

We the People: Self-Determination v. Sovereignty in the Case of De Facto States

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Abstract

On 17 February 2008, Kosovo declared its independence from Serbia. Soon thereafter, the United States, as well as a host of other States formally recognized Kosovo. The recognition of Kosovo's statehood by a majority of Western Powers has sparked renewed hopes of independence for a number of de facto States. Yet, the countries that have recognized Kosovo's independence argue that this is a 'unique' case. But is Kosovo really a one-off? De facto States too, either implicitly or explicitly, claim a right to self-determination that includes secession as a remedy. So why is it then that the people of Kosovo have been able to attain independent statehood, whereas the people of Abkhazia, South Ossetia, Nagorno-Karabakh, or Transnistria have not? Our contribution will explore this question by looking at how this divergent practice has reshaped the contours of the modern-day right to self-determination and, thereby, it will also extrapolate the current criteria that a people must meet in order to obtain independence.

French Translation

Le 17 février 2008, le Kosovo a déclaré son indépendance de la Serbie. Peu après, les États-Unis, ainsi que d'autres États, ont reconnu formellement l'État du Kosovo. La reconnaissance du statut étatique du Kosovo par une majorité de pouvoirs occidentaux a réveillé les espoirs renouvelés de nombreux États "de fait". Or, les États qui ont reconnu l'indépendance du Kosovo prétendent qu'il s'agit ici d'un cas "unique". Mais le Kosovo est-il réellement un cas exceptionnel? Les États de fait aussi, implicitement ou explicitement, revendiquent un droit à l'autodétermination incluant la sécession comme un remède. Ainsi, pourquoi est-il que le peuple du Kosovo a pu atteindre l'autodétermination, alors que les peuples de l'Abkhazie, de l'Ossétie du Sud, du Haut-Karabakh ou de la Transnistrie, ne l'ont pu obtenir? Cette contribution explorera cette question en regardant comment cette pratique divergente a défini les contours du droit moderne à l'autodétermination et tentera ensuite d'extrapoler les critères actuels qu'un peuple doit satisfaire afin d'obtenir l'indépendance.

Spanish Translation

El 17 de febrero de 2008, Kosovo declaró su independencia de Serbia. Poco después, los Estados Unidos, así como una serie de otros Estados, reconocieron formalmente el Estado de Kosovo. El reconocimiento de la condición de Estado de Kosovo por la mayoría de las potencias occidentales despertó esperanzas renovadas de independencia de una serie de Estados "de facto". Sin embargo, los Estados que han reconocido la independencia de Kosovo argumentaron que se trataba de un caso "único". Pero es realmente Kosovo un caso excepcional? De hecho, los Estados de facto también reclaman, de manera implícita o explícita, el derecho a la libre determinación que incluye la secesión como remedio. Entonces ¿cómo es que el pueblo de Kosovo ha sido capaz de alcanzar un Estado independiente, mientras el pueblo de Abjasia, Osetia del Sur, Nagorno-Karabaj, Transnistria no puede? Nuestra contribución explorará esta cuestión, examinando cómo esta práctica ha reconfigurado los contornos del derecho a la libre determinación y, por lo tanto, también extrapolará los criterios actuales que un pueblo debe cumplir a fin de obtener la independencia.

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Introduction

“We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign State.”¹ With these words, on 17 February 2008, Kosovo proclaimed its independence from Serbia. Soon thereafter, the United States, as well as a host of European Union (EU) Member States formally recognized the independence of Kosovo.² However, its parent State and certain other countries, such as Russia, Moldova or Romania, argued that the unilateral declaration of independence and Kosovo’s subsequent secession from Serbia constituted a breach of international law.³ Nevertheless, Kosovo’s recognition by a majority of Western Powers sparked renewed hopes of independence for a number of de facto States. In this respect, Serbia’s then president, Boris Tadić, stated that “there are dozens of other Kosovos in the world, and all of them are lying in wait for Kosovo’s act of secession to become a reality and to be established as an acceptable norm.”⁴ As time would show, he was right.

Immediate responses were observed in the Caucasus, where the de facto presidents of Abkhazia and South Ossetia announced that they too would seek their independence before various international fora.⁵ While there was no prompt response, Russia formally recognized the independence of the two break-away entities just a few months later.⁶ This was no surprise, as even before Kosovo’s declaration of independence, Vladimir Putin had warned that, “[i]f someone believes that Kosovo should be granted full independence as a state, then why should we deny it to the Abkhaz and the South Ossetians?”⁷ Similarly, Igor Smirnov, the leader of Transnistria, indicated that Kosovo’s impending recognition as a State exposed double standards: “[i]f this is a really fair, universal approach to conflict settlement, it must be applied also to Transnistria, and Abkhazia, and South Ossetia, and Nagorno-Karabakh.”⁸ Nonetheless, the countries that recognized Kosovo’s independence have since argued that Kosovo is a ‘unique’ case that does not set a precedent for other separatist movements.⁹

Is Kosovo indeed a one-off? Obviously, the various situations in these territories are factually different. In this respect, they are all unique. However, de facto States contend that their cause for independent statehood is no less just as Kosovo’s. In this respect, either implicitly or explicitly, they too claim a right to self-determination that includes secession as a remedy.¹⁰ So why is it then that the people of Kosovo have attained independence, whereas the people of Abkhazia, South Ossetia, Nagorno-Karabakh, and Transnistria have not? The present contribution will explore this question by looking at how divergent practice has reshaped the contours of the present-day right to (external) self-determination and, thereby, extrapolate the current criteria or conditions that a people must meet to obtain

¹ Republic of Kosovo Assembly, *Kosovo Declaration of Independence* (7 February 2008) (Jakup Krasniqi), online: Assembly Kosova <www.assembly-kosova.org>.

