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## Note

# Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession

Aaron Kreuter\*

### INTRODUCTION

Two distinct regions divide modern-day Somalia. On one hand, this division is geographical. On the other, it cuts much deeper, between peace and violence, and stability and instability. Clan tensions, widespread civil war, and maritime piracy mar the southern half of the country.<sup>1</sup> The government is powerless to combat the instability, resulting in an exodus of Somali refugees into the nearby countries of Kenya and Yemen.<sup>2</sup> The lives of the residents in the south consist of a struggle for survival amidst violence and anarchy.<sup>3</sup>

The situation in the north, the region of Somaliland, is conspicuously different.<sup>4</sup> Until the middle part of last decade, the inhabitants of the region participated actively in the civil

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1. Robert Draper, *Shattered Somalia*, NAT'L GEOGRAPHIC, Sept. 2009, at 76–77; see also Austin Bay, *The Pirates of Puntland*, WASH. TIMES, Nov. 28, 2008, <http://www.washingtontimes.com/news/2008/nov/28/the-pirates-of-puntland> (discussing the use of Somalia as a base by the pirates of Somalia).

2. Draper, *supra* note 1, at 77.

3. *Id.* at 79 (“Asked to recall memories of when life was good, Mohammed stares out toward sea. His smile is not of the youthful kind. ‘I don’t remember any,’ he says.”).

4. See *id.* at 86. There is another region in north Somalia known as Puntland, to the east and distinct from Somaliland. Though the populations are similar, Puntland is geographically smaller and significantly more politically unstable than Somaliland. See Bay, *supra* note 1.

war that continues to rage in the south.<sup>5</sup> In 1996, however, the leaders of the northern clans agreed to cooperate in a peace conference where they gathered “to reconcile clan conflicts at what one participant call[ed] ‘the Guinness record kind of conference—months of talking and finally agreeing on a charter to set up a government. And while we were having this conference, out in the countryside, everyone came and put their guns under a tree.’”<sup>6</sup> Since the people of Somaliland unilaterally decided to pursue peace, the region has enjoyed a period of relative stability.<sup>7</sup> It has not enjoyed corresponding economic prosperity, however, partly because Somaliland is unable to form meaningful relationships with other nations, who refuse to recognize the government of Somaliland as independent from Somalia.<sup>8</sup> For this reason, the people of Somaliland wish to secede from Somalia, but no government currently recognizes their right to independence.<sup>9</sup>

This Note seeks to analyze Somaliland’s assertion of independence in light of international norms and theories of self-determination and secession, and to propose a solution to the deficiency in the law as it currently stands. Part I outlines the principles of statehood, the various legal standards of self-determination, the legal justifications for secession, and the right to territorial integrity. Part I also discusses political problems with recognizing seceding states, and the recent history and status of Somaliland and Somalia. Part II discusses the applicability and implications of each of the various legal standards and theories as they relate to Somaliland’s case for secession. This Part concludes that under the current international standards, Somaliland lacks a sufficient legal basis to separate and become an independent, sovereign nation. Part III lays out an answer to this problem whereby, in limited circumstances, citizens within a failed state may justifiably secede.

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5. Draper, *supra* note 1, at 86.

6. *Id.*

7. Scott Baldauf, *In Somalia’s Break-Away Corner, an Oasis of Stability*, CHRISTIAN SCI. MONITOR, June 11, 2009, at 6.

8. *See* Draper, *supra* note 1, at 86.

9. *The Nation Nobody Knows*, ECONOMIST, Apr. 14, 2001, at 42 (“Somaliland is not recognised as independent by anybody . . .”).

