

INTERNATIONAL LAW OF SECESSION: NEW RULES FOR A NEW ERA

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TABLE OF CONTENTS

I.	INTRODUCTION	523
II.	CURRENT INTERNATIONAL LAW OF SECESSION: HOW DOES AN INDEPENDENCE MOVEMENT ACHIEVE INDEPENDENCE?	526
A.	Aims of Secessionist Movements	527
B.	Achieving Secessionist Aims Under Current International Law	529
1.	Internal Aims	529
2.	External Aims	532
(a)	Secessionist Success as a Criterion for Recognition by Individual States	532
(b)	The International Legal Presumption Against Secession	535
C.	Incentives Toward Violence Under the Current System	538
III.	CREATING A NEW LAW OF SECESSION	540
A.	Goals of Proposed Reforms: What Can Be Achieved?	540
B.	A New System	544
1.	Active International Involvement	544
2.	Consensual Legitimate Standards of General Applicability	547
(a)	Consensual Formulation	548
(b)	Suggested Standards	549
(i)	Traditional Criteria of Statehood	550
(ii)	Desire of the Population	551
(iii)	Commitment to Human Rights and Democratic Principles	551

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(iv) Political Autonomy and Unjust Incorporation	552
(v) Discrimination and Oppression by the Parent State	553
(vi) Feasibility of Independence: Political, Geographic, and Demographic Factors	554
(c) Making the Recommendations: How the Standards Might Work in Practice	556
3. Enforceable Decisions	560
IV. CONCLUSION: PROSPECTS FOR REAL REFORM	562

I. INTRODUCTION

The United Nations (U.N.) Charter is perhaps the most authoritative source of international law and norms of conduct for the post-World War II era; it is the foundation on which relations between states are based. Among the provisions of the Charter are two basic principles of international law. Article 2(4) states a basic presumption against the use of force except in certain narrowly defined circumstances — “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”¹ Article 2(7) evinces traditional respect for sovereignty, forbidding external intervention in the domestic affairs of a sovereign state — “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement”² Application of these provisions, however, has never been simple. In particular, the problem of secessionist or independence movements, in which a portion of an existing state attempts to assert its independence as a new and separate state, presents a situation of increasing relevance in which these two principles, both contained in the U.N. Charter, interact, overlap, and even clash.

Considerations of claims of seceding peoples begin and end with the provisions of the U.N. Charter. However, as this paper will discuss, consideration of these principles alone fails to deal adequately with such disparate interests. Perhaps it is time for a new approach.

Within the past few years, active and vibrant movements for secession and independence have arisen in a number of locales, most notably in the Baltic States and the Yugoslav republics. In these cases, the central government (i.e., the Serbian-dominated Yugoslav central government, or the U.S.S.R.) has sought to crush the independence movement and maintain control through a variety of means, including the use of force. The central government has attempted to insulate its actions from foreign and international criticism, and even more

1. U.N. CHARTER art. 2, para. 4.

2. *Id.* art. 2, para. 7.

importantly from interference, by claiming that its actions are a legitimate attempt to deal with an internal problem well within its domestic jurisdiction.³ On the other hand, the separatist entities have asserted their independence,⁴ and claimed that the actions of the central government are an illegal use of force against an independent state. Who is correct? Unfortunately, international law provides no clear-cut answer to this problem. The answer inevitably varies on a case-by-case basis and hinges largely on subjective political, rather than objective legal, criteria. The Yugoslav situation is a prime example. Several nations, including the nations of the European Community (E.C.), recognized the independence of Croatia and Slovenia in mid-January of 1992,⁵ and thus regarded any use of force by the Yugoslav central government against these new states as illegal. However, many other nations, including the United States, did not recognize the independence of the new states until much later.⁶ Until such recognition took place, use of force by the Yugoslav central government was presumably regarded as a legal exercise of authority within the state's domestic jurisdiction.⁷

3. See, e.g., Igor Grazin, *The International Recognition of National Rights: The Baltic States' Case*, 66 NOTRE DAME L. REV. 1385, 1409 (1991) ("[I]n January 1991, Gorbachev labeled the concern of European and North American States over the events in Lithuania and Latvia as an interference in Soviet internal affairs.")

4. In the last year or two, unilateral declarations of independence have become almost commonplace. First, each of the Soviet republics declared independence, and then most of the Yugoslav republics followed the same path. The most recent example is Bosnia-Herzegovina. See Chuck Sudetic, *Turnout in Bosnia Signals Independence*, Mar. 2, 1992, N.Y. TIMES, at A3.

5. Stephen Kinzer, *Europe, Backing Germans, Accepts Yugoslav Breakup*, N.Y. TIMES, Jan. 16, 1992, at A10.

6. It took three months of violence and intense criticism of the United States position before the United States decided to recognize the breakaway republics, in April of 1992. See Johanna Neuman, *Yugoslav Republics Recognized*, USA TODAY, Apr. 8, 1992, at 6A. The nations of the E.C. and the United States have also recognized the independence of Bosnia-Herzegovina. *Id.* However, despite its claims of independence, Macedonia has not been recognized; thus, it is, for purposes of international law, a part of Yugoslavia and a matter of domestic Yugoslav concern.

7. Whether a particular entity is to be treated as a state for purposes of international law also determines whether the entity receives other rights and benefits which are generally accorded states, such as the right to bring suit in the International Court of Justice. See CHRISTOPHER O. QUAYE, *LIBERATION STRUGGLES IN INTERNATIONAL LAW* 46 (1991). It must be noted, however, that

This problem is not new. Secessionist movements have existed throughout history.⁸ But, it is one of greater relevance today as the ossified Cold War order breaks down. The collapse of strong central governments in Eastern Europe has led to the breakdown of multinational states, as peoples with distinct cultural and ethnic backgrounds in discrete territories strive to achieve political autonomy denied them for decades. The breakup of the Soviet Union and Yugoslavia may be only the beginning; Czechoslovakia and the Russian Federation may be the next to face serious threats of secession.⁹ Secession is also obviously not limited to Eastern Europe. Africa has already been the scene of several secessionist struggles¹⁰ and even some developed Western nations encompass territories in which there

even if an entity is not a state, human rights law and some elements of "the law of war" constrain parties' behavior. See generally THE LAW OF NON-INTERNATIONAL ARMED CONFLICT (Howard S. Levie ed., 1987) (providing materials on Protocol II to the 1949 Geneva Convention which covers behavior of parties involved in "internal wars").

8. See, e.g., GREGORY CRAVEN, SECESSION: THE ULTIMATE STATES RIGHT 4 (1986) ("The threat of secession has continued to dog federal states throughout history."). Of course, secessionist struggles are not limited to traditional federal states. See *infra* note 13 and accompanying text. While the American Civil War is perhaps the example of secession that most dominates American consciousness, other more recent independence struggles are also relevant. The Algerian fight for independence against France posed many of the same problems that are now arising in Eastern Europe. Asked one author, "Was the Algerian conflict an international or an internal war?" QUINCY WRIGHT ET AL., THE INTERNATIONAL LAW OF CIVIL WAR 181 (Richard A. Falk ed., 1971).

9. See Mary Battiata, *Separatist Slovaks Becoming More Vocal in "Family Feud" with Czechs*, WASH. POST, Mar. 19, 1991, at A21 ("Until recently, Slovakia's dominant political groups, allied under the umbrella of the democratic citizens movement Public Against Violence, checked extreme nationalist parties and ensured the Slovak republic's grudging cooperation with the Czechoslovak federal government . . . Now the alliance has come rancorously apart . . ."); Walter Ruby, *Tatarstan Votes Overwhelmingly for Sovereignty*, JERUSALEM POST, Mar. 24, 1992, available in LEXIS, World Library, Allwld File ("The voters of Tatarstan voted overwhelmingly . . . to declare their republic — part of Russia since 1552 — a sovereign state."); Elizabeth Shogren, *Strongman Demands Full Secession for Russia's Chechen-Ingush Region*, L.A. TIMES, Nov. 11, 1991, at A6.

10. See, e.g., James Brooke, *In Africa, Tribal Hatreds Defy the Borders of State*, N.Y. TIMES, Aug. 28, 1988, at D1 (noting that Biafra's attempt to secede from Nigeria resulted in the loss of one million lives and one of the worst ethnic wars in modern African history); *Ethiopia; Falling Apart*, ECONOMIST, June 8, 1991, at 44 (int'l ed.), available in LEXIS, World Library, Allwld File (documenting several ethnic struggles in Africa, including the approximately thirty year attempt of the Eritreans to secede from Ethiopia).

is substantial popular support for independence (i.e., Quebec and the Basque provinces).

The increasing relevance and importance of the problem of secession are not simply due to the fact that more nations may be confronted by them, but they are also due to the changing international climate. The collapse of the bipolar Cold War world, combined with a more persistent trend toward greater recognition of human rights, has created a unique opportunity to develop new legal and political approaches to the problems posed by independence movements. Ideally, these developments will allow political and ideological considerations (such as anti-communism) to play less of a role and will allow legitimate moral and legal considerations to fill the gap. International human rights law may have created enough of a breach in the traditional rules of sovereignty to allow a new, more international, more interventionist, and more just approach to secessionist struggles to take root. Current international law with regard to secession is examined in this article. The conclusion is reached that current policies are inadequate for furthering the aims of the U.N. Charter or the aims of any organized system of international law. A new legal system for dealing with secessionist issues is proposed, and some of the implications of such a system are examined toward the end of the article.

II. CURRENT INTERNATIONAL LAW OF SECESSION: HOW DOES AN INDEPENDENCE MOVEMENT ACHIEVE INDEPENDENCE?

In order to evaluate current international law and practice with regard to secession, it is essential to understand how the various forces interact under the current structure. Making the assumption that pressures to secede are inevitable and that secessionist movements must be given consideration,¹¹ we must then look at what sort of actions the secessionist movement and the parent state must take in order to achieve their respective aims under the current system, and whether these actions should be encouraged by the international legal system. In addition, it is important to consider the impact the current system has upon the *results* of secessionist struggles, and whether these results are in accord with the goals of the inter-

11. See, e.g., *infra* notes 13-14 and accompanying text.

national community (as expressed in the U.N. Charter and other sources).

A. *Aims of Secessionist Movements*

Christopher Quaye defines two categories of secessionist struggles: "(a) struggles by people who have been incorporated into the political structures of larger states against their will; and (b) struggles by people who, though not seriously opposed to their initial incorporation . . . are later faced with experiences that leave them no other choice than to fight for separation."¹² Secessionist struggles may arise in a wide variety of contexts, including democratic constitutional federations (Canada/Quebec), totalitarian communist dictatorships (U.S.S.R./Baltics), colonial situations (France/Algeria), and emerging Third World nations (Pakistan/Bangladesh).¹³ Although the specific reasons for secession may differ, there are certain elements secessionist movements have in common: "any system incorporating groups of distinct identity who do not believe that there are real advantages to remaining within the collective entity will be subjected to increased pressure for secession or reorganization."¹⁴

Thus, the primary aim of any secessionist movement, by definition, is for the "distinctly identifiable group" to leave the political arrangement into which they are currently incorporated in order to establish a new politically independent state. This desire has both an internal and external dimension. Internally, the secessionist movement seeks all the prerogatives within the borders of the affected territory that generally accompany political independence, such as control over the economy, political rights, culture, foreign affairs, and a military force.¹⁵ Essen-

12. QUAYE, *supra* note 7, at 10.

13. A list of several dozen secessionist movements (including some of rather dubious strength) may be found in LAWRENCE T. FARLEY, *PLEBISCITES AND SOVEREIGNTY* 11-12 (1986).