² 23 out of 28 EU Member States have recognized Kosovo as a State. Cyprus, Greece, Romania, Slovakia and Spain do not recognize it.

³ See Christopher J Borgen, “Introductory Note to Kosovo’s Declaration of Independence” (2008) 47 ILM 461 at 461.

⁴ UNSCOR, 63rd Year, 5839th Mtg, UN Doc S/PV/5839 (2008).

⁵ Nina Caspersen, “The South Caucasus after Kosovo: Renewed Independence Hopes?” (2013) 65:5 Eur Asia Stud 929 at 929.

⁶ See e.g. “Russia Recognizes Georgian Rebels”, *BBC News* (26 August 2008) online: BBC News <http://news.bbc.co.uk/2/hi/in_depth/7582181.stm>.

⁷ Robert Parsons, “Russia: Is Putin Looking to Impose Solutions to Frozen Conflicts?”, *Radio Free Europe/Radio Liberty* (2 February 2006) online: RFE/RL <www.rferl.org/content/article/1065363.html>.

⁸ Christopher J Borgen, “Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia’s “Frozen Conflicts”” (2007) 9 Oregon Rev Intl L 477 at 520, citing “Transnistrian President Jealous About Kosovo Variant” *Infotag* (17 February 2006) [Borgen, “Imagining Sovereignty”].

⁹ Illustrative, in this respect, is the statement of Condoleezza Rice, the US Secretary of State at that time: “[t]he 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 UN administration—are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today” (US Department of State, Media Release, “U.S. Recognizes Kosovo as Independent State” (18 February 2008) online: <<http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>>.)

¹⁰ For example, Abkhazia’s 1999 Declaration of Independence reads as follows: “we appeal to the UN, OSCE, and to all States of the world to recognise the independent State created by the people of Abkhazia on the basis of the right of nations to free self-determination” (People’s Assembly of the Republic of Abkhazia, *Act of Independence of the Republic of Abkhazia* (12 October 1999) (S. Djindjolia), online: Unrepresented Nations and Peoples Organization <<http://www.unpo.org/>>).

independence. This will be done as follows: (I) first, the evolution of the right to (external) self-determination will be analysed through the lens of the self-determination v. sovereignty discourse; (II) second, an outline of the criteria or conditions that appear to facilitate (or obstruct) unilateral secession will be drawn; (III) third and final, we will endeavour to explain why, as opposed to other break-away territories, de facto States have been unable to achieve independent statehood.

I. The Self-Determination v. Sovereignty Conundrum

Self-determination is probably one of the most-often invoked norms of international law. Surprisingly, it is also one of the most misunderstood, as it has been plagued by uncertainty and inconsistency from its very outset.¹¹ The concept initially gained international prominence with Woodrow Wilson's revered 'Fourteen Points' speech to the United States Congress on January 8, 1918.¹² While President Wilson contended that "[s]elf-determination' is not a mere phrase", but "an imperative principle of action, which statesmen will henceforth ignore at their peril,"¹³ at that time, the concept was nothing more than an "aspirational ideal" without any legal content.¹⁴ However, since 1945, the concept of self-determination evolved into a fundamental principle of the UN and, most importantly, the vehicle of choice for the decolonization movement.¹⁵ Furthermore, since 1960 it has been recognized in the UN context as a legal right, not just a principle¹⁶ and, as such, it was included in the main international human rights covenants adopted in 1966.¹⁷ Today, the basic norm of self-determination has come to refer to the right of all peoples to freely "determine their own destiny."¹⁸ But what does this right entail exactly?

The application of the right to self-determination in the post-Cold War era has been, at the very least, inconsistent. However, it is now generally accepted that this right is comprised by two distinct dimensions: internal and external self-determination.¹⁹ The internal aspect of self-determination refers to the right of all peoples to "participate ... in the decision-making processes of the State,"²⁰ or that of ethnic, racial, or religious minority groups "not to be oppressed by central government."²¹ This, it is often argued, is the prevailing rule.²² For instance, the Supreme Court of Canada, in its opinion on the secession of Québec, indicated that the right to self-determination is "normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an

¹¹ See generally Hurst Hannum, "Rethinking Self-Determination" (1993) 34:1 Va J Intl L 1. On the evolution of the right to self-determination, see also Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (Paris: La Documentation Française, 1999).

¹² Hannum, *supra* note 11 at 3. See also Woodrow Wilson, "The Fourteen Points Speech" in Ray Stannard Baker & William E Dodd, eds, *The Public Papers of Woodrow Wilson: Authorized Edition*, vol 1 (New York: Harper & Brothers, 1927) at 155.

