.N. General Assembly resolutions,<sup>59</sup> declarations of international conferences,<sup>60</sup> judicial pronouncements,<sup>61</sup> decisions of international arbitral tribunals,<sup>62</sup> and some state practice supports 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. This has become known as the "remedial" right to secession.

The remedial right to secession has its origin in the advisory opinion given by the second Commission of Rapporteurs in the 1920 *Aaland Islands Case*.<sup>63</sup> After excluding the existence of a general right to secede, the Commission observed that "[t]he separation of a minority from the State of which it forms part and its incorporation into another State may 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 [for the protection of minorities]."<sup>64</sup>

The denial of the exercise of the right of democratic self-government as a precondition to the right of a non-colonial people to dissociate from an existing state is supported most strongly by the United Nations' 1970 Declaration on Principles of International Law Concerning Friendly Relations, which frames the

58. See Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 79 n.88 (1992); Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992); Antonio Cassese, *The Self-Determination of Peoples*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 101 (Louis Henkin ed., 1981); Thomas M. Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 2, 13-14 (Catherine Brolmann et al., eds., 1993); Otto Kimminich, *A "Federal" Right of Self-Determination?*, in MODERN LAW OF SELF-DETERMINATION 83 (Christian Tomuschat, ed., 1993); Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 181-190 (1977); Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L L. & COMP. L. REV. 323, 340 (1994); Christian Tomuschat, *Self-Determination in a Post-Colonial World*, in MODERN LAW OF SELF-DETERMINATION 1, 2-8 (Christian Tomuschat, ed., 1993).

59. See G.A. Res. 2625, *supra* note 37, at 121-124.

60. *Vienna Declaration and Programme of Action*, World Conference on Human Rights, U.N. Doc. A/CONF.157/23 (1993), reprinted in 32 ILM 1661 (1993) [hereinafter *Vienna Declaration and Programme of Action*].

61. See, e.g., Decision of the Supreme Court of Canada in the Matter of Section 53 of the Supreme Court Act, and in the matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated September 30, 1996, [1998] 2 S.C.R. 217, para. 154 [hereinafter *Decision of the Supreme Court of Canada*].

62. See, e.g., Conference on Yugoslavia Arbitration Commission Opinion No. 1, Opinions on the Questions Arising from the Dissolution of Yugoslavia, Nov. 1992, 31 I.L.M. 1488, 1494-1497 [hereinafter *Conference on Yugoslavia*].

63. Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the *Aaland Islands Question*, LEAGUE OF NATIONS O.J. Spec. Supp. 3 (1920).

64. *Id.*

proper balance between self-determination and territorial integrity as follows:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.<sup>65</sup>

By this declaration, the General Assembly indicated that the right of territorial integrity takes precedence over the right to self-determination only so long as the state possesses "a government representing the whole people belonging to the territory without distinction as to race, creed or color."<sup>66</sup> Reasoning *a contrario*, where such representative government is not present, "peoples" within existing states are entitled to exercise their right to self-determination through secession.

A similar clause was included in the 1993 Vienna Declaration of the World Conference on Human Rights, which was accepted by all United Nations member states.<sup>67</sup> However, unlike the 1970 Declaration on Friendly relations, the Vienna Declaration did not confine the list of impermissible distinctions to those based on "race, creed, or color," indicating that distinctions based on religion, ethnicity, language or other factors would also trigger the right to secede.<sup>68</sup>

Further references by U.N. bodies to the right to "remedial secession" can be found in the 1993 Report of the Rapporteur to the U.N. Sub-Commission Against the Discrimination and the Protection of Minorities on *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*,<sup>69</sup> and in General Recommendation XXI adopted in 1996 by the Committee on the Elimination of Racial Discrimination.<sup>70</sup>

Most recently, in considering whether Quebec could properly secede from Canada, the Canadian Supreme Court found that:

A right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.<sup>71</sup>

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65. G.A. Res. 2625, *supra* note 37, at 124.

66. *Id.*

67. See Vienna Declaration and Programme of Action, *supra* note 61, at para. 2.

68. See *Id.*

69. *Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, Commission on Human Rights: Sub-commission on Prevention and Protection of Minorities, 45<sup>th</sup> Sess., Agenda Item 17, at para. 84, U.N. Doc. E/CN.4/Sub.2/1993/34 (1993).

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

71. See Decision of the Supreme Court of Canada, *supra* note 62, at para. 154.

The Court then went on to declare:

A state, whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have the territorial integrity recognized by other states.<sup>72</sup>

The Court found that because the people of Quebec were not “denied meaningful access to government to pursue their political, economic, cultural and social development, they were not entitled to secede from Canada” without the agreement of the Canadian government.<sup>73</sup> Implicit in this decision, however, is the proposition that had the Court found that the people of Quebec were denied any such right of democratic self-government and respect for human rights, unilateral secession from Canada would have been permissible under international law.

As for actual State practice, the existence of a right to remedial secession is supported by the 1971 secession of Bangladesh from Pakistan (with the aid of India), which was justified on the ground that the Bengali population was victim of massive economic and political discrimination as well as violence and repression.

Another development that lends credence to the idea that a new post-colonial right to remedial secession may be on the point of crystallizing is the U.N.-sanctioned intervention on behalf of the Kurds in May 1991.<sup>74</sup> The rationale for this intervention was that the Kurds in northern Iraq were suffering massive human rights deprivations inflicted by the Iraqi government.<sup>75</sup> Subsequent to the intervention, the Kurds enjoyed the benefits of *de facto* intermediate sovereignty from Baghdad’s harsh rule as a consequence of the U.S.- and British-enforced no-fly zone over northern Iraq.