14. W. Michael Reisman, *International Law After the Cold War*, 84 *AM. J. INT'L. L.* 859, 864 (1990); see also Cass Sunstein, *Constitutionalism and Secession*, 58 *U. CHI. L. REV.* 633, 654-66 (1991) (discussing a wide range of reasons an entity might want to secede, including abridgement of civil rights, economic self-interest and/or exploitation, the injustice of the original incorporation, and cultural integrity).

15. It is likely that the desire for economic and cultural rights may often be the true driving force behind the secessionist movement in the first place;

tially, the secessionists seek to have sovereign control over their territory and people. Externally, a seceding entity seeks international recognition. It wants to be treated as a sovereign independent state by other nations and by the international community as a whole, as represented by the U.N.,¹⁶ and to receive all the rights and privileges accorded independent sovereign states. In practice, the internal and external aims of secessionist movements are inevitably intertwined, as substantial achievement of either set of aims will often lead to realization of the other.¹⁷

political independence may be sought simply because it appears to be the best way actually to secure these rights. See, e.g., Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. OF INT'L L. 177, 187 (1991) (stating that secessionists want "an independent state dominated by their own culture, language or religion"); Asbjørn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 NOTRE DAME L. REV. 1311, 1330 (1991) (stating that a major goal of independence movements is "a reassertion of national control over language and culture"). It must be noted, however, that political independence rarely guarantees complete freedom of action and in fact, may only represent a minor change from the preceding system. See, e.g., Reisman, *supra* note 14, at 864 ("In an interdependent world, there can, in fact, be no such thing as total secession and independence — only reorganization and rearrangement."). For instance, most of the new independent republics of the former Soviet Union have economies which rely heavily on Russia and do not have their own military.

16. A strong argument may be made that U.N. membership is now the primary criterion for determining whether an entity is or is not a state. Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 cmt. h (1986) ("[A]dmission to membership in an international organization such as the United Nations is an acknowledgement by the organization, and by those members who vote for admission, that the entity has satisfied the requirements of statehood.").

17. Whether the international community "recognizes" the new state will often hinge on how successful the secessionist movement is in asserting real control over its territory. See *infra* notes 37-42 and accompanying text. Likewise, if a movement receives international recognition as a state, use of force against it becomes presumptively illegal, and the international community can bring various forms of pressure to bear on the parent state to abandon attempts to assert control over the new state. E.C. recognition of Croatia and Slovenia may have played a major role in persuading the Serbian-dominated central government to give up its military campaign against those breakaway republics. In practice, however, it is much more common for new states to realize their internal aims before achieving international recognition. See *infra* note 42 and accompanying text.

B. Achieving Secessionist Aims Under Current International Law

1. Internal Aims

A popular movement with clear secessionist aims will seek the most effective means of achieving such aims. In order to achieve control over its territory and people, the secessionist movement must persuade the parent state to relinquish its control over the secessionist territory. A secessionist movement cannot be successful in its internal aims if the parent state retains control over substantial military forces within the secessionist state and insists on having effective control over its policies and laws, even if such control is only exercised sparingly.¹⁸ Some parent states may be easier to convince than others. Canada seems completely willing to give up control over Quebec if negotiations on a reorganized federation fail and the province's citizens continue to evince a desire for independence. However, the desire of inhabitants for independence is usually not sufficient to convince a parent state to relinquish control. More commonly, parent states are willing to use force to maintain control over the territory.¹⁹ Indeed, when a parent state

18. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 60 (1979). In some states (especially federal ones), a local region may have considerable autonomy, and the local legislature may have substantial control over local affairs. *Id.* at 291-94. However, as long as the central government retains control over some important matters (such as foreign affairs or the right to nullify repugnant local legislation), the autonomous region is not truly independent. *Id.* at 291. Traditionally, the test of success in a secessionist movement required that the seceding territory be able to govern its territory with enough stability and effectiveness to eliminate any real probability of the ousted sovereign regaining control. *Id.* at 255-56. This strict policy has been eroded in the Twentieth Century, so that it is no longer possible to state an unequivocal test for success; in some instances, external recognition of secessionist claims results from a combination of broad support by the people of the disputed territory and control of substantial territory by the secessionists. *Id.* at 257-63.

19. Such force can take a variety of forms: massive occupation as in the Baltics, see, e.g., Julian Isherwood, *Preparations Complete for Baltic Tribunal*, UPI July 24, 1985, available in LEXIS, Nexis Library, International File ("During the two-day [tribunal] [a]gainst the Soviet Union . . . [t]he Soviet Union [was] . . . charged with the military occupation of Latvia, Lithuania and Estonia, forcing demographic changes through deportations and forcible resettlements, denying the population's fundamental freedoms and violating human rights."); conventional armed incursion as in Croatia, see, e.g., Kevin Griffin,

is faced with a widespread popular movement for secession, suppression by force may be the only means of retaining control over the territory.²⁰ The question then becomes: how can a secessionist movement make the costs of trying to maintain control by force sufficiently high so that the parent state abandons its attempts and allows secession? A combination of tactics is usually employed.

There seem to be at least three major weapons a secessionist movement can invoke: international pressure, moral persuasion, and simple brute force. Force is the most obvious weapon. If the secessionist movement can effectively assert military control over its own territory, or even if it can inflict enough death and destruction on the parent state, it will quickly achieve independence.²¹ The other two "weapons," international pressure and moral persuasion, work in conjunction with one another and must not be underestimated. As previously stated, international recognition will greatly aid a secessionist movement in achieving its internal aims.²² Even if the international community does not recognize the new state, pressure may be brought to bear on the parent state to "moderate" or alter its

Tank Shells Can't Quash Croatian Spirit: Freedom Fighters Undaunted, Canadian Supporters Diligent, THE VANCOUVER SUN, Dec. 19, 1991, available in LEXIS, Nexis Library, International File (describing reaction of Croatian refugee/immigrant organizations to Yugoslavian incursions and attacks on Croatia); or simply suppression of separatist organizations as in the Basque provinces of Spain, see Ken Medhurst, *Basques and Basque Nationalism*, in NATIONAL SEPARATISM 235, 246 (Colin H. Williams ed., 1982).

20. Suppression by force is also generally considered to be legitimate. The right to put down internal insurrection is commonly considered to be among the fundamental rights of states. See, e.g., HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 23 (1988) ("[U]nder traditional international law, a rebellion within the borders of a sovereign state is the exclusive concern of that [s]tate.").

21. The secessionist movement in Croatia can attribute most of its apparent success to the use of force. Even though Croatia may have been losing territory to the federal Yugoslav army, its ability to control the majority of its territory with an organized military force may have played a major role in securing E.C. recognition. The death and destruction imposed on the advancing Yugoslav armies attracted international attention, and much more important, turned Serbian public opinion against the war. See, e.g., John F. Burns, *Monarchists Dust Off Past to Challenge Belgrade Rule*, N.Y. TIMES, Mar. 10, 1992, at A8 (describing an anti-government rally in Belgrade in which "[c]ontempt for those responsible for the fighting was everywhere in the crowd", and the government was condemned for "having 'needlessly' sent thousands of Serbs to death").

22. See *supra* note 17 and accompanying text.

conduct,²³ particularly if the international community perceives the secessionists to be morally right, or more commonly, if the international community believes it to be in its political interest to do so.²⁴ In order to make effective use of these three weapons, most secessionists develop organized defense forces both armed and unarmed,²⁵ pursue diplomacy with foreign states, organize an often democratic government,²⁶ and demonstrate popular support through the use of a plebiscite.²⁷

23. Perhaps the best example of such pressure involved the Algerian war for independence against the French. The U.N. General Assembly supported the Algerian cause, even passing a resolution supporting the Algerian claim for independence. See WRIGHT, *supra* note 8, at 227 (discussing the Algeria case and noting that "the member states of the United Nations, acting simultaneously, had registered their collective judgment on an issue of self-determination"). This may have been a major cause of the French decision to withdraw. More recently, although the West did not recognize Lithuania's declaration of independence in 1990, it did make its displeasure with Soviet suppression efforts widely known. See Grazin, *supra* note 3, at 1409.

24. See WILSON, *supra* note 20, at 105. During the Cold War, Soviet military, political, and moral support for Communist insurgencies was matched by Western support for anti-Communist insurgencies. See generally 3 WORLD BOOK ENCYCLOPEDIA 614, 615-18b (1980) (chronicling Soviet and Western military, political, and economic activities in Europe, Asia, Africa, and Latin America). In Africa, support by new states for anti-colonial movements in neighboring states was widespread. WILSON, *supra* note 20, at 105.

25. While armed defense forces are usually the rule (e.g., the FLN in Algeria), unarmed ones do occur. CRAWFORD, *supra* note 18, at 247, 258-59. An example of an unarmed defense force is the campaign of nonviolent disobedience led by Mohatma Gandhi in India's quest for independence from Great Britain. See 10 WORLD BOOK ENCYCLOPEDIA 92, 106m-106n (1980). Unarmed defense forces may actively protect vital buildings from armed attack by surrounding them with masses of people, such as the Lithuanians did when faced by Soviet forces in 1990. See Grazin, *supra* note 3, at 1399 (noting that the Lithuanians barricaded parliament buildings).

26. See CRAWFORD, *supra* note 18, at 42, 47. Often, if the secessionist territory already has a measure of political autonomy, a secessionist government will come to power legally. *Id.* at 261. A good example of this is Lithuania. Grazin, *supra* note 3, at 1409.

27. A "plebiscite" is a vote for or against a proposal, especially on a choice of government or ruler. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 903 (1987). Lithuania demonstrated its support for independence overwhelmingly in a referendum on February 9, 1991. See Grazin, *supra* note 3, at 1409. Plebiscites may be U.N. supervised, as in Namibia. See Reisman, *supra* note 14, at 869 n.10. Voting is not the only way to demonstrate popular support though. In Algeria, the FLN used "strikes and demonstrations as evidence of popular support." WRIGHT, *supra* note 8, at 189. Where the parent state forbids a vote, and has the ability to enforce such a prohibition, demonstrations may be the only way to show public support.

2. External Aims

Achieving international recognition, or at least international attention, is critical for a secessionist movement, both as an aim in its own right, and as a help toward achieving other secessionist aims. Although the concept of "recognition" has been losing force,²⁸ once a secessionist movement has managed to convince other states to treat it as a state, it gains legitimacy and perhaps even tangible assistance. It receives the same rights and privileges of other independent states.²⁹ The ability of a secessionist movement to achieve international recognition under current law is sharply constrained by two major principles: (a) individual states make individual determinations whether "to recognize" based upon subjective political considerations and the actual success of the secessionists; and (b) in spite of the fact that there may be a right to "self-determination" under international law, there is currently no right to secession, and in fact, there is a presumption against secession. These two factors have a major impact on how a secessionist movement must conduct itself in order to achieve independence.