I. THE FOUNDATIONS OF STATE INDEPENDENCE:  
ISSUES OF STATEHOOD, SELF-DETERMINATION,  
AND TERRITORIAL INTEGRITY

A. TWO COMPETING THEORIES OF STATEHOOD

The Montevideo Convention on the Rights and Duties of States of 1933 is often cited as a primary international legal instrument defining the concept of statehood.<sup>10</sup> It contains the following prescription: a state “shall constitute a sole person in the eyes of international law.”<sup>11</sup> For this reason, “States are juridically equal, enjoy the same rights, and have equal capacity in their exercise.”<sup>12</sup> To be a state, a territory must have “a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”<sup>13</sup> Furthermore, “The political existence of the state is independent of recognition by the other states.”<sup>14</sup>

The Montevideo Convention is the clearest statement of the declaratory theory of statehood.<sup>15</sup> The declarative theory requires two things: that the prospective state meets each of the four elements listed above and that the state declares its sovereignty.<sup>16</sup> Thus, statehood does not depend on recognition or acknowledgement by other nations.<sup>17</sup> The United Nations has contributed to the development of this theory since the time of the Montevideo Convention by acknowledging the importance of democracy, equal rights, and respect for self-determination.<sup>18</sup> Some argue, however, that in practice, states place at least some

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10. See generally, Eric Ting-Lun Huang, *The Modern Concept of Sovereignty, Statehood and Recognition: A Case Study of Taiwan*, 16 N.Y. INT'L L. REV. 99, 111–12 (2003) (citing the Montevideo Convention as a key document in determining a modern state's statehood and sovereignty).

11. Convention on the Rights and Duties of States art. 2, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

12. *Id.* art. 4.

13. *Id.* art. 1.

14. *Id.* art. 3.

15. Brad Poore, Note, *Somaliland: Shackled to a Failed State*, 45 STAN. J. INT'L L. 117, 136 (2009).

16. Huang, *supra* note 10, at 116 (“[A] political entity that acquires the criteria for statehood does not become a state unless it declares that it is an independent sovereign state. This is derived from international custom that a declaration of the establishment of a state is necessary to create a new state.”).

17. See Poore, *supra* note 15, at 136 (“[T]he theory holds that a state exists when four conditions are met, regardless of political recognition.”).

18. See Huang, *supra* note 10, at 116–18 (discussing the evolution of the declarative theory since the advent of the United Nations).

importance on the issue of recognition by other states.<sup>19</sup>

The practical importance of recognitions has led to a second theory—the constitutive theory of statehood.<sup>20</sup> Proponents of this theory assert that a state becomes a legal person once other nations recognize it as such.<sup>21</sup> Recognition occurs when a nation publicly accepts the existence of the state.<sup>22</sup> This theory, despite having fallen out of favor during the decades since World War II,<sup>23</sup> has lately enjoyed a modest resurgence.<sup>24</sup> Nevertheless, critics argue that this approach leads to uncertainty, especially when some nations choose to recognize a state but others do not.<sup>25</sup> They also contend that it hinders the exercise of the right of self-determination because it places more importance upon the judgment of the recognizing nation than upon the rights of the state exercising self-determination.<sup>26</sup>

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19. See, e.g., William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115, 119 (2009) (discussing criticisms of the declarative theory, including that state practice may not support it and that recognition may be more important to statehood).

20. *Id.* at 118 (“The constitutive theory provides that a state is only a state upon the political act of recognition by other states.”).

21. See Poore, *supra* note 15, at 136.

22. See K. William Watson, *When in the Course of Human Events: Kosovo's Independence and the Law of Secession*, 17 TUL. J. INT'L & COMP. L. 267, 288 (2008) (“An entity aspiring to the legal status of statehood effectively requires the acceptance of its potential peers.”).

23. See generally, Hersch Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 420 (1944) (“States . . . enter into legal relations with one another in conformity with their own will by virtue of the act of recognition. Prior to that act no relations of a legal nature can exist between them.” (citing G. W. F. Hegel, ENZYKLOPADIE DER PHILOSOPHISCHEN WISSENSCHAFTEN IM GRUNDRISSE §§ 545, 547 (Rosenkranz ed., 1870))).

24. See Worster, *supra* note 19, at 120.

25. *Id.* The current situation in Kosovo is one such example of this uncertainty. The issue of Kosovar secession is currently before the International Court of Justice, in light of the uncertainty caused by recognition by the U.S., U.K., and France (among others) and the refusal to recognize by countries like Serbia and Russia. G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=0>; see also Christopher J. Borgen, *The Language of the Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 6–7 (2009).

26. See Worster, *supra* note 19, at 120 (“Some have argued that the declaratory theory emerged because of objections to the discretion of states, as well as a principled acknowledgment of the role of self-determination.”).