More recently, in the case of the dissolution of the former Yugoslavia, the republics of Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia were deemed entitled to secede on the basis that they were denied the proper exercise of their right of democratic self-government, they possessed clearly defined borders within the umbrella state, and, in some cases, they were subject to ethnic aggression and crimes against humanity committed by the forces of the central government of Belgrade.<sup>76</sup> Notably, the international community did not consider that the Bosnian Serb entity known as Republika Srpska was entitled to disassociate from Bosnia-Herzegovina because, although it possessed a right of political autonomy, it was not denied the proper exercise of its political rights, and it did not possess historically defined borders.<sup>77</sup> On the contrary, in the case of the Serb autonomous region of Kosovo, the international community (through North Atlantic Treaty Organization (N.A.T.O) action) supported the effort of the Albanian Kosovars to

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72. *Id.*

73. *Id.* at 222.

74. See Simpson, *supra* note 9, at 284.

75. *Id.*

76. See Conference on Yugoslavia, *supra* note 62, at 1494-1497.

77. *Id.* at 1498.

attain a status that was characterized as "intermediate sovereignty" within Kosovo's regional borders in the face of ethnic cleansing and repression by the central government of Serbia.<sup>78</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-determination, including independence, may be recognized as legitimate.<sup>79</sup> 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>80</sup>

#### *D. Rules for Achieving Independence*

Where a people are entitled to resort to remedial secession, international law may provide guidance on how independence may be achieved. As Professor Franck, one of the "five experts" consulted in the 1992 Opinion on the consequences of a secession of Quebec from Canada, recalls, "so we were able to say to the Quebec government, international law does not tell you whether you have a right to secede or not, but it does tell you that unless you do it according to [certain] rules you are likely to run into a lot of flak from the international community."<sup>81</sup>

Recent state practice indicates that as a precondition to the legitimate attainment of international status, a self-identified group seeking to disassociate itself from the parent state must first affirmatively demonstrate that it was denied the ability to exercise its right of democratic self-government and that its people were denied basic human rights.<sup>82</sup> Second, it must respect the principle of *uti possidetis*, whereby states become independent within their colonial or administrative boundaries and may not seek to obtain territory held by third states.<sup>83</sup> Third, the new state must commit itself to the respect for the rule of law,

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78. Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Kosovo Conflict over Final Status*, 31 DENVER J. INT'L L. 387 (2004).

79. See Kirgis, *supra* note 58, at 304. Some commentators have taken the position that the right of a people to secede must further be based on a "balancing of conflicting principles," considering such factors as "the nature of the group, its situation within its governing state, its prospects for an independent existence, and the effect of its separation on the remaining population and the world community in general. LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 217 (1978); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 73-74 (1982).

80. Cf. G.A. Res. 6(1), U.N. GAOR, 31st Sess., Supp. No. 39, at 10, 15, U.N. Doc. A/31/39 (1976) (appealing to member states "to provide all assistance required by the oppressed people of South Africa and their national liberation movements during their legitimate struggle").

81. Thomas M. Franck, Remarks at the Proceedings of the 87<sup>th</sup> Annual Meeting, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, Mar.-Apr. 1993, at 261.

82. European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of the New States, 31 I.L.M. 1485, 1486-1487 (1992).

83. *Id.*

democracy and human rights, including the need for guarantees for the rights of minorities, the inviolability of all frontiers, and all commitments with regard to disarmament and nuclear non-proliferation.<sup>84</sup>

As described in more detail in the other two articles in this series, intermediate sovereignty and phased/earned recognition can be a particularly useful mechanism for the international community to employ to facilitate the responsible exercise of the right of remedial secession consistent with the preconditions set forth above. It would involve an initial period of heightened autonomy and self-government, the interim maintenance of territorial association with the parent state, international monitoring, and the possibility of attaining full sovereignty after meeting a series of benchmarks over time. The intermediate sovereignty approach can be employed with the parent state's consent (albeit obtained under threat of sanction or force) or in the absence of its consent (e.g., as a result of humanitarian intervention).

#### IV. CONCLUSION

The maintenance of territorial integrity is vital in light of the disruptive consequences of breaches of that integrity. But since its ultimate purpose is to safeguard the interests of the peoples of a territory, it follows that "[t]he concept of territorial integrity is meaningful only so long as it continues to fulfill that purpose to all the sections of the people."<sup>85</sup>

The modern trend is to treat territorial integrity as a rebuttable presumption, which can be invoked only by states that act in accordance with the principle of self-determination. International support for transitional independence in the form of phased sovereignty must be recognized as a valid remedy when the state's actions extinguish that presumption, thus resolving the tension between territorial integrity and self-determination.

This article has illustrated that sovereignty was never as absolute in practice as in theory. Consequently, earned sovereignty may be no more than an old wine in a new bottle. But its value to diplomats is that this new bottle may be attractive enough to sell to those seeking to exercise the newly recognized right of remedial secession, who have grown unsatisfied with the prospect of simple autonomy. At the same time this less potent vintage (which carries with it the possibility of permanent intermediate sovereign status) may, with a little coaxing, prove palatable to parent states, which oppose complete secession.

As described in the other two articles in this trilogy, developments in Bosnia, Kosovo, Montenegro, East Timor and Iraq suggest that the time has come to embrace *de jure* the new reality of earned sovereignty that is emerging from diplomatic practice.

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84. *Id.*

85. See Simpson, *supra* note 10, at 283, quoting Umozurike Oji Umozurike, in SELF-DETERMINATION IN INTERNATIONAL LAW 3 (1972).