(a) Secessionist Success as a Criterion for Recognition by Individual States

Any consideration of recognition of secessionist movements as new states must begin with the basic principle that there are "no binding rules in international law" to recognize a new state.³⁰ Each state makes independent decisions, based upon its own criteria,³¹ regarding the timing of recognition of new

28. See L. THOMAS GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS* 148-53 (1978). Actually, while the idea of recognizing *governments* may be losing force, the idea of recognizing *states* still has considerable vitality. As previously stated, see *supra* note 21, E.C. recognition of Croatia and Slovenia played a major role in those secessionist struggles.

29. See WILSON, *supra* note 20, at 105 ("Recognition is essentially an expression of intention . . . to treat a liberation movement as a subject of international law.").

30. Grazin, *supra* note 3, at 1388.

31. See WRIGHT, *supra* note 8, at 3 ("Governments decide for themselves what to do about a foreign civil war . . ."). The most recent glaring example of this policy concerned Slovenia and Croatia, which for a number of critical months were recognized by some major states but not by others. This is not the

states and the support of secessionist claims. Even though there are some internationally accepted standards for when an entity becomes entitled to recognition as a state,³² the "majority of states blend both law and politics into their decision."³³ In fact, from the empirical evidence that exists, a strong argument can be made that subjective political considerations far outweigh objective legal ones when states decide how to react to a secessionist claim of independence. "There is little evidence that governments shape their response to civil war adversaries by reference to legal rules and procedures but rather shape policy mainly on the basis of calculations of prudence and military necessity."³⁴ Because recognition often has a direct impact on whether a secessionist movement actually becomes a new and lasting state, it should not be surprising that other states try to use the tool of recognition to produce a favorable outcome. Not only are there ample instances in which the "United States has used recognition as a political tool,"³⁵ but other states also have often taken self-serving, inconsistent positions on secessionist struggles.³⁶

only example, however. During its war of secession, Biafra was recognized by some states but not by the majority of the world community. See WILSON, *supra* note 20, at 86. Also, the Western Sahara has only been recognized by approximately 60 states. *Id.* at 116.

32. See GALLOWAY, *supra* note 28, at 5-6 (citing three criteria for recognition: de facto control of territory and government, public acquiescence in the authority of the government, and a willingness to comply with international obligations); RESTATEMENT (THIRD) OF INTERNATIONAL FOREIGN RELATIONS LAW § 201 (1987) (citing four criteria for recognition: a defined territory, a permanent population, an organized government, and the capacity to conduct foreign relations).

33. GALLOWAY, *supra* note 28, at 5.

34. WRIGHT, *supra* note 8, at 9.

35. GALLOWAY, *supra* note 28, at 1. The United States has used recognition "to support antimonarchical governments . . . to advance economic imperialism . . . to promote constitutional government . . . and to halt the spread of communism." *Id.*

36. See QUAYE, *supra* note 7, at 223-24 (giving numerous instances of states adopting self-serving positions on whether to recognize or support a secessionist movement). Particularly amusing are the numerous cases where a state's position on a particular secessionist movement or on secession in general has undergone a complete reversal because of a change in the political landscape. *Id.* at 224 (discussing, among other examples, how Soviet and American positions on the right of Eritrea to secede flipped after a pro-Western government in Ethiopia was replaced by a Marxist one, and how Pakistani and Indian positions contrasted on the respective rights of Kashmir and Bangladesh to secede).

Although recognition, and the decision on whether or not to support a secessionist claim, is based heavily on the political calculus of the foreign state, there is at least one criterion which does play a major role in affecting decisions to recognize an emerging state. The benchmark is simply the political and military success of the secessionist movement. This idea is a very old one. Under traditional international law, classification of an internal insurrection as a rebellion, insurgency, or belligerency depended heavily on its battlefield success.³⁷ Although this traditional classification scheme has largely subsided since World War II,³⁸ the evaluation of secessionist movements is still much more descriptive than normative — recognition is based on what already *is* rather than on *what should be*. And what is critical for determining “what is” is whether the secessionist movement has been able to resist the imposition of force by the parent state and maintain effective control within its borders. A secessionist movement “can only hope to achieve a position of parity vis a vis outside governments by a significant measure of success, exhibited by government control over territory.”³⁹ Often, not only does *de facto* recognition hinge on the outcome of a secessionist struggle,⁴⁰ but, in effect, the outcome also is considered determinative of whether the cause was just, legitimate, or legal.⁴¹

The concept of “premature recognition” illustrates the complex interplay between the subjective political component of recognition in order to aid a secessionist movement, and the objective test of whether the movement controls its territory.

37. See WILSON, *supra* note 20, at 29 (“The status of parties to an internal conflict was determined by their political and military success and not by the perceived righteousness of their efforts.”). These classifications played a major role in determining how rebels and an affected state must be treated under international law. *Id.* at 23-28.

38. *Id.* at 13-33 (documenting changes in the international law of internal warfare).

39. WRIGHT, *supra* note 8, at 13; see also QUAYE, *supra* note 7, at 244 (noting that under traditional international law, recognition should occur only when a “[n]ew system has been securely and permanently established in place of a former one”).

40. WILSON, *supra* note 20, at 23 (describing the military success requirement as a decision by the international legal system to simply “accept the outcome of internal violence”).

41. See QUAYE, *supra* note 7, at 211 (“[T]he legitimacy of . . . secessionist struggles depend[s] on whether or not they succeed . . .”).

Although recognizing a state before it has complete control of its territory is usually viewed by the international community as premature, states do occasionally declare such recognition in order to "confer legitimacy on the objectives and actions of the liberation movement fighting for independence."⁴² "Premature recognition" is a relatively easy way for a state to enhance a secessionist movement's chances for ultimate success, and is also a primary example of the primacy of decision making by individual states in the recognition process. Of course, recognition of a new state before it has control of its borders is only "premature" if one accepts the traditional notion that military and political success is the most important criterion in determining whether an entity deserves to be treated as a state.

(b) The International Legal Presumption Against Secession

The difficulty of the requirement that secessionists must demonstrate actual control of territory in order to achieve recognition goes hand-in-hand with an existing international presumption against secessionist movements. In spite of decades of international law supporting self-determination,⁴³ the right of self-determination is generally considered to *not apply* to groups that desire to secede from an existing state, as opposed to those fighting colonial domination,⁴⁴ largely because existing

42. WILSON, *supra* note 20, at 116; *see also id.* at 105 (citing Indonesia, Algeria, Guinea-Bissau, and the Western Sahara as entities which were "prematurely" recognized as states by other states).

43. The U.N. Charter gives its support to the principle of "self-determination of peoples." U.N. CHARTER art. 1, para. 2; *id.* art. 55. Countless U.N. resolutions, documents, commissions, and studies since the Charter have confirmed the fundamental commitment to the principle of self determination. *See generally* AURELIU CRISTESCU (SPECIAL RAPPORTEUR OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES), THE RIGHT TO SELF DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATIONS INSTRUMENTS, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, U.N. Sales No. E.80.XIV.3 (1981); *see also* FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 27 (1988) (noting that two U.N. International Covenants on Human Rights suggest that "the right to self-determination [of peoples] precedes the [individual] rights recognized"); WILSON, *supra* note 20, at 78 ("[T]he principle of self-determination has undergone a metamorphosis, largely in the last forty years, from a principle of political thought to a right in international law.").

44. *See* Western Sahara (Advisory Opinion), 1975 I.C.J. 12 (stating that the right of self-determination does not necessarily imply the creation of a new state); WILSON, *supra* note 20, at 81 (noting the difference between colonial

states fear the implications of such a "right."⁴⁵ Several academics have challenged this notion, and argued, sometimes on the basis of statements contained in U.N. documents,⁴⁶ that a

territories, where the right of self-determination has been held to apply, and "metropolitan areas" of states, where it does not apply); *id.* at 84 ("[D]ifferent ethnic or cultural groups within an established state have a right to self-determination in that they have a right to participate in the government of that State . . . [but they do] not have a right to sever [their] ties with the established government."); Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431, 1446 (1991) ("[S]aying that all nations have the right to a state flies in the face of several thousands of years of history and certainly flies in the face of the law as it is today."); *see also* WILSON, *supra* note 20, at 24 ("[T]raditional international law clearly favors the established government in the case of rebellion regardless of the cause for which the rebels are fighting.")

45. *See* QUAYE, *supra* note 7, at 220 (noting the fear that "legitimizing secession would be opening the Pandora's box" and would lead to "the fragmentation of the present international system"); *see also* Hannum, *supra* note 44, at 1446 ("[T]here is a fundamental fear on the part of *all* countries and especially newer states, that the recognition of minority rights will encourage fragmentation or separation and undermine national unity and the requirements of national development."). At least some of the fear concerning secession may be based in part on the experience of the American Civil War. *See, e.g.,* CRAVEN, *supra* note 8, at 1 ("[S]ecession is the name of a vague horror which in the form of . . . civil war brought the United States to its very knees, and cost the lives of one million."). Unfortunately for secessionists everywhere, the North in the American Civil War is almost universally regarded as the "morally right" side in that war, perhaps largely because a morally questionable war aim (suppressing self-determination in the form of a clearly expressed desire of states and their peoples to secede from the Union) was associated, and even superceded by an unquestionably moral war aim (elimination of slavery). The fact that the United States has been perceived as a very successful federation over time makes the claims and beliefs of anti-secessionists even stronger. Ideally, people considering whether secession should be made easier under international law should consider the merits of the individual claim, rather than approaching the issue with a preconceived notion created by the stigma attached to the notion of secession by the American South. *Cf.* Charles Krauthammer, *Why Lithuania Is Not Like South Carolina*, TIME, Apr. 16, 1990, at 88 (attempting to distinguish Lithuanian secession (just) from South Carolinian secession (unjust)).

46. Among the primary instruments relied on are the *U.N. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter *Declaration on Friendly Relations*] (stating that "all peoples have the right to freely determine, without external interference, their political status"), the *U.N. Declaration on the Granting of Independence to Colonial Countries and People*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) ("All peoples have the right to self-determination; by virtue of that right they freely determine their political status . . ."), and the *U.N. Declara-*

"right of secession"⁴⁷ does or should exist.⁴⁸ In practical terms however, although the U.N. has supported secessionist movements in a few, essentially colonial, cases,⁴⁹ the international community in general has supported the traditional presumption against secession making it very difficult for a secessionist

tion on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 21, U.N. Doc. A/41/925 (1986) ("The human right to development also implies the full realization of the right of peoples to self-determination, which includes . . . the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.") These same documents, however, also offer support for an anti-secessionist position. See, e.g., *Declaration on Friendly Relations*, *supra*, at 66 (stating that the Declaration does not authorize "any action which would dismember or impair . . . the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights").

47. The debate over the existence of a "right to secession" is a fascinating one. See, e.g., *infra* note 48 (citing articles discussing the right to secession). However, the question is somewhat beyond the scope of this paper, which is more concerned with establishing a comprehensive structure or system to handle existing secessionist claims in a manner which produces outcomes more consistent with the principles (particularly peaceful resolution of disputes) of the U.N. Charter. Whether a legal or moral "right" to secede does or should exist is of some relevance in establishing a new, better, and more just system. See *infra* notes 83-109 and accompanying text (discussing when secession might be justified and desirable).