¹³ Woodrow Wilson, "War Aims of Germany and Austria" in Baker & Dodd, *supra* note 12, at 180.

¹⁴ See Christopher J Borgen, "The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia" (2009) 10 Chicago J Intl L 1 at 7 [Borgen, "Language of Law"].

¹⁵ See *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [UN Charter] (which stipulates that "[t]he Purposes of the United Nations are [...] [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" art 2(1)). See also *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15th Sess, Supp No 16, UN Doc A/4684 (1960) [*Declaration on the Granting of Independence*]; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, 25th Sess, Supp No 28, UN Doc A/2625 (1970) [*Friendly Relations Declaration*].

¹⁶ See *Declaration on the Granting of Independence*, *supra* note 15. See also *Friendly Relations Declaration*, *supra* note 15; Malcolm N Shaw, *International Law*, 7th ed (Cambridge: Cambridge University Press, 2014) at 82.

¹⁷ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 1 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3 art 1 (entered into force 3 January 1976) [ICESCR].

¹⁸ See ICESCR, *supra* note 17 art 1. See also Cedric Ryngaert & Christine Griffioen, "The Relevance of the Right to Self-Determination in the Kosovo Matter: In Partial Response to the Agora Papers" (2009) 8:3 Chinese J Intl L 573 at 574, citing Thomas M Franck et al, "The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty" in Anne F Bayefsky, ed, *Self-Determination in International Law: Québec and Lessons Learned* (Cambridge: Kluwer Law International, 2000) 241 at 248.

¹⁹ See generally James Summers, *Peoples and International Law*, 2nd ed, Martti Koskenniemi, ed, *The Erik Castrén Institute Monographs on International Law and Human Rights*, vol 17 (Leiden: Brill Nijhoff, 2014) at 60–70. See also Véronique Huet, *Le principe de l'autodétermination des peuples : Concept et applications concrètes* (Paris: L'Harmattan, 2013) at 11–13.

²⁰ David Raič, *Statehood and the Law of Self-Determination, Developments in International Law*, vol 43 (The Hague: Kluwer Law International, 2002) at 237.

²¹ Antonio Cassese, "Political Self-Determination: Old Concepts and New Developments" in Antonio Cassese, ed, *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979) 137 at 137.

²² See Borgen, "Imagining Sovereignty" *supra* note 8 at 483.

existing [S]tate.”²³ Yet, there have been many instances where afflicted minority groups claimed a right to unilaterally secede from their parent State. In this respect, some argue that the external dimension of self-determination is limited to colonial cases,²⁴ while others contend that it also applies to subjugated peoples outside the colonial context.²⁵ However, since the external aspect of the right to self-determination outright clashes with the principle of State sovereignty, this remains the “subject of much debate.”²⁶

As some have argued, “the defining issue in international law for the 21st century” is to find a compromise “between the principles of self-determination and the sanctity of borders.”²⁷ In this respect, the principle of State sovereignty, also known as the “backbone” of the Westphalian structure, aims to uphold the current parameters of the international system.²⁸ One of the corollaries of State sovereignty is the principle of territorial integrity, which acts as a guarantee against the dismemberment of a State’s territory.²⁹ International legal scholarship favours the idea that, outside the colonial context, “the right [to] self-determination is limited by the principle of territorial integrity.”³⁰ Otherwise, as accurately observed by Andrew Coleman, “the floodgates would open and the international community would come to be comprised of literally thousands of micro-[S]tates.”³¹ In this regard, the 1970 Friendly Relations Declaration provides that the right to self-determination shall not “be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”³² Independent statehood, it seems, is not an entitlement under international law. However, the Declaration also stipulates that only “States conducting themselves in compliance with the principle of equal rights and self-determination of peoples”³³ can rely on the principle of territorial integrity. This formula insinuates that the right of States to territorial integrity is by no means unqualified. Actually, in accordance with the normative shift from “sovereignty as authority” (control over territory)” to “sovereignty as responsibility”,³⁴ the principle of “territorial integrity is in its turn limited by international law.”³⁵ Therefore, neither of the two principles is absolute.³⁶ Arguably then, under the correct set of circumstances, such an approach would leave the door open for unilateral secession. If, on the contrary, secession were absolutely excluded, the right to self-determination would be rendered illusory.³⁷

According to Marcelo Kohén, ‘secession’ refers to “the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter.”³⁸ Obviously then, it is the lack of consent of the parent State that makes unilateral secession such a

²³ *Reference re Secession of Québec*, [1998] 2 SCR 217 at para 126 [*Reference re Secession of Québec*].

²⁴ See Franck et al, *supra* note 18 at 248, 279–80.

²⁵ See Simone F van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?* (Cambridge: Intersentia, 2013) at 50.

²⁶ Malcolm N Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003) 271 at n 140.

²⁷ Lorie M Graham, “Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace”” (1999) 6 ILSA J Intl & Comp L 455 at 465.

²⁸ See e.g. Ioana Cismaş, “Secession in Theory and Practice: the Case of Kosovo and Beyond” (2010) 2 Goettingen J Intl L 531 at 548, citing A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, (New York: Cambridge University Press, 1995) at 333.