## B. THE DEVELOPMENT OF LEGAL STANDARDS RELATED TO SELF-DETERMINATION

The modern concept of self-determination has its roots in a speech before Congress by President Woodrow Wilson in 1918.<sup>27</sup> In this speech, Wilson announced fourteen points for “a program of peace” that he felt would protect the world from a repeat of the horrors of the First World War.<sup>28</sup> The fifth point stated that, when “determining . . . questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.”<sup>29</sup> Citizens of a country, President Wilson argued elsewhere, had “a right to choose the sovereignty under which they shall live.”<sup>30</sup>

Despite both the passage of nearly a century since President Wilson’s speech and the prominent status of the right to self-determination within various international treaties and instruments,<sup>31</sup> no norm has emerged which comprehensively

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27. The concept of self-determination, however, is older than Woodrow Wilson’s Fourteen Points. The French Revolution is one notable example of early self-determination efforts. Borgen, *supra* note 25, at 4; *see also* Christopher J. Borgen, *Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia’s “Frozen Conflicts”*, 9 OR. REV. INT’L L. 477, 482–83 (2007) (detailing the rise of the self-determination concept during the early part of the 20th century).

28. President Woodrow Wilson, Address to Congress (Jan. 8, 1918) (“What we demand . . . is that the world . . . be made safe for every peace-loving nation. . . . All the peoples of the world are in effect partners in this interest. . . . The program of the world’s peace, therefore, is our program . . .”).

29. *Id.*

30. President Woodrow Wilson, Gridiron Dinner Address (Feb. 26, 1916) *in* THE POLITICS OF WOODROW WILSON: SELECTIONS FROM HIS SPEECHES AND WRITINGS, at 260 (August Heckscher ed., 1956).

31. *See, e.g.*, U.N. Charter art. 1, para. 2 (“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”); Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 2, July 4 1992, 31 I.L.M. 1488, 1498 (1992) [hereinafter Badinter Commission] (“[T]he principle of the right to self-determination serves to safeguard human rights.”); International Covenant on Economic, Social, and Cultural Rights art. 1(1), Dec. 16, 1988, 993 U.N.T.S. 3 (“All peoples have the right of self-determination.”); International Covenant on Civil and Political Rights art. 1(1), Mar. 23, 1976, 999 U.N.T.S. 171 (“All peoples have the right of self-determination.”); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, Annex, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8028 (Oct. 24 1970) [hereinafter Declaration on Friendly Relations] (“[A]ll peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right . . .”).

defines the scope of the right to self-determination.<sup>32</sup> Numerous cases evince this lack of clarity—as in Indonesia, the Democratic Republic of Vietnam, Algeria,<sup>33</sup> and more recently, Kosovo and South Ossetia.<sup>34</sup> Academic commentators also disagree as to the meaning of both the declarative and constitutive theories of self-determination; some contend that a broad application is proper in order to reconcile international legal disputes, and others say that such theories serve no practical purpose other than as tools of analysis.<sup>35</sup>

Notwithstanding the differing interpretations of the right to self-determination, three international legal principles have emerged in regard to nascent state sovereignty. The most established of the three principles holds that a colonized region has a right to self-determination—that is, a right to determine its future free from the interference of a colonizer.<sup>36</sup> Today, because the pervasiveness of colonialism has dwindled since

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32. See Peter Hilpold, *What Role for Academic Writers in Interpreting International Law? A Rejoinder to Orakhelashvili*, 8 CHINESE J. INT'L L. 291, 292 (2009) (“[T]here can be no doubt that the law of self-determination is one of the most non-transparent areas of international law, in which the drafters of the relevant norms played with ambiguity and half-hearted concessions and denials.”); Jure Vidmar, *International Legal Responses to Kosovo’s Declaration of Independence*, 42 VAND. J. TRANSNAT’L L. 779, 808–09 (2009) (discussing the need to “clarify the ambiguities associated with the applicability of the right of self-determination in non-colonial contexts”).

33. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 258–60 (1979) (detailing the self-determination efforts of each of the three countries, and how the self-determination efforts of each led to independence).