48. See, e.g., Brillmayer, *supra* note 15 (arguing for a right to secession based upon valid territorial claims); Grazin, *supra* note 3 (attempting to adumbrate guidelines for when a right to secession should exist, based upon a case study of the Baltics' drive for independence); cf. Sunstein, *supra* note 14, at 669 ("In some cases, a right to secede will be fully justified as a matter of political morality."). Many scholars, however, have argued against a right of secession. See, e.g., Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 619, 628 (1992) (arguing against secession because in most cases it is "unlikely to be philosophically defensible and institutionally sensible").

49. During Algeria's struggle for independence against France, the U.N. General Assembly (and much of the international community) strongly supported the Algerian cause, even passing a resolution to that effect. See WRIGHT, *supra* note 8, at 227 (discussing the Algeria case and noting that "the member states of the United Nations, acting simultaneously, had registered their collective judgment on an issue of self-determination"). The General Assembly also passed resolutions supporting Namibian independence and calling for sanctions against South Africa until such independence was achieved. See QUAYE, *supra* note 7, at 228 (quoting and discussing General Assembly resolutions regarding the Congo). In the case of Bangladesh, there was also considerable support for the secessionist cause. See WILSON, *supra* note 20, at 82-83 (discussing the Bangladesh case and noting international support for the proposition that the secession represented "a legitimate act of self-determination").

movement to succeed. Many states consistently express great respect for the principle of territorial integrity and oppose the idea of secession in general.⁵⁰ The community of states often acts as a closely knit club determined to aid its members against threats from outsiders, i.e. stateless peoples represented by independence movements. Those who already have power and states of their own jealously protect their privileges and often refuse to support others who would challenge the power and privileges of fellow states.⁵¹ The result is that when the movement actually achieves military control over its territory and people, it usually achieves the full recognition of the international community.

C. *Incentives Toward Violence Under the Current System*

In order to achieve independence, secessionist movements must be able to assert effective control over their territory. Such effective control is necessary both to achieve the internal aim of being able to effectively shape the destiny of the territory and people, and the external aim of recognition by other states. Parent states, which are invariably committed to territorial integrity, are aware of the importance of effective control over the territory. They therefore seek to maintain such control in the only way they can, namely the use of military force in the form of occupation or active suppression. Use of force by the parent state is considered both legitimate, at least until the secessionists begin to gain recognition,⁵² and effective, since the parent often has a considerable advantage in population and resources. Secessionist movements, likewise, must use force.

50. See, e.g., FARLEY, *supra* note 13, at 9-10 ("With few exceptions, the nationalist movements that rode to statehood on the principle of national self-determination have now all but renounced the principle in favor of the Westphalian dogma of 'territorial integrity.'"); QUAYE, *supra* note 7, at 224-27 (claiming that "[m]ost African countries are antiseccessionist" and citing examples of anti-secessionist statements by heads of state); WILSON, *supra* note 20, at 84-85 (quoting the Cairo Declaration from the 1964 Conference of Heads of State of Government of Non-aligned Countries which pledged support for the principle of "territorial integrity").

51. See Brilmayer, *supra* note 15, at 182 (noting that the Organization of African Unity has consistently opposed the idea of secession even though existing boundaries "constituted remnants of previous colonial empires drawn with little respect for the distribution of ethnic groups"); see also *supra* note 50.

52. See WILSON, *supra* note 20 and accompanying text. Such use of force is, of course, constrained by international human rights law.

It is not only an important weapon in itself, but it is also essential in gaining a second major advantage: international support, in the form of recognition, or even intervention.⁵³ Thus, the structure of the international system essentially *forces* secessionist disputes into an escalating cycle of violence. Military success is not just the *only* path to independence but it may also be the *only* way for a parent state to maintain its territorial integrity.⁵⁴ These incentives toward violence are directly contrary to the principles contained in the U.N. Charter and to the entire foundation of a modern organized system of international law.⁵⁵ Furthermore, the legal presumption against secession combined with the difficulty of a secessionist movement achieving practical success means that peoples who truly want independence are often forced to remain within an oppressive parent state.⁵⁶ This presumption seems to directly contradict the ideal of self-determination, expressed in the U.N. Charter and other countless documents.⁵⁷ Finally, the presump-

53. See generally Marc Weller, *Threat to Peace Allows World Body to Override Charter*, THE TIMES (London), Apr. 6, 1991, available in LEXIS, World Library, Allwld File (discussing potential U.N. humanitarian assistance to the Kurdish minority in Iraq). Intervention may be in the form of a third party supplying money, arms, or even troops to the secessionist cause. Indian intervention in 1971 in favor of Bangladesh during its struggle to secede from Pakistan is one prominent example of third party intervention in a secessionist conflict. *Id.* Tanzania also intervened in Uganda in 1979; the U.N. did not condemn either intervention. *Id.*

54. It is hard to think of *any* serious secessionist movement which has not led to violence. The most peaceful movement is perhaps that in Quebec, and even there, separatist terrorism has been a problem. The more common pattern is for secessionist struggles to degrade into civil war, as in Croatia, Biafra, Katanga, Eritrea, and the American Confederacy. See *supra* note 45.

55. See QUAYE, *supra* note 7, at 264-65 (criticizing the "effective control principle" because "[i]ts inherent ambiguities and tendency to favor the fait accompli nullify many of the hard-won values of the international community, notably, the rules against the use of force").

56. In fact, where a parent's military power is far superior to that of the secessionist entity's, secession may be impossible. In 1990, the case for Lithuanian independence appeared very strong; however, since Lithuania could not challenge the U.S.S.R. militarily and could not control its borders, no action on its part (demonstrations, a plebiscite, unarmed resistance) could succeed at achieving independence—either in the form of international recognition or effective governing control over the territory. See, e.g., Esther Schrader and Michael Parks, *Lithuania Acts to Defuse Crisis; Secession: The Republic Puts Off Border Control Plans*, L.A. TIMES, Mar. 29, 1990, at A1.

57. See U.N. CHARTER art. 1; *id.* art. 55; *supra* note 43; see also CRISTESCU, *supra* note 43.

tion against secession, the principle of non-intervention, and a strong adherence to traditional notions of sovereignty cause international bodies to generally abstain from action. In the case of secessionist struggles, where concerted action by the international community, especially in the U.N., might help bring about a peaceful and just result, the system renders such action a rarity. Parties to the dispute are essentially left to fight it out as the family of states passively stands by ready to acknowledge the ultimate result. In short, current law and practice on secession produce exactly the wrong incentive and causes the wrong kinds of behavior. There is much room for improvement.

III. CREATING A NEW LAW OF SECESSION

A. *Goals of Proposed Reforms: What Can Be Achieved?*

Although the international community will almost always disagree on the merits of any particular secessionist movement, there are a number of goals behind which there is a substantial consensus and which are pervasive throughout the current body of international law. Any new law of secession must attempt to satisfy these aims to the greatest extent possible.

Among these goals are the prevention of violence resulting from the use of force; consideration for the principles of self-determination, stability, sovereignty, and territorial integrity; and recognition of individual rights in the context of peaceful negotiation and settlement. Perhaps the foremost goal is prevention of violence and the use of force. Not only is violence an evil in itself, it produces other evils.⁵⁸ Much of the current legal system, including the U.N. Charter, is designed with a primary focus on preventing violence and the use of force.⁵⁹ Almost as important are the goals of self-determination⁶⁰ and

58. Violence breeds more violence. It leads to instability and tends to expand the scope of disputes as more and more parties are drawn in. As the parties become more polarized, solutions become increasingly difficult. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION* 11 (1990) ("[T]he rapid escalation of violence and simultaneous resort to state and opposition terrorism distort the underlying issues and make them much more difficult to resolve, even when majorities on both sides may be willing to compromise.")

59. See, e.g., U.N. CHARTER art. 1, para. 1, 2 (mentioning the word "peace" or "peaceful" six times).

60. See U.N. CHARTER, art. 1, para. 2; *id.* art. 55; *supra* note 43; see also

stability. The definition of "stability" is not always clear,⁶¹ yet governments frequently invoke its importance. To be sure, violent turmoil and uncertainty are not conducive to economic development and prosperity.

Some attention must be paid to the traditional international law norms of sovereignty and territorial integrity. These ideals are primarily reflections of an increasingly outmoded state-centered view of international law. These norms exist primarily to protect the interests of *states* and their governments, rather than individuals or ethnic groups. Despite all the recent changes, because the international system is still largely based on a system of independent states, any proposed reform must take into consideration these sovereignty and territorial integrity norms. Failure to consider these norms will result either in a failure to implement proposed reforms, since states still are the primary decision makers in the international arena, or in increased dislocations and instability upon implementation, due to the radical and unpredictable change in the way the world operates. Still, there is increasing support, especially in the area of human rights law, for the principle that the rights of individuals and "peoples" should counterbalance the rights of states.⁶² Real human beings should count for more than abstract political constructs.⁶³

The ideal way for secessionist disputes to be resolved is through peaceful negotiation and settlements which are satisfactory to all concerned sides. The international system should encourage and foster this type of resolution. Perhaps the best example of such a process, albeit an imperfect one, is the situation with regard to Quebec. Responsible, democratically elected political leaders for the federal government and the

TESON, *supra* note 43, at 27.

61. An argument can be made that "stability" is important to existing governments mainly because it supports (or perhaps is even synonymous with) continued tenure in office and a continued hold on power.

62. See Reisman, *supra* note 14, at 861 ("Radical changes in conceptions of the legitimacy of national authority, deriving from the international human rights programs have supplanted the older absolute notions.").

63. Cf. Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1297 (1991) ("The principle of territorial integrity must not serve as a shield for tyrants, dictators, or totalitarian rulers; it must not become a screen behind which human deprivations are sought to be justified, condoned, and perpetuated.").

secessionist-minded province have been vigorously negotiating the issue for a number of years. Violence, and even the threat of violence, has been kept to a minimum. Regardless of whether Quebec ultimately decides to secede, Quebec will have been able to exercise the right of self-determination, and relative stability will have been maintained.⁶⁴ What has been and will be key to this process is that both sides have been willing to talk, make concessions, and compromise. Quebec has expressed a willingness to consider proposals to grant it new cultural and political rights and autonomy without secession, and perhaps more importantly, Canada has expressed a willingness to let Quebec secede peacefully if an agreement cannot be reached.⁶⁵

It will almost certainly be impossible to construct an international legal system which will allow all secessionist disputes to resemble the situation in Quebec, although the Quebec situation can and should be used as a model. Unfortunately, many states will jealously guard their privileged positions and attempt to maintain their territorial integrity at great cost.⁶⁶ Some have profited greatly at the expense of minorities in potentially secessionist areas and may not be willing to relinquish their advantages.⁶⁷ Fortunately, however, even in situations where states may be willing to fight to maintain territori-

64. Even if Quebec secedes, it is likely that little will change. There will still be strong economic ties between Quebec and Canada, and constitutional, democratic governments will remain in place in both states. See William Claiborne, *Maple Leaf Rage; Canadians Are Concerned Over U.S. Intentions Should Their Nation Break Up*, WASH. POST, Mar. 1, 1992, at C2.