²⁹ Territorial integrity has been elevated to the status of a fundamental principle of international law through its proclamation in the UN Charter. See *UN Charter*, *supra* note 15 art 2(4).

³⁰ See e.g. Jure Vidmar, “Remedial Secession in International Law: Theory and (Lack of) Practice” (2010) 6:1 St Antony’s Intl Rev 37 at 37.

³¹ Andrew Coleman, “Determining the Legitimacy of Claims for Self-Determination: A Role for the International Court of Justice and the Use of Preconditions” (2010) 6 St Antony’s Intl Rev 57 at 58.

³² *Friendly Relations Declaration*, *supra* note 15.

³³ *Ibid.*

³⁴ Jennifer Welsh, “Introduction” in Jennifer Welsh, ed, *Humanitarian Intervention and International Relations* (New York: Oxford University Press, 2004) 1 at 2. See also Anne Peters, “Humanity as the A and Ω of Sovereignty: A Rejoinder to Emily Kidd White, Catherine E Sweetser, Emma Dunlop and Amrita Kapur” (2009) 20:3 EJIL 569.

³⁵ Raič, *supra* note 20 at 323.

³⁶ See van den Driest, *supra* note 25 at 166.

³⁷ *Ibid.*

³⁸ Marcelo G Kohén, “Introduction” in Marcelo G Kohén, ed, *Secession: International Law Perspectives* (New York: Cambridge University Press, 2006) 1 at 3.

problematic issue in international law. Indeed, when separation from the territorial State is a consensual process whereby the parent State recognizes the newly independent State, the international community will normally follow suit.³⁹ When consent from both parties exists, the right to secede is not at all controversial.⁴⁰ Unilateral secession, however, sparks general hysteria among the international community. This is precisely why, outside the colonial context, the international community supports a right to external self-determination only in “the most extreme of cases and, even then, under carefully defined circumstances.”⁴¹ In other words, unilateral secession represents a last resort option or, if you will, an “*ultimum remedium*” for blatant breaches of internal self-determination and human rights.⁴² Accordingly, if a right to remedial secession exists,⁴³ it too is a qualified one.⁴⁴ Looking at the secessionist struggles that have taken place since the end of World War II, only Bangladesh,⁴⁵ and now possibly Kosovo,⁴⁶ are instances where non-consensual secession has led to independent statehood.⁴⁷ In comparison, a myriad of other attempts at unilateral succession remain unsuccessful.⁴⁸ To give but a few examples, in the cases of Abkhazia, South Ossetia, Chechnya, Nagorno-Karabakh, Transnistria, or Republika Srpska, the self-determination discourse has lost out against the principle of territorial integrity. In other words, most times, sovereignty trumps self-determination. As a result, some secessionist movements have been (forcibly) re-incorporated by their parent States, while others have achieved de facto independence through effective control of their territories and, even decades after separating from their parent State, uphold an aspiration for international recognition.⁴⁹ A sovereign and independent State is the Holy Grail of break-away entities across the globe. In this respect, their secessionist claims, much as in the case of Kosovo, revolve around the right to self-determination. Nevertheless, in the eyes of the international community, these territorial entities remain “criminalised, ethnic fiefdoms that constitute a threat to security.”⁵⁰ Winners and losers, it seems. But what, then, are the rules of the game?

II. Unilateral Secession: A User’s Manual

As seen here, the concept of self-determination does not establish a general *jus secedendi* under international law. However, it neither precludes this possibility. Declarations of independence,⁵¹ as well as unilateral secession, are legally neutral acts under international law.⁵² Yet, in non-colonial situations, the external dimension of self-determination needs to be balanced against the principle of territorial integrity. Accordingly, when the consent of the parent State is not given, the only “maybe-legal option”⁵³ for

³⁹ For example, the consent of the Soviet Union to the independence of the Baltic States.

⁴⁰ See generally Cismaş, *supra* note 28 at 581.

⁴¹ *Reference re Secession of Québec*, *supra* note 23 at para 126.

⁴² See van den Driest, *supra* note 25 at 166. See also Rein Müllerson, “Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia” (2009) 8:1 Chinese J Intl L 2 at 19.

⁴³ See *Reference re Secession of Québec*, *supra* note 23 (whereby the Court held that “it remains unclear whether this [...] actually reflects an established international law standard” at para 135). Legal support for this right, some argue, may however be found in the Aaland Islands dispute, the Friendly Relations Declaration, the *Katangese Peoples’ Congress v Zaire* case, the Québec secession case, and the practice of successful and unsuccessful unilateral secessions. In this respect, see *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*, LNOJ, 1920, Supp No 3, 4; *Friendly Relations Declaration*, *supra* note 15; The African Commission on Human and Peoples’ Rights, 1994, 16th Session, Communication No. 75/92, *Katangese Peoples’ Congress v Zaire*, Banjul, The Gambia at para 6; *Reference re Secession of Québec*, *supra* note 23. See also Ryngaert and Griffioen, *supra* note 18 at 579–585.

⁴⁴ Ryngaert & Griffioen, *supra* note 18 at 579.

⁴⁵ See James Crawford, *The Creation of States in International Law*, 2nd ed (New York: Oxford University Press, 2006) at 415.