34. See Borgen, *supra* note 25, at 7 (discussing remaining questions regarding self-determination in the context of Kosovo and South Ossetia, including “what the scope of the right would be—who can claim a right to self-determination and what right does that entail?”).

35. The clearest example of this debate can be found in the series of articles and responses between Hilpold and Orakhelashvili. Compare Hilpold, *supra* note 32, at 292–93 (“The principle of self-determination is one of the most powerful intellectual tools allowing for changes in an otherwise static international community. . . . [I]t must be considered that the international community is formed by States holding widely different opinions on many issues, among them the right to self-determination.”) with Alexander Orakhelashvili, *The Kosovo UDI between Agreed Law and Subjective Perception: A Response to Hilpold*, 8 CHINESE J. INT’L L. 285, 287 (2009) (“Theory in this particular context is valuable only to the extent that it conceptualizes the principle of self-determination as is actually accepted as part of international law; short of that, theory becomes little more than the advancement of one’s personal perception.”).

36. See Declaration on Friendly Relations, *supra* note 31, at 124 (citing the Declaration’s partial purpose “[t]o bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned”).

World War II under the influence of the United Nations,<sup>37</sup> this method of self-determination has limited relevance.<sup>38</sup> Second, international custom recognizes a right to internal self-determination—that is, dissatisfied constituents have the right to use existing political processes as a tool for self-determination.<sup>39</sup> Finally, international custom also recognizes *external* self-determination—that is, secession.<sup>40</sup> When secession occurs against the wishes of the parent state, it is rarely acknowledged.<sup>41</sup> For example, the United Nations refuses to admit into membership states which have illegally seceded.<sup>42</sup>

### C. THOUGH THE LAW OF SECESSION IS NOT SETTLED, THREE METHODS OF SECESSION EXIST

The law of secession remains largely unsettled, reflecting the ambiguity surrounding the law of self-determination. Case law over the last century fails to identify a definite standard that fully remedies this lack of clarity.<sup>43</sup> Academic commentators disagree as to the applicability to secession of any of the legal standards of statehood and self-determination,<sup>44</sup> and

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37. See Pamela Epstein, *Behind Closed Doors: "Autonomous Colonization" in Post United Nations Era—The Case for Western Sahara*, 15 ANN. SURV. INT'L & COMP. L 107, 135–36 (2009) ("Member states [in the U.N.] are under a duty to bring about a speedy end to colonialism, including due regard for the freely expressed will of the peoples concerned.").

38. See Vidmar, *supra* note 32, at 808.

39. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 282 (Can.) ("The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."); see also Borgen, *supra* note 25, at 9 ("[S]elf-determination means the right to be free from external interference in its pursuit of its political, economic, and social goals.").

40. Vidmar, *supra* note 32, at 814.

41. See *id.* at 809 ("[I]n the absence of a relevant constitutional provision or specific approval by a parent state, the question of secession is much more disputable.").

42. See James Crawford, *State Practice and International Law in Relation to Unilateral Secession*, in SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED 31, 32 (Anne F. Bayefsky ed., 2000) ("Outside the colonial context, the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede. There is no case since 1945 where it has done so.").

43. See, e.g., *Report Presented by the Council of the League by the Commission of Rapporteurs*, The Aaland Islands Question, League of Nations Council Doc. B7 (1921) [hereinafter Aaland Islands Report]; see also Reference re Succession of Quebec, 2 S.C.R. at 277–78; Badinter Commission, *supra* note 31, at 1497–99.

44. See *supra* note 35 and accompanying text.



even whether secession is within the scope of international law.<sup>45</sup> Most argue that secession falls foremost within the auspices of domestic law rather than international law.<sup>46</sup> The use of domestic law to secure secession and independence is termed “bilateral” secession. In practice, two things can together justify bilateral secession: “a clear expression of democratic will” by those wishing to secede,<sup>47</sup> and negotiations between the secessionists and the parent country.<sup>48</sup> In this way, the parent country grants independence in response to democratic pressure, effectively justifying secession.