65. The Canadian government has not threatened to use military force to keep Quebec in the union. The "nightmare scenario" involves unity talks breaking down and "bitter disputes between Quebec and Canada over the division of federal assets in Quebec and the apportioning of the federal debt." *Id.* This "nightmare" is far from the civil war that often takes place when secession is contemplated. Ironically, Quebec and Canada are more worried about the use of force by the *United States* (to "safeguard such vital American interests as the St. Lawrence Seaway") in the event of breakup than they are worried about civil war. *Id.* At the time of this writing, Canadian leaders are completing work on a compromise proposal which will likely be submitted to the electorate and provincial legislatures in the near future. Prospects for approval are uncertain. See Clyde H. Farnsworth, *Canadians Work Out Details of Charter Pact*, N.Y. TIMES, Aug. 28, 1992 at A2.

66. See *supra* notes 50-51 and accompanying text (noting considerable opposition to secession and support for the principle of "territorial integrity").

67. In fact, exploitation by a majority is one primary ground cited in favor of allowing a minority group and territory to secede. See *infra* notes 99-105 and accompanying text.

al integrity, there is reason to believe that an international system can be constructed to minimize the use of force.

There are numerous instances where states, initially determined to use force to maintain territorial integrity, eventually are persuaded by events to cease using force and allow the secessionist area to gain its independence.⁶⁸ Such events usually include international involvement and at least some success by the secessionists on the battlefield. However, complete success is far from necessary. In Algeria, continued resistance by secessionists, the determined desire of the majority of Algerians to secede, and international pressure persuaded the French to ultimately yield.⁶⁹ In Croatia, despite military gains by the federal army, the cost of the war combined with increasing international support for secession (as evidenced by E.C. recognition) persuaded the federal government to agree to a cease-fire.⁷⁰ Where the costs of continued fighting begin to exceed the benefits, parent states are more likely to allow secession.

Thus, the general outline for a new international system for dealing with secession is clear: it should encourage peaceful negotiation and moderation, and strongly discourage the use of force, and thereby decrease polarization. Both sides should be encouraged to listen and consider all options. Secession should be considered politically and morally acceptable; i.e., it must be made clear to states facing this problem that secession is not something to be feared and opposed at all costs. Even under a

68. See *supra* notes 19-23 and accompanying text.

69. For a discussion of the events in Algeria, see WRIGHT, *supra* note 8, at 179-243. It should be remembered that the U.N. General Assembly demonstrated considerable support for the Algerian cause. *Id.* at 227, 424.

70. Despite some violations, the cease-fire appears to be holding, and peacekeeping forces have moved into position to protect the cease-fire. It is certainly possible that violence may again erupt, particularly since the final borders of the new Croatian state are unclear. At this point, it would appear highly unlikely that the Yugoslav federal government would renew its attempts to reconstitute the union by force. Croatian independence is all but assured. Bosnia-Herzegovina presents a very different situation. At the time of this writing, violence continues and the territory's fate remains uncertain. Although many factors account for this situation, an important one which bears noting is that the struggle in Bosnia is similar to that of a classic civil war. The war in Croatia presents a typical secessionist struggle of the type with which this article is primarily concerned. See *infra* note 94 (noting the problem created when a large discrete minority opposes secession — as in Bosnia).

reformed system, the situation can degenerate towards violence, and the international community must work to end the violence. Where the secessionist claim has merit, costs must be imposed on the parent state to encourage it to stop using force. Such costs should be imposed through the use of effective political tools including international recognition of the seceding entity, and economic and political pressure, rather than through military force. It is readily acknowledged that there will be situations where international action cannot achieve anything productive and therefore may be inappropriate, such as where the parent state has overwhelming advantages and is determined to maintain control, as in Tibet. However, the inability to resolve such cases should not prevent the implementation of a system which would help in a great many other situations. Stating the aims and the general outline of a new international law of secession is the easy part. The more difficult task, attempted in the next section, is designing more specific methods and procedures to meet these goals.

B. *A New System*

Any new system should include an automatic mechanism to trigger international involvement, and a set of legitimate standards that is generally applicable and based on an international consensus. Such standards should consider both moral rights and pragmatic politics. U.N. Commissions applying these standards should actively make recommendations and suggest options, such as the use of plebiscites and peace-keeping forces.

1. Active International Involvement

Perhaps the greatest flaw in the current international system for dealing with secession is the "hands off" approach adopted by the international community which allows internal wars to take place and then recognizes the outcome of these wars. International inactivity, inattention, and legitimation of violent outcomes is a recipe for continued instability, violence, and oppression. Any new system for dealing with secessionist movements *must* involve automatic, active engagement on the part of the international community, as represented by the U.N. and regional organizations.⁷¹ Consensus on the part of the

71. Although regional organizations may be useful, the U.N. is the preferred

international community is very important as a deep split may only cause intensified violence.⁷² Affected states will undoubtedly complain that this international involvement is an infringement on their sovereignty, even if the international involvement is confined to simple statements of support for the secessionists.⁷³ The answer to this complaint is two-fold: (a) affected states should be encouraged to look at U.N. involvement as a blessing rather than a curse in that it will bring considerable mediative and diplomatic resources to bear on the problem in an effort to arrive at a just and peaceful solution;⁷⁴ and (b) under the most recent view of international law, which minimizes the role of sovereignty and expands the international role in protecting human rights, involvement in secessionist disputes is within the authority of the U.N.⁷⁵ While increased infringement on sovereignty is not a desirable end in itself, it is a necessary component of any new system which increases international involvement in order to prevent violence and protect the right of self-determination.

The first step in creating a system which will increase international attention to and participation in secessionist disputes is to create an automatic mechanism which will allow such disputes to reach the international agenda. Secessionist groups should not have to resort to violence to gain international attention to their situation.⁷⁶ Perhaps the best way to ac-

body. In the U.N., in theory at least, as most nations will be physically removed from the conflict, the judgment of that organization is likely to be more objective and less affected by the political self-interest of states. "Distance" should provide for better, more principled judgment.

72. This is particularly true if the parent state and secessionist movement both receive assistance (especially military) from their allies in the world community.

73. See, e.g., *supra* note 3 (noting Soviet displeasure with Western concern for the situation in the Baltics during those states' drive for independence).

74. Some states may not appreciate U.N. involvement. However, the prospect for avoiding potentially costly confrontations is a powerful reason for states to look favorably upon international involvement. In fact, where a parent state believes it is "in the right" there is every reason for it to desire an impartial evaluation of its claims. See *infra* notes 113-14 and accompanying text (noting that there are instances where an impartial international evaluation may find that a secessionist claim has no merit).

75. Widespread "internal" disputes always have a considerable international dimension. At the very least they often represent a threat to international peace and security.

76. One of the commonly cited goals of terrorists, including separatist ter-

comply with this first step is to allow separatist groups to petition the U.N. and voice their grievances and claims. While any group would be permitted to petition, those petitions from existing, democratically elected governments would be accorded greater weight than petitions by small separatist groups.⁷⁷ The petitions would be reviewed by an existing U.N. Commission or Subcommission, or by a newly created one.⁷⁸ If it appears that the secessionist claims are serious and have at least some merit, the investigatory body can either issue a recommendation that a full-scale investigation be initiated, or perhaps initiate such an investigation on its own.⁷⁹ Ideally, the Commission would initiate the investigation on its own since that would prevent political considerations and general inertia from preventing the investigation from proceeding. However, this might not be possible under current law since the U.N. Charter does not explicitly give subsidiary organs the power to commence investigations. It might be necessary for the Commission to issue a recommendation, thereby persuading a state to bring the issue to the General Assembly and/or Security Council,⁸⁰ resulting in one of those bodies authorizing the investigation.⁸¹ Perhaps the General Assembly and/or Security Council could circumvent the problem by preemptively issuing a resolution

rorist organizations, is to gain international attention. See WILSON, *supra* note 20, at 108-09 (claiming that the Algerian independence movement intentionally began to use force in order to "internationalize" the issue); QUAYE, *supra* note 7, at 231 (noting that the issue of Biafran succession was never officially brought to the U.N.'s attention).

77. As a general rule, the more authority and legitimacy the petitioning group has, the more seriously its allegations will be taken, and the more likely it is that a full-scale investigation will be ordered.

78. See U.N. CHARTER art. 7, para. 2 ("Such subsidiary organs as may be found necessary may be established in accordance with the present charter.").

79. The standard for use of full-scale investigations would be subject to discussion and international agreement. One likely criterion would be whether there is a reasonable chance that the investigation would conclude that secession of the petitioning entity is appropriate. Analysis of the facts would employ the standards outlined in Section III.B.2 of this article. Since secession is far from the only possible recommendation that could be issued by the investigatory body, a relatively lenient standard might be appropriate.

80. See U.N. CHARTER arts. 34, 35 (permitting any member of the United Nations to bring situations that threaten international peace and security, to the attention of the Security Council or General Assembly).

81. See U.N. CHARTER arts. 13, 24 (giving the General Assembly and Security Council the power to initiate investigations).

authorizing the Commission to conduct investigations where it deems necessary. In any event, the critical point at this juncture is that impartial investigations become a routine and automatic step in dealing with secessionist disputes.

The primary purpose of the investigation is to find facts. The investigators will try to learn everything possible about the territory in question — its people, history, culture, and political desires. It must also investigate all claims of human rights abuses. Presumably, the parent state will cooperate with such an investigation; however, there may be a real possibility that it will be reluctant to do so. The U.N. should use moral and economic sanctions to bring pressure to bear on any state that refuses to allow investigators into the area in question.⁸² Even if the investigators can not visit the area they should proceed with the investigation as best they can.

2. Consensual Legitimate Standards of General Applicability

While reporting the facts of a situation is a key step which would allow the U.N. to make more informed decisions with regard to secessionist problems,⁸³ an impartial and apolitical Commission⁸⁴ should be able to issue recommendations. There should be few limits on such recommendations, and they should include continued federal control over the territory, increased autonomy within the federal structure, or full independence. The range of options, particularly with regard to autonomy, is virtually limitless.⁸⁵ If the Commission does not have enough

82. Both the Security Council and the General Assembly can take a role in sanctioning a state. While the Security Council can consider binding sanctions under article 41 of the U.N. CHARTER, the General Assembly can issue resolutions condemning the state in question and urging members to take non-violent action against that state. *See id.* art. 10, 11, 14.

83. *Cf.* WRIGHT, *supra* note 8, at 3 (“[T]here is then [currently], no machinery to obtain a fair interpretation of the facts associated with a variety of claims and counterclaims asserted in relation to civil war situations.”).

84. Those who doubt whether any body can be impartial and apolitical should consider the relative success of the International Court of Justice, which possesses both of these characteristics. States also submit disputes to international arbitration bodies, which are regarded as impartial.