⁴⁶ But see Vidmar, *supra* note 30 (arguing that the examples of Bangladesh and Kosovo do not correspond to the logic of remedial secession). For arguments against the existence of a right to remedial secession, see also Olivier Corten, “Déclarations unilatérales d’indépendance et reconnaissance prématurées: du Kosovo à l’Ossétie du Sud et à l’Abkhazie” (2008) 4 *Revue générale de droit international public* 721.

⁴⁷ See Borgen, “Language of Law”, *supra* note 14 at 9–10 (where Borgen notes that “in that period, there have been at least twenty unsuccessful secessions.”).

⁴⁸ *Ibid* at 10.

⁴⁹ Abkhazia, South Ossetia, and Nagorno-Karabakh are just a few examples.

⁵⁰ On the ‘image’ of de facto States and beyond, see Nina Caspersen, “From Kosovo to Karabakh: International Responses to De Facto States” (2008) 56:1 *Südosteuropa* 58 at 59 [Caspersen, “From Kosovo to Karabakh”].

⁵¹ See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403 at para 84.

⁵² See Crawford, *supra* note 45 at 390.

⁵³ Cismaş, *supra* note 28 at 581.

peoples seeking independent statehood is found in the so-called right to remedial secession.⁵⁴ This right, so it is argued, can be exercised as a “self-help [remedy]”⁵⁵ in extreme situations. Therefore, as Antonio Cassese mentioned, remedial secession is “the most radical form of external self-determination”.⁵⁶

Dugard and Raič, two authors supporting the idea that international law allows for remedial secession in certain exceptional circumstances, argue that the application of this right can only be triggered when the following criteria are met: (i) first, the group invoking the right must be a ‘people’ with a distinct identity, “forming a numerical minority in relation to the rest of the population of the parent State”, but constituting “a majority within a part of the territory of that State”; (ii) second, the parent State must have exposed said people to “serious grievances” amounting to massive violations of fundamental human rights of that people and/or a constant denial of the people’s right to internal self-determination; (iii) third, “no (further) realistic and effective remedies for the peaceful settlement of the conflict” are left, since all negotiations between the people and the parent State have failed.⁵⁷ However, we find that, when measured against the practice of non-colonial State creations, these conditions appear, at best, insufficient. As a matter of fact, international practice has yet to provide even a single example whereby a break-away entity has emerged as a sovereign and independent State by simply fulfilling the foregoing criteria. Hence, to find the missing piece(s) of the puzzle, one must have a closer look at the practice of successful attempts at unilateral secession.

The emergence of Bangladesh as a sovereign State and, more recently, the unilateral secession of Kosovo, are generally cited as examples supportive of the remedial secession doctrine.⁵⁸ To a greater or lesser extent, both Bangladesh and Kosovo had exhibited the cumulative conditions described above before their leap for independence. Bangladesh, for instance, proclaimed its independence in 1971, followed by a period of martial rule that “involved acts of repression and even possibly genocide and caused some ten million Bengalis to seek refuge in India.”⁵⁹ Twenty-eight States, including India, immediately recognized Bangladesh.⁶⁰ While the unilateral secession of Bangladesh may well have ended oppression, it also remains true that universal recognition only followed in 1974, after Pakistan formally recognized its former province.⁶¹ Since it was the consent of the parent State that, in the end, led to the formal recognition of Bangladesh, it can be assumed that secession was not yet perceived as a prerogative under international law.⁶²

Kosovo’s independence follows a similar pattern. Indeed, while the proclamations included in the Declaration of Independence may, at times, resemble remedial secession arguments,⁶³ it is difficult to understand how unilateral secession in 2008, after Kosovo had been governed independently from Serbia for almost nine years, could end any oppression. If remedial secession is indeed a last resort remedy, Kosovo should have declared independence as early as 1999, at the very height of its oppression.⁶⁴ The conditions relating to human rights abuses and/or denial of internal self-determination, the fulfilment of which may trigger unilateral secession, were simply no longer in place at the time of the Declaration of Independence.⁶⁵ Nonetheless, Kosovo has since been embraced as an independent State by a considerable

⁵⁴ While recognized by many authors, the existence of a right to remedial secession is also disputed by a number of international legal scholars as a matter of international law. For an overview of these disputes, see van den Driest, *supra* note 25 at 103–121.

⁵⁵ Lee C Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) at 96.

⁵⁶ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 120.

⁵⁷ See John Dugard and David Raič, “The Role of Recognition in the Law and Practice of Secession” in Kohen, *supra* note 38, 94 at 109, citing Raič, *supra* note 20 at 332.

⁵⁸ See Christian Tomuschat, “Secession and Self-Determination” in Kohen, *supra* note 38, 23 at 42.

⁵⁹ Crawford, *supra* note 45 at 141.

⁶⁰ See Vidmar, *supra* note 30 at 43.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ The document made reference to “years of strife and violence in Kosovo, that disturbed the conscience of all civilised people” and declared Kosovo to be “a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law” (*Kosovo Declaration of Independence*, *supra* note 1); See also Vidmar, *supra* note 30 at 48–49.

⁶⁴ See Vidmar, *supra* note 30 at 49.