85. *See* John B. Attanasio, *Foreword*, 66 NOTRE DAME L. REV. 1195, 1207-08 (1991) (discussing various schemes for increased political, economic, and cultural autonomy within an overarching federal framework); HANNUM, *supra* note 58, at 16-18 (discussing various political constructs short of full statehood, such as

information to issue recommendations, it should suggest possible options or further steps. In particular, the Commission should consider recommending a plebiscite if the desire of the population is not entirely clear,⁸⁶ or the dispatching of a peace-keeping force if such a force would help prevent violence. What is critical, however, is for there to be clearly enunciated, established standards for when secession should or should not be encouraged. Fortunately, there is reason to believe that principled, legitimate, workable guidelines for evaluating secessionist claims can be formulated.

(a) Consensual Formulation

Both the political bodies of the U.N., like the General Assembly, and the apolitical organs, like the study commissions, should play a role in formulating the criteria by which secessionist movements should be evaluated. Although agreement may be difficult, it would be particularly helpful if the apolitical organs make concrete recommendations. It is not the aim of this paper to set forth a comprehensive, conclusive set of criteria by which secessionist movements should be evaluated, because the legitimacy and force of the standards *requires* that they be the product of an international consensus. It is, however, possible to outline some of the major factors that should be considered in forming such a consensus.

protected independent states, associated statehood, and protected dependent states); *see also* Jacques Rupnik, *Czech Off*, NEW REPUBLIC, Aug. 17 and 24, 1992, at 15, 16 (discussing potential interdependent relationships in the Czechoslovakia context).

86. Plebiscites are a very useful tool in resolving international disputes. *See* FARLEY, *supra* note 13, at 136 ("Plebiscites, when conducted, rarely fail."). The U.N. has successfully used plebiscites many times in the past. *Id.* at 33-46 (discussing several instances of successful U.N. supervised plebiscites). They make the wishes of the subject population clear to the entire world thereby making it clear which is the "morally correct" position. The first step taken by a government intent on maintaining control over an area with secessionist tendencies is often to prevent a plebiscite from taking place. *See* QUAYE, *supra* note 7, at 170 (noting that Morocco managed to prevent a referendum on independence from taking place in the Western Sahara as part of its program to gain complete control over the region). Plebiscites do not always lead to secession. There is often a very real chance that the vote will be for continued union. *Id.* (citing several such cases).

(b) Suggested Standards

Two considerations must be kept in mind when contemplating the proposed standards which follow. First, most of these standards involve factors that must be evaluated along a spectrum — the closer to one end of the spectrum, the more seriously the Commission should consider the desire for secession. Some of the standards involve *necessary* conditions, like the desire of the population for independence, the definability of territory, and the presence of a functioning government; while others simply make the secessionist claim stronger or weaker. Second, the standards must be a measure of two different types of considerations. On the one hand, the standards must ascertain the moral legitimacy or moral strength of a particular secessionist claim;⁸⁷ on the other, the standards must evaluate the actual political situation and determine the practicality of secession.⁸⁸ Virtually all of the literature concerning secession focuses on the former moral consideration when, in fact, the latter political consideration is at least as important if a workable international legal system is to be developed to handle secessionist disputes. However, the current international system places much weight on the second pragmatic consideration, and perhaps not enough on moral justice. Realistic, legitimate standards must reconcile the difference between theory and practice. Standards which emphasize justice and political moral-

87. See generally, LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 46-58 (1978) (exploring whether there is a "right to secede" as a matter of Natural Law); Sunstein, *supra* note 14, at 669 (noting that a "right to secede" may be "justified as a matter of political morality"). It is submitted that the very use of the term "right to secede" suggests that inquiry and analysis is disproportionately focused on abstract considerations of justice. Secession is perhaps best viewed not as a right, but rather as a concrete solution to a particular political problem.

88. There is an apparent paradox involved in an evaluating Commission being impartial and apolitical, yet applying standards that take into account political realities. These aims are not, however, contradictory in that the apolitical nature of the Commission is meant to prevent the self-interest of individual states from interfering in the evaluation of secessionist claims. However, the Commission by including an objective evaluation of political considerations such as the size and strength of the secessionist entity and parent state, can help insure a recommendation which will not be mooted by events. See *infra* notes 106-109 and accompanying text (discussing why an evaluation of political factors is necessary).

ity to the exclusion of pragmatic considerations can never be successfully implemented, and the benefits of a new system will never be realized.

(i) Traditional Criteria of Statehood

The first guideline for evaluating the merits of a secessionist claim should involve some of the traditional criteria for recognizing a viable state.⁸⁹ The traditional criteria for statehood not only have a special legitimacy given their historic pedigree, but also have real utility in examining secessionist situations. For independence to be a realistic option, there must be a definable territory and population, and a government capable of asserting effective control. Requiring *actual* control over the territory should be de-emphasized, as such a requirement provides incentives to use force. Territorial distinctiveness⁹⁰ is usually considered with the ethnic or cultural distinctiveness of the people inhabiting the land.⁹¹ If independence is to be a realistic option in the near future, a government capable of asserting effective control is a must. Ideally, the government should have been freely elected, have the respect and support of the people, and be "in place" in the territory.⁹² Lack of a government, or the existence of one which is in exile or is self-appointed, militates against a recommendation of secession.⁹³

89. See *supra* note 32 (outlining the traditional criteria).

90. The requirement of an historically distinct territory has already been analyzed by at least one scholar. See Brilmayer, *supra* note 15.

91. Ethnic or cultural distinctiveness of the affected group and territory is almost always present in secessionist disputes, and most scholars consider it an important or essential factor. See, e.g., *infra* notes 99-101 and accompanying text. Professor Brilmayer, however, argues that *territorial* distinctiveness and self-determination of the *territory* are a more appropriate point on which to focus than ethnicity or culture. See Brilmayer, *supra* note 15, at 197-201.

92. See, e.g., Sunstein, *supra* note 14, at 644-45 (discussing the Baltics); David Lawday, *Raised Flag, Rising Heat*, U.S. NEWS WORLD REP., Apr. 1, 1991, at 36 (discussing the breakaway Yugoslav republics).

93. This is one case where pragmatic considerations must to some extent trump considerations of justice. In some cases, it will be impossible for a democratically elected government to be present in the disputed territory. This does not make the claim any less just. In fact, denial by the parent state of democratic elections may make the claim even more just. However, if there is no legitimate government able to assume control of the territory and conduct international relations, then true independence in the immediate future is not possible. International pressure for immediate secession is likely to be completely

(ii) Desire of the Population

The desires of the population of the territory are critical. Secession should only be considered where the population of the territory has freely demonstrated a desire to secede. For this reason, a U.N.-sponsored plebiscite should be required in almost every secessionist situation. The more overwhelming support is for independence, the more seriously the Commission should consider recommending independence. The secessionist claim is particularly strong where groups which would be a minority in the new state show considerable support for independence.⁹⁴ By giving considerable weight to the desires of the population, the international legal system appropriately recognizes the morally legitimate principle of self-determination.

(iii) Commitment to Human Rights and Democratic Principles

The willingness of the secessionist leaders and population to comply with international obligations, human rights law, and the principles of the U.N. Charter, should also be considered. It would be extremely unfortunate if a secessionist territory began to oppress minorities within the territory after independence was achieved.⁹⁵ Although this factor might be difficult to eval-

ineffective and may lead to chaos if the parent state decides to simply withdraw. The secessionist territory is not without hope however. As discussed below, if the claim is otherwise a strong one, the recommendation may include a number of steps (i.e. condemnation of the parent state or pressure to allow elections) which would aid the territory, allow for a legitimate government to take power, and make secession a realistic possibility at some point in the future.

94. Such was apparently the case in Lithuania where over 90% of Lithuanian citizens voted for independence, even though the proportion of ethnic Lithuanians in the republic is only 80%. See Sunstein, *supra* note 14, at 645. Further support is found in Estonia, where 78% of the population voted for secession. *Id.* Estonians only constitute 39% of the population. See Brilmayer, *supra* note 15, at 200. Support of minorities for independence is not only convincing because it illustrates the overwhelming desire of the population for independence, but also because it presents persuasive evidence that minorities will be fairly treated in the new state. Where a large ethnic minority shows determined opposition to secession, an attempt to secede could well provoke a bloody civil war — regardless of how determined the parent state is to maintain control. Such was the case in Bosnia-Herzegovina, where the Serbs, who comprise one-third of the population, boycotted the independence referendum. See *How Yugoslavia Has Broken Down*, U.S.A. TODAY, Aug. 6, 1992, at 2A.

95. This is a very real problem in recent secessionist disputes. See Bruce W.

uate in practice,⁹⁶ history and current attitudes and practices should give the investigatory body insight into how the new state and its government will treat its people, and how it will apportion political, economic, and cultural rights to which the people are entitled.

(iv) Political Autonomy and Unjust Incorporation

In addition to the requirement of territorial distinctiveness is the criterion of political autonomy. A secessionist claim should be viewed more favorably if the territory has a history of being treated as politically separate and of having its own territorial government. If the territory was completely independent at one point, an even stronger claim can be made. Further, if the territory was "unjustly incorporated" into the parent state to which it now belongs, the claim is at its strongest.⁹⁷ The Baltics fall into this last category. Similarly, had Kuwait not been liberated from Iraq, it might have been able to pursue a very strong secessionist claim at a later date. Where an entity has a history of self-government and/or independence, there is an intuitively strong claim that it has a right not to lose these prerogatives.⁹⁸ In addition, a history of politi-

Nelson, *Perils of Nationhood; The Baltics Have Their Independence Back, and Foreign Recognition, But They Won't Be Able to Break Moscow's Grip Right Away*, TIME, Sept. 9, 1991, at 35. Some ethnic Russians living in the Baltic states feared the treatment they would receive if the states gained independence. In Croatia, it is ethnic Serbs who are most fearful of and resistant to secession. See Paul Lewis, *U.N. Chief Wants Troops in Yugoslavia Until Accord*, N.Y. TIMES, Feb. 18, 1992, at A3 (noting that "[e]thnic Serbian fighters opposed to secession . . . oppose Croatian forces").

96. After all, it is unlikely that a secessionist government would inform the U.N. of its intent to rule dictatorially and mistreat minorities.

97. See Addis, *supra* note 48, at 1228 (describing this as "the least controversial justification for secession"). Professor Grazin, in particular, stresses the political component of secessionist movements. See Grazin, *supra* note 3, at 1394 (outlining three political justifications for secession); *id.* at 1395 ("This Article asserts not only that ethnic self-consciousness and objective ethnic criteria are necessary, but that the political dimensions of both are also important for an ethnic minority's right of self-determination to be recognized by the other subjects of international law."). It is important to recognize that the strength of an historical/political claim to secession is one which must be measured on a spectrum. See, e.g., Brilmayer, *supra* note 15, at 197 ("Self-determination claims can be ranked on a spectrum, depending upon the extent to which inclusion of the claimants' territory was wrongfully brought about by the current majority group.").

98. Claims based upon history carry substantial legitimacy. See, e.g.,

cal separateness is persuasive evidence that the territory can successfully exist as a self-governing independent entity in the future.

(v) Discrimination and Oppression by the Parent State

It is hard to imagine a territory wishing to secede without some reason. That reason usually is that the parent state is discriminating against the territory in some way. The oppression or discrimination may be political, economic, religious, or cultural. Often it is due to the fact that the territory is populated by a distinct ethnic or religious minority.⁹⁹ Examples range from violent and blatant oppression of the Kurds in Iraq,¹⁰⁰ to unequal treatment in Basque Spain.¹⁰¹ Secession will not always be the best option in cases of oppression. Often less drastic solutions such as increased autonomy or protection of human rights may be preferable.¹⁰² However, in at least some cases, secession may be the best or possibly the only way for the discriminated group and territory to protect itself.¹⁰³ Discrimination and oppression may also be evaluated on a spectrum — the more severe the oppression, the more weight the investigatory body should give to the secessionist claim.¹⁰⁴ In

Brilmayer, *supra* note 15, at 189 (“[T]he most intuitively appealing and direct territorial claims that one encounters typically have historical origins.”).

99. See Sunstein, *supra* note 14, at 654-66 (discussing the reasons why territories want to secede).

100. See Strobe Talbott, *America Abroad; Iraq: It Could Even Be Worse*, TIME, Sept. 28, 1992, at 49 (discussing the persecution Kurds have suffered for decades); see also QUAYE, *supra* note 7, at 233 (noting the desire of Biafra and Bangladesh to secede after they “had been exposed to gross inhumanity and discrimination by their compatriots”).

101. See HANNUM, *supra* note 58, at 8 (describing Basque Spain and the Punjab in India as examples of “rich regions complaining of exploitation or unequal treatment”).

102. See, e.g., Brilmayer, *supra* note 15, at 185 (“The fact that some states deny certain groups the right to participate does not explain why secession, rather than full participation, is the appropriate remedy.”).

103. See BUCHHEIT, *supra* note 87, at 222 (“[T]he world community has accepted the legitimacy of secession as a self-help remedy in cases of extreme oppression.”); see also Grazin, *supra* note 3, at 1390 (“[T]he people’s right of self-determination is . . . one method of protecting the rights of ethnic minorities [T]he ethnic majority, formerly the minority, is protected through its becoming a nation.”).

104. The spectrum of oppression ranges from genocide, widespread attempts to eliminate a culture, and complete political exclusion (as under apartheid), to

addition, the Commission should take into account a past history of discrimination and the future prospects of oppression. Discrimination which has existed for decades and which is likely to continue is much more serious than that which might occur under a particular short-lived government or policy. Discrimination and oppression are important factors to examine and consider in making recommendations regarding any particular secessionist movement.¹⁰⁵

(vi) Feasibility of Independence: Political, Geographic, and Demographic Factors

In order to ensure that the standards represent a realistic assessment of secessionist claims rather than an abstract academic exercise, the political feasibility of independence should be taken into account. The size, population, and resources of the territory in question should be considered both in absolute terms and relative to the parent state as a whole. The larger and potentially stronger the secessionist entity is, the more seriously its claim should be taken. This is the case for several reasons. First, although there may currently be legitimate independent states of very small size (i.e. Nauru¹⁰⁶), there are good reasons why the international legal system does not want to encourage the creation of more micro-states.¹⁰⁷

government support of the majority religion or a moderate net flow of economic resources away from the territory. See generally Sunstein, *supra* note 14, at 655-61 (oppression as a reason to secede); see also BUCHHEIT, *supra* note 87, at 213-14.

105. This approach is suggested by the U.N. Declaration on Friendly Relations which states that self-determination "may not be permitted in states if the exercise thereof may lead to the disintegration of states whose governments represent all their subjects and do not discriminate against any of them." See *Declaration on Friendly Relations*, *supra* note 46, at 121 (emphasis added).

106. Nauru has a population of under 10,000, an area of 8.2 square miles, and a gross national product of less than \$100 million. See THE 1992 INFORMATION PLEASE ALMANAC 229 (1992).

107. These reasons include international stability, maintenance of the nation-state as the primary player in the international legal system, and economic development (which is generally aided by breaking down borders rather than building them up). See BUCHHEIT, *supra* note 87, at 222 (warning that proliferation of micro-states "would create vast confusion in the current inter-State system and might well defeat [the] purpose of promoting conditions for social and economic welfare by resulting in a proliferation of tiny ethnic communities lacking an economic base or viable political structure"). Without some consideration of size, secession claims begin to border on the absurd. See,

Second, the larger, wealthier, and more powerful the territory is, the more likely it will be a successful participant in the international state system once it achieves independence. Finally, and perhaps most importantly, the larger and stronger the territory is, the more likely it is to engage in a bloody civil war with the parent in order to achieve independence. This political feasibility consideration then, also suggests that the secession standards should take into account how determined the territory is to achieve secession, and its military capability relative to the parent. Since a major aim of a new international legal system is to prevent violence, the standards must give greater weight to the claims of entities that have the capacity to cause prolonged violence. For instance, if the Commission had recommended that Croatia not be independent, it is likely that, given its size, strength, and determination, Croatia would have declared and fought for independence anyway, rendering the Commission's recommendation moot and useless.¹⁰⁸ In order to make a meaningful recommendation then, a review of pragmatic political considerations is a necessary exercise.¹⁰⁹

This "political feasibility" criterion may be the most controversial of the standards herein proposed since it rewards the strong at the expense of the weak. Use of this criterion relies not so much on considerations of morality or legitimacy, but rather on considerations of hard political, geographic, and demographic realities — the more people present in the secessionist territory, the more legitimate its claim would appear to be. However, any system that does not take this criterion into account is likely to be unworkable and unrealistic. Currently,

e.g., id. at ix (discussing the situation of "the Hutt River Province — a twenty-nine square mile section of Western Australia whose thirty inhabitants served a formal notice of secession on the Australian government in 1970").

108. The argument also holds true in reverse — if the parent has the ability and desire to completely and easily suppress the secessionists, a recommendation of secession is likely to be worthless. As discussed *infra* note 112 and accompanying text, Lithuania, circa 1980, presents one potential example. Modern Tibet may present another.

109. A pragmatic standard requires in part that the investigatory body predict what will happen in the event of international inaction, and then issue a recommendation that takes this into account. Independence might be recommended to prevent a war when ultimate independence is the likely result of such a war. On the other hand, a more limited proposal for increased autonomy and protection of minority rights would be appropriate when probable quick and successful suppression of the secessionist movement is to be expected.

size and strength is essentially the *only* factor determining whether a secessionist movement succeeds. A system which relegates size and strength to the role of one consideration among many allows for more legitimate and principled considerations to play a greater role, while preserving the possibility that such a system can actually be implemented. Any new legal system must acknowledge the impossibility of creating an entirely just, entirely legitimate system in the "real world", particularly where the current system is dominated by a lack of these characteristics. Changes in the system must therefore be directed at securing as much improvement as possible without creating a structure which is too utopian, idealistic, and fragile to be successfully implemented. If it wants to be taken seriously, the investigatory body has little choice but to examine and consider political, geographic, and demographic factors in formulating its recommendations.

(c) Making the Recommendations: How the Standards Might Work in Practice

The investigatory body's report should make explicit findings with regard to each of the standards. This, in itself, would greatly clarify secessionist issues. However, the Commission should also issue a concrete recommendation, taking into account each of its findings. The recommendation would not only be a product of how strong the secessionist claim is under the standards, but also of how polarized the situation is — the stronger the claim and the more polarized the situation, the more willing the Commission should be to recommend full secession. In other words, where parties on both sides are still flexible in their positions and where tension and violence have not yet escalated to a critical point, the Commission should be more willing to encourage continued negotiation and perhaps even suggest compromise solutions. However, where it has become apparent that the secessionists will fight to achieve full independence and the parent state is willing to fight to stop them, the Commission's recommendations must be much more firm and should be confined to either recommending independence or continued incorporation in the parent state.¹¹⁰

110. The situation in Croatia and Slovenia in late 1991, and early 1992, is a good example of this "polarized" case. Given the sixth standard discussed in

Although the lack of an impartial ascertainment of the facts, such as would be provided by the investigatory body, prevents us from knowing how the process would have worked, and what recommendations would have issued in past secessionist disputes, it is possible to theorize about what might have occurred had the proposed system been in place. By so doing, it is possible to better understand how the standards might operate in the future. If the secessionist governments of Slovenia and Croatia had presented their claims to the Commission in late 1991, or early 1992, it is likely that the existence of a separate territory, a functioning democratic government, a history of political autonomy, and a clearly expressed desire of the population for independence would have supported a claim of secession. Although the level of discrimination by the parent state, and the commitment of the new governments of Slovenia and Croatia to human rights and democratic principles was not entirely clear, there is no evidence that these factors would have weighed so strongly against secession as to have severely impaired the strength of the claim. Perhaps the most important consideration in the case of these secessionist entities is that Slovenia and Croatia were (and are) relatively large, well-populated areas that possessed their own militias which were ready, willing, and able to fight for independence. Thus, the presence of necessary conditions for secession (definable territory, government, and desire of population) combined with pragmatic political considerations and a moderately strong moral claim, suggest that the Commission would have issued a recommendation that Croatia and Slovenia be allowed peacefully to secede, and that they should already be treated as independent states by the international community.

In the case of Lithuania, if that state had brought a claim in mid-1990, it is also possible that a recommendation for secession might have issued, but for somewhat different rea-

supra note 106-109 and accompanying text (the size, strength, and determination of the movement), where a secessionist movement is prepared to fight and has enough strength to cause a long and bloody war, a recommendation of secession is perhaps the best and only option, assuming the other five standards indicate that the secessionist claim has merit. On the other hand, if the secessionists represent only a minority of the population, as exists in the Basque provinces, then even a willingness to fight is not sufficient to warrant a recommendation of secession. See Brillmayer, *supra* note 15, at 194 (noting that "only eighteen percent of the Basques are said to support secession from Spain").

sons. Lithuania also met the minimum necessary conditions — definable territory, functioning government, and strong desire of the population for independence. Under the standards set forth above, it had a very strong claim in terms of morality and legitimacy. There was a history of political autonomy and unjust incorporation as well as a strong commitment to democracy and minority rights on the part of the new government.¹¹¹ Pragmatic political considerations though, were somewhat more problematic. Lithuania was dwarfed by the U.S.S.R. and thus, the parent state could violently crush the secessionists if it felt it necessary to its critical interests. On the other hand, Lithuania was large enough to constitute a viable state, and its population was determined to assert independence. The Commission's recommendation would probably have acknowledged the strong moral claim of Lithuania to independence and would probably have urged a negotiated settlement, including possible secession. Alternatively, it might have recommended that the U.S.S.R. and world community take affirmative steps to allow a peaceful secession. However, it is questionable whether the Commission should have or would have recommended that the world community treat Lithuania as an independent state — since unilateral Soviet suppression could quickly render such a recommendation moot. Thus, the standards in this case would have produced a recommendation which took into account the legitimacy of the Lithuanian claim as well as the political reality of asserting such a claim and which might have moved the situation towards a satisfactory resolution.

The situation in Lithuania in 1990, might usefully be compared to the situation in Lithuania in 1980. Applying the standards in 1980 would probably not have resulted in a recommendation of secession¹¹² since at that time, there was no secessionist-minded government in place nor was there any firm indication that the population desired secession. More importantly, an analysis of the political situation would quickly

111. It is important to note that the functioning government was democratically elected and that a substantial proportion of ethnic minorities *supported* independence, thus providing persuasive evidence that the government was willing to accord the minorities fair and proper treatment. *See supra* note 94.