⁶⁵ See Ryngaert & Griffioen, *supra* note 18 at 585.

part of the international community. What this suggests, we argue, is that the doctrine of remedial secession cannot, in and by itself, determine the legitimacy of secessionist claims.

In the case concerning the secession of Québec, the Supreme Court of Canada held that “[t]he ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.”⁶⁶ A favourable outcome to an attempt at nonconsensual secession, it seems, is highly dependent on international recognition. Arguably, when oppressed people invoke the right to remedial secession, the international community may be more willing to ignore the territorial integrity of the parent State and bestow recognition upon the secessionist entity.⁶⁷ Whether a legal entitlement or not, it appears that the doctrine of remedial secession provides political and normative legitimacy to aggrieved secessionist groups and, as a result, may encourage other States to recognize their independence. For instance, the majority of the countries that recognized Kosovo as an independent state invoked the elements of remedial secession to explain their reaction.⁶⁸ Unilateral secession, it seems, can only become effective through widespread international recognition. While this argument could be seen as problematic in view of the general understanding in contemporary international law that recognition is a declaratory and not a constitutive act, it also remains true that, in cases concerning entities with ambiguous status, recognition is important as it attaches certain rights and duties to the entity in question, facilitates its relationship with other States, brings about legal capacity, and potentially full membership in international organizations.⁶⁹ Arguably then, extensive international recognition will turn independence into an irreversible option.⁷⁰

Alternatively (or possibly even cumulatively), international involvement in the form of a UN international administration mission would, in all likelihood, facilitate a break-away entity’s attempt at unilateral secession.⁷¹ While the international community has rarely intervened to assist peoples in the realization of their secessionist claims, it also remains true that, in those few cases where the level and form of such intervention was significant, independent statehood almost always followed.⁷² Illustrative in this respect are the examples of East Timor and Kosovo.

The East Timorese struggled for independence from Indonesia for several decades. However, it was not until the UN Security Council established a peacekeeping mission and, immediately thereafter, a transitional administration mission (United Nations Transitional Administration in East Timor), that East Timor finally became a sovereign and independent State.⁷³ Despite the exceptionality argument,⁷⁴ the almost unprecedented UN involvement in Kosovo has further contributed to the crystallization of this practice. For instance, in his Report on Kosovo’s future status, Martti Ahtisaari indicated that prolonged and significant involvement by the international community could potentially justify a move away from the UN’s defence of the territorial integrity of its Member States.⁷⁵ The United Nations Mission in Kosovo (UNMIK), he further contended, had created an “irreversible” situation whereby Serbia had ceased to exercise “any governing authority over Kosovo.”⁷⁶ The establishment of UNMIK, as well as the gradual loss of Serbia’s sway over Kosovo had generated “an unstoppable momentum” toward independent

⁶⁶ *Reference re Secession of Québec*, *supra* note 23 at para 155.

⁶⁷ See Vidmar, *supra* note 30 at 41–42. See also Malcolm N Shaw, “Peoples, Territorialism and Boundaries” (1997) 8:3 *Eur J Intl L* 478 (he argues that “recognition may be more forthcoming where the secession has occurred as a consequence of violations of human rights” at 483).

⁶⁸ See Grace Bolton & Gezim Visoka, “Recognizing Kosovo’s Independence: Remedial Secession or Earned Sovereignty?” (Occasional Paper No. 11/10, 2010) *South East European Studies at Oxford* at 17–21, online: <<http://doras.dcu.ie/17126/1/RecognizingKosovosindependence.pdf>>.

⁶⁹ See Crawford, *supra* note 45 at 93.

⁷⁰ See generally Jure Vidmar, “Explaining the Legal Effects of Recognition” (2012) 61:2 *ICLQ* 361 at 374–376; Crawford, *supra* note 45 at 501.

⁷¹ Some authors contend that this is an essential condition for peoples seeking self-determination. In this regard, see Milena Sterio, “On the Right to External Self-Determination: “Selfstans”, Secession, and the Great Powers’ Rule” (2010) 19 *Minn J Intl L* 137 at 170.

⁷² For more on the relationship between the right to self-determination and the international administration of territories, see Huet, *supra* note 19 at 119–161.

⁷³ See *Ibid* at 158–160.

⁷⁴ For an in-depth discussion about the precedential value of Kosovo’s unilateral secession, see Anne Peters, “Has the Advisory Opinion’s Finding that Kosovo’s Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?” in Marko Milanović & Michael Wood, eds, *The Law and Politics of the Kosovo Advisory Opinion* (Oxford: Oxford University Press, 2015) at 291.

⁷⁵ *Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status*, UNSC, 2007, UN Doc S/2007/168 at para 7.

⁷⁶ *Ibid*.

statehood.⁷⁷ Arguably then, some form of international involvement in self-determination seeking regions may ultimately determine the success or failure of a claim to independence.

The above, we believe, illustrates the remaining criteria for unilateral secession. To us, the practice of successful non-consensual secessions indicates that the conditions currently underlying the theory of remedial secession cannot, by themselves, secure independent statehood. Widespread international recognition and/or significant UN involvement are needed in addition. Otherwise, an entity that claims independence from its parent State, whether justified or not under the rules of remedial secession, will, most likely, fail to attain *de jure* statehood. This, some argue, is the story of *de facto* States.