112. It is questionable that an investigation would even have taken place since the initial screening would probably have determined that the claim had no reasonable chance of success.

determine that the U.S.S.R. could and would rapidly and perhaps violently suppress any attempt at secession. Thus, if the Commission were to issue any recommendation at all, it would likely have been a relatively mild one which directed the Soviets to respect the rights of the Lithuanians and allow them to freely express their political desires.

The Canadian-Quebec dispute presents an illustration of an instance where a Commission recommendation should be very restrained. Given the fact that the dispute has not become polarized or prone to large-scale violence, and given that both sides are still engaged in vigorous negotiation, a recommendation should probably just summarize findings, note that the secessionist claim has at least some merit, and strongly encourage the parties to continue negotiation towards a mutually acceptable solution. The recommendation would urge the world community to offer any assistance to the negotiation process as may be useful and to recognize the result of such negotiation.

Finally, application of the standards to the situation in the Basque provinces illustrates one situation in which a recommendation of continued incorporation might be entirely appropriate. There is some evidence that the vast majority of the Basque population wishes to remain part of Spain.¹¹³ If this is in fact true, a necessary condition for secession is lacking, and the other standards become virtually irrelevant. A recommendation in such a case¹¹⁴ might be for Spain to hold a referendum in the provinces to ascertain the population's desire, or it might simply caution Spain to respect the separate culture of the Basques. Most likely, a recommendation would note that the secessionist claim has little merit and suggest that the provinces should remain an integral part of Spain. Spain would be free to suppress violent secessionists as it felt necessary.

The standards outlined herein are one possible set of guidelines. A vigorous academic debate followed by international negotiation would be the best way to formulate actual standards. These suggested standards, however, indicate that it is possible to formulate criteria that are both principled and

113. See Brilmayer, *supra* note 15, at 194 (noting that "only eighteen percent of the Basques are said to support secession from Spain").

114. As previously noted, a weak claim such as this is not likely to get beyond the initial screening stage. See *supra* notes 77-79, 112 and accompanying text.

pragmatic, and that are agreeable to the international community. Such standards can be usefully applied by an impartial body to a wide variety of real world situations in order to formulate workable, concrete recommendations.¹¹⁵

3. Enforceable Decisions

At the completion of the investigation, the U.N. investigatory team will release its report, including all of the relevant facts and recommendations, and based on the consensual legitimate criteria, to the General Assembly, the Security Council, and the public at large. The moral force and effect on world opinion of these recommendations will be great, and may help encourage a resolution of the dispute by the parties themselves. However, further U.N. action will often be necessary. There must be a commitment on the part of the General Assembly and/or Security Council to implement the recommendations. Such a report should create a climate in which implementation of the recommendations is almost pro forma.¹¹⁶ Implementation may include the offering of mediation, the sponsoring of a plebiscite, or the sending of peacekeepers. Resolutions encouraging various forms of increased autonomy are also an option, as well as recommendations for full independence. In that case, the U.N. should pass resolutions declaring the right of the secessionist entity to independence and encouraging the parent state to adhere to that decision.¹¹⁷ If the parent state refuses, various forms of sanctions, especially economic, should be

115. For a comprehensive, alternate system for evaluating the legitimacy of secessionist claims, see BUCHHEIT, *supra* note 87, at 216-45.

116. There is, however, always the possibility that the individual states of the U.N. will believe it to be against their political interest to implement the recommendations and will therefore refuse to take action. However, the risk of such refusal under the proposed new system is less than under the current system. The hypocrisy of states voting against an impartial, carefully justified recommendation would be uncomfortably apparent.

117. Since the concept of "recognition" tends to confuse the normative with the descriptive, it should probably not be used. Where a secessionist entity *ought* to be independent, the U.N. can say simply that and take actions to secure that end. Where a secessionist entity *is* for all intents independent, as where the parent state has chosen not to challenge independence, the U.N. can offer membership to the new state. Under the new system, violence should be reduced in secessionist disputes, and parties are more likely to abide by U.N. decisions. Thus, the normative and the descriptive will merge. As soon as the U.N. declares that the entity is deserving of full independence, it becomes independent.

imposed.¹¹⁸ The costs to the parent state in terms of its world image, its moral legitimacy, and its economic health, should be made great.¹¹⁹

The system described above will not work in every case. There may be some cases such as the above hypothetical involving Lithuania, circa 1980, where action by the U.N. would be pointless or even counterproductive.¹²⁰ However, by depoliticizing the issues, by encouraging early impartial international action, by establishing a system where successful use of force is all but irrelevant to ultimate success, and by destigmatizing secession, the international community can create a new system for dealing with secessionist claims which minimizes violence, preserves stability, and maximizes opportunities for self-determination. Any infringement on traditional state sovereignty is justified by the potential advantages to the world order. The proposed new system also resolves the dilemma stated in the "Introduction" to this article, involving the potential friction between articles 2(4) and 2(7) of the U.N. Charter. Under the new system, any secessionist claim with sufficient merit to warrant U.N. investigation creates a dispute which is not solely a matter of "domestic jurisdiction" and which is subject to the presumption against the use of force. Whether the

118. Both the Security Council and the General Assembly (where it may be easier to pass resolutions given the absence of permanent members' vetoes) can play a role here in implementing sanctions. Even though only the Security Council can pass binding economic sanctions pursuant to article 41 of the U.N. Charter, the General Assembly may pass resolutions under article 18 condemning the actions of the parent state and "recommending" that member states individually take action against the parent state. U.N. CHARTER, arts. 18, 41.

119. In spite of the failure of economic sanctions against Iraq, such sanctions combined with moral reproach from the world community can be surprisingly effective. South Africa is one example where such action brought about the demise of a distasteful system. World community action against Algeria is perhaps another example. See WRIGHT, *supra* note 8, at 424 ("The influence of the United Nations, particularly the General Assembly, in the institution of negotiations between France and the FLN in the Algerian war is . . . indication of its potency.").

120. The fact that implementation and enforcement of the recommendations is a task performed by the political organs of the U.N. presents an important check on the Commission's recommendations. Recommendations, as well as enforcement and implementation measures that are politically unrealistic or that are too intrusive on state sovereignty, will never become a reality. See *Developments in the Law — International Environmental Law*, 104 HARV. L. REV. 1484, 1522-24 (1991).

entity is already "recognized" as a state becomes largely irrelevant.

IV. CONCLUSION: PROSPECTS FOR REAL REFORM

A tendency in academic commentaries on international law is to propose legal solutions which have little chance of succeeding in a "real world" dominated by politics and self-interest. There is reason to believe that new rules for dealing with secessionist claims along the lines herein suggested are a realistic possibility. Recent interest in concerted international action, as evidenced by U.N. action in Iraq, Cambodia, and Croatia, and as shown by the reduction in the respect accorded traditional sovereignty claims, suggests that these proposals would receive a positive reception unthinkable only a few years ago. The end of the Cold War is another encouraging factor in international cooperation. Previously, the United States and the former Soviet Union may have been unwilling to criticize allies who were unjustly suppressing secessionist movements (i.e. Turkey and the Kurds) out of a fear that such criticism would play into the hands of their arch-rival. Now that maintaining a "united front" is less important, allies may be criticized if their conduct fails to measure up to international standards. The fear that the kind of system discussed herein would embarrass a close ally is significantly less troublesome. Finally, recent secessions in the Baltics and Yugoslavia may have helped reduced some of the fear and stigma associated with secession. States no longer have to regard secession as an unadulterated evil to be resisted at all costs.¹²¹

Since none of these reforms would require a Security Council resolution,¹²² the support of only two-thirds of existing

121. The situation in Czechoslovakia may be the best evidence that recent secessions have had a positive impact. At the time of this writing, Czechs and Slovaks are continuing to negotiate over their future. Violence is at a minimum and both sides seem to be realistically contemplating options for the future. See, e.g., Rupnik, *supra* note 85, at 16.

122. Initial review of petitions from secessionist movements could be achieved by a General Assembly resolution authorizing a subsidiary organ to undertake this function. Perhaps, an existing organ could even take the initiative on its own as part of its already-assigned duties. As discussed *supra* notes 79-81 and accompanying text, authorizing an investigation might or might not require action by the Security Council or General Assembly — action by either though would probably suffice. Finally, implementing the recommendations of an

states would be sufficient to achieve full implementation. Although some opposition to elements of this proposal is to be expected, the overall merits of the proposed new system — leading to decreased violence and increased stability — should persuade many states to support these concepts.¹²³ By internationalizing and depoliticizing the issues, difficult decisions involving secessionist movements will be removed from the hands of individual states. While some states might consider the disadvantage of inability to use the situation for political advantage, the majority would probably consider it a great advantage to be able to avoid these difficult, sensitive decisions. Individual states would no longer be faced with the “damned if you do, damned if you don’t” dilemma of whether or not to recognize a secessionist movement.¹²⁴ They could simply follow the study group’s recommendations and thereby be insulated from criticism. Because a new system for dealing with secessionist movements would help to make the world more orderly and more peaceful, there is good reason to believe that a sufficient number of states would be willing to make it a reality.¹²⁵

investigatory team would require *either* General Assembly or Security Council action. *See supra* note 118.

123. *See* BUCHHEIT, *supra* note 87, at 245 (“Surely it is wiser, and in the end safer, to raise secessionist claims above the present ‘force of arms’ test and into a sphere in which rational discussion can illuminate the legitimate interests of all concerned.”).

124. *See* R.R. Baxter, *Foreword in* GALLOWAY, *supra* note 32, at x-xi (discussing the dilemma faced by the United States in deciding when to recognize, and analyzing the risks of recognizing too early or too late).

125. *Cf.* Grazin, *supra* note 3, at 1386 (“International law and the existing world order have to meet a serious challenge: whether to preserve themselves untouched at the price of negating certain rights of some nations, or to accept general political and legal principles that may change the political map in the course of a renaissance of nations that are not members of the world community today.”). Even though the success of some secessionist movements may lead other entities to push for independence, the fears of some that states would undergo widespread fragmentation are unjustified. The advantages of union are ever more apparent in the modern, interdependent world, a fact to which the twelve nations of the E.C. can attest. Furthermore, the system discussed above is not likely to lead to an outbreak of successful secessionist movements if only because the system and criteria still favor secession in very limited circumstances. Although the international community may be presented with many more secessionist claims, the recommendation in most cases is much more likely to be limited to suggesting continued negotiation or greater autonomy than to recommending complete independence. In fact, ideally, the system would only

The world has seen dramatic, virtually unimaginable changes in the past two or three years. The trend away from confrontation and violence and towards compromise and peaceful resolution of disputes continues to increase. Numerous bloody conflicts, which seemed likely to continue indefinitely, have been resolved — Nicaragua, El Salvador, Namibia, Angola, Cambodia, the Baltics, and Croatia all come to mind. The referendum in South Africa and Arab-Israeli negotiations are two more recent examples of desires by peoples to resolve conflicts without further violence. Current law and practice regarding secessionist movements is an anachronism better suited for the 19th century than for the 21st. The time has never been riper for real reform.

bring about secession where there was a good chance that it would have occurred anyway.