III. De Facto States: Victims or Pariahs?

De facto States are “territories that have gained *de facto* independence,” but no international recognition or support.⁷⁸ Break-away entities such as Abkhazia, South Ossetia, Nagorno-Karabakh, or Transnistria uphold, to the exclusion of the central government, effective control over the territories they lay claim on, but for one reason or another, have failed to secure sovereign and independent statehood.⁷⁹ Instead, although they also claim a right to remedial secession, *de facto* States are forced to languish at the fringes of an international community that views them as nothing more than pariahs that have violated the principle of territorial integrity.⁸⁰ Whether accepted or not, claims for independence are invariably made on the basis of the right to self-determination, which, in the words of Marc Weller, “encapsulates the hopes of ethnic peoples and other groups for freedom and independence.”⁸¹ On this matter, some legal scholars contend that *de facto* States are victims of circumstance: their claims for remedial independence unjustifiably rebuffed by the international community and their quest for sovereign statehood unreasonably hindered by the exceptionality discourse put forward with respect to some of their counterparts.⁸² However, it is submitted here that this could not be further from the truth. Indeed, it is painfully obvious that these territories fail to fulfil most, if not all, the criteria or conditions for unilateral secession. In this respect, Dugard and Raič assert that an attempt at unilateral secession in the absence of these criteria could very well constitute an “abuse of right” and a “violation of the law of self-determination.”⁸³ Additionally, if the criteria for unilateral or remedial secession are not met, and a *de facto* State is nonetheless created in violation of the law of self-determination, the international community will most likely withhold recognition.⁸⁴ The very existence of these statelets, we argue, supports this proposition.

The reason why these territories have failed to attain independent statehood is simple: the underlying criteria for unilateral secession are not met. Take, for instance, the cases of Abkhazia and South Ossetia where, prior to the outbreak of any secessionist struggle, it is possible that individuals of Abkhazian and South Ossetian origin did not constitute a clear majority of the population in the areas they claimed as their own.⁸⁵ When a people do not constitute a majority of the population inhabiting the territory that it claims, independent statehood becomes an almost unattainable goal.⁸⁶ The absence of serious human rights violations by Georgia is also relevant here. In this respect, the request by the Prosecutor of the International Criminal Court (ICC) to open an official investigation into the situation in Georgia casts

⁷⁷ Ryngaert & Griffioen, *supra* note 18 at 586.

⁷⁸ See Caspersen, “The South Caucasus”, *supra* note 5 at 932.

⁷⁹ See *ibid.* See also Caspersen, “From Kosovo to Karabakh”, *supra* note 51 at 62–64.

⁸⁰ See Caspersen, “From Kosovo to Karabakh”, *supra* note 50 at 62. See also, e.g. Joint Session of the Nagorno Karabakh Oblast and Shahumian Regional Councils of People's Deputies, Declaration, “Declaration on Proclamation of the Nagorno-Karabakh Republic” (2 September 1991) online: Nagorno-Karabakh Republic Ministry of Foreign Affairs <<http://www.nkr.am/en/declaration/10/>> (whereby Nagorno-Karabakh pointed toward a “policy of apartheid and discrimination pursued in Azerbaijan”).

⁸¹ Marc Weller, “Settling Self-Determination Conflicts: Recent Developments” (2009) 20:1 Eur J Intl L 111 at 111.

⁸² See Sterio, *supra* note 71 at 139, 169. See also Caspersen, “From Kosovo to Karabakh”, *supra* note 50 at 64, 82.

⁸³ Dugard and Raič, *supra* note 57 at 109.

⁸⁴ See *ibid.* See also Crawford, *supra* note 45 at 131.

⁸⁵ See Ryngaert & Griffioen, *supra* note 18 at 583.

⁸⁶ *Ibid* at 577.

further doubts on South Ossetia's remedial secession claims.⁸⁷ More precisely, the Prosecutor of the ICC has found that there is a "reasonable basis" to believe that "war crimes" and "crimes against humanity" have been committed in the context of the five-day war that Georgia and Russia fought over South Ossetia in 2008.⁸⁸ Some of the alleged crimes, it seems, were committed as part of a campaign to expel ethnic Georgians from South Ossetia, whereby Georgian civilians were killed in a forcible displacement campaign operated by the South Ossetian de facto authorities.⁸⁹ This, coupled with the "intransigence [of Abkhazia and South Ossetia] at the negotiating table", further explains their failure to attain independence.⁹⁰

On this point, the UN Security Council has long bemoaned the lack of progress in the area of status negotiations, indicating, for instance, that "a comprehensive political settlement, which must include a settlement of the political status of Abkhazia within the State of Georgia" should be achieved.⁹¹ In Nagorno-Karabakh too, there is no solid basis for unilateral secession since the Armenian majority has not been exposed to egregious human rights violations or flagrant denials of the right to internal self-determination.⁹² In the situations described here, secession does not appear as a good faith attempt to redress severe injustice. Transnistria, Borgen contends, is no different.⁹³ It also fails to meet any of the conditions for external self-determination, as there is no distinct Transnistrian people, no massive violations of human rights by Moldova, and other options short of unilateral secession are readily available to the leaders of the Transnistrian enclave.⁹⁴ The claims for remedial secession that de facto States have put forward are therefore nothing more than mere rhetoric. Their leaders have realized that arguments for independence based solely on the idea of national self-determination always lose out against the principle of State sovereignty. As a consequence, these aspiring States have adapted their discourse by adding remedial secession arguments.⁹⁵ Unfortunately for them, such arguments are unsubstantiated by the facts on the ground.

For the reasons exposed here, international responses toward de facto States have been characterized by constant support for the preservation of the territorial integrity of their respective parent States, firm rejection of their secessionist endeavours, and an invariable emphasis on the implementation of self-determination within the confines of the parent State. For instance, even though Nagorno-Karabakh considers itself a sovereign and independent State, the UN Security Council maintains that "the sovereignty and territorial integrity of the Azerbaijani Republic" must be guaranteed and, in this respect, highlights "the inadmissibility of the use of force for the acquisition of territory."⁹⁶ As a result, the countries that, for whatever reason, bestow formal recognition upon de facto States could be found in violation of the law of self-determination and the principle of non-intervention.⁹⁷ Consequently, if not entirely nonexistent, international recognition of de facto States is, at most, extremely scarce.⁹⁸ International policies toward places such as Abkhazia, South Ossetia, Nagorno-Karabakh, or Transnistria are, by and large, guided by the principle of territorial integrity. Unsurprisingly then, their claims for external self-determination have always been dismissed as unsubstantiated.

⁸⁷ *Corrected Version of "Request for Authorisation of an Investigation Pursuant to Article 15"*, The Hague, Situation in Georgia (Office of the Prosecutor, ICC-01/15-4-Corr, 13 October 2015).

⁸⁸ *Ibid* at para 349.

⁸⁹ *Ibid* at paras 7, 10.

⁹⁰ Raič, *supra* note 20 at 385; See also Ryngaert & Griffioen, *supra* note 18 at 583.

⁹¹ SC Res 1393, UNSCOR, 2002, 4464th Mtg, UN Doc S/RES/1393 (the suggestion that Abkhazia was "within the [S]tate of Georgia" prompted the de facto leaders of Abkhazia to refuse further negotiations) at 1.

⁹² Heiko Krüger, "Nagorno-Karabakh" in Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov, eds, *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014) 214 at 225.

⁹³ Borgen, "Imagining Sovereignty", *supra* note 22 at 501–506.

⁹⁴ See *ibid*.

⁹⁵ See Caspersen, "From Kosovo to Karabakh", *supra* note 50 at 61.

⁹⁶ SC Res 853, UNSCOR, 1993, UN Doc S/RES/853 at 1. Similarly, with respect to South Ossetia, see SC Res 896, UNSCOR 1994, UN Doc S/RES/896 at para 4 (whereby the UN Security Council stressed the importance of "respect[ing fully] the sovereignty and territorial integrity of the Republic of Georgia").

⁹⁷ See Ryngaert & Griffioen, *supra* note 18 at 579.

⁹⁸ To give just two examples, Abkhazia is recognized by six UN member States (Russia, Nicaragua, Venezuela, Nauru, Tuvalu and Vanuatu), whereas Transnistria is recognized by none.

Concluding Remarks

The disintegrative processes described throughout this paper, whether successful or not, raise fundamental questions of international law and politics, without, however, giving any definitive answers. Clearly, the international community lacks the requisite structure that would enable it to appropriately deal with (external) self-determination claims. While we have seen strong doctrinal support for a qualified right to unilateral secession, it also remains true that State practice tends to either confuse, or weaken doctrinal theories. However, whether or not a right to remedial secession exists, it was contended here that independent statehood by means of unilateral secession can only be achieved if certain requisite criteria are present. Arguably, three pre-conditions must be met: (i) the group wanting to exercise its collective right to self-determination must qualify as a “people”; (ii) these people’s rights must be routinely oppressed by their parent State; and finally (iii) negotiations on the status of the break-away territory leads to no reasonable conclusion. To this, we believe, two more conditions that operate either alternatively or cumulatively should be added: (iv) widespread recognition by third States (v) and/or international involvement, in particular through the United Nations. In this respect, we have also seen that the rejection of the secessionist claims of de facto States may be explained on the basis of the law of selfdetermination. Indeed, international responses to de facto States actually serve in clarifying the rules of the independence game. What this practice highlights is that entities such as Abkhazia, South Ossetia, Nagorno-Karabakh, or Transnistria have failed in their quest for independent statehood not as a result of misfortune, but because they did not meet the conditions under which unilateral secession is permitted in international law. In other words, their secessions were unlawful, not remedial. However, just as in the case of Kosovo, it is nearly impossible to imagine a scenario short of forcible reincorporation whereby these contested statelets would somehow return to their parent State. Whether we like it or not, de facto States are here to stay, with potentially destabilizing effects for the regions where they are situated. This basic reality cannot be ignored. More fundamentally, at the risk of further destabilization, the international community must strive to elaborate a more coherent legal framework to address the issues posed by secessionist movements across the globe.