When the parent state is unwilling to negotiate, however, the outcome is less clear. Certain historical cases indicate that a second “unilateral”<sup>49</sup> or “remedial”<sup>50</sup> method of secession is justified. The Aaland Islands Case in 1921<sup>51</sup> articulated the following requirements for justifiable secession when the parent state opposes it: 1) those wishing to secede were “a people”;<sup>52</sup> 2) they were subject to serious violations of human rights at the hands of the parent state; and 3) no other remedies were available to them.<sup>53</sup> The Supreme Court of Canada applied a

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45. Borgen, *supra* note 27, at 485 (“[I]nternational law is silent as to secession, which is viewed as a matter of domestic law and politics, not international law.”); Special Comm. on European Affairs of the N.Y. City Bar, *Executive Summary: Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, 14 ILSA J. INT’L & COMP. L. 379, 383 (2008) [hereinafter Special Committee] (“[I]nternational law has little to say as to any supposed ‘right’ to autonomy.”).

46. See Borgen, *supra* note 25, at 8; see also Special Committee, *supra* note 45, at 383 (“[G]rants of ‘autonomy’ are largely issues of domestic law.”).

47. Reference re Succession of Quebec, 2 S.C.R. at, at 264–65.

48. *Id.* at 265–66.

49. *Id.* at 264 (describing this form of attempted secession as “unilateral”).

50. See, e.g., Vidmar, *supra* note 32, at 814–18 (describing the form of attempted secession as “remedial” when a parent state opposes it and is unwilling to negotiate).

51. This case concerned a collection of islands that were historically under Finnish control, through referendum, but sought to become Swedish. Aaland Islands Report, *supra* note 43, at 21. In this case, the League of Nations concluded that, as long as the people of the Aaland Islands were granted a measure of self-determination, they had no right to secede from Finland and be annexed by Sweden. *Id.* at 29 (concluding that 1. the Aalanders deserve “protection and support” in their status as an ethnic minority; 2. annexation is not the only option in this case; and 3. the “Finnish State is ready to grant the inhabitants satisfactory guarantees and faithfully to observe the engagement which it will enter into with them”).

52. The definition of “people” is somewhat ambiguous. See Vidmar, *supra* note 32, at 810–12. Nonetheless, “the term ‘people’ has been used to signify citizens of a nation-state, the inhabitants in a specific territory being decolonized by a foreign power, and ethnic groups.” Borgen, *supra* note 25, at 7–8.

53. Borgen, *supra* note 25, at 8.

similar standard in its decision on the secession of the Province of Quebec in 1998.<sup>54</sup> If a state seeking independence can present evidence of these factors, most commentators would argue it likely has a basis for justifiable secession.<sup>55</sup>

Finally, the secessionists may attempt to secede by simply declaring themselves independent from a parent state.<sup>56</sup> This occurs without a blessing from the parent state or justification under the unilateral standard discussed above.<sup>57</sup> Such de facto secession is the most difficult to justify and may in fact be unjustifiable.<sup>58</sup> Some suggest that the only possibility for justification in the case of de facto secession occurs through recognition of the secessionists' independence by other nations.<sup>59</sup> This can be especially difficult because, as one commentator has noted, it is not "easy to formulate any satisfactory test for determining the statehood of the seceding entity before its complete success." That is, there is no way to analyze claims to statehood until secessionists have successfully separated from their parent state.<sup>60</sup>

#### E. POLITICAL CONSIDERATIONS OBSCURE THE LEGAL PRINCIPLES SURROUNDING SECESSION

In practice, application of the legal theories of secession is rarely as precise as each of the theories discussed above might indicate. This is because, in addition to the legal considerations, politics often gets involved.<sup>61</sup> Given the often-unclear nature of

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54. Reference re Succession of Quebec, [1998] 2 S.C.R. 217, 281, 284–86 (Can.) (laying out three requirements including that the seceding group are a "people," "governed as part of a colony, or subject to alien subjugation, domination or exploitation," and when it is deprived of "the meaningful exercise of its right to self-determination").

55. See Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137, 145–46 (2010) (discussing the current norms regarding unilateral, or remedial, secession).

56. See Vidmar, *supra* note 32, 818.

57. See *id.* at 817–18.

58. Cf. Reference re Succession of Quebec, 2 S.C.R. at 296 ("[R]ecognition, even if granted, would not, however, provide any retroactive justification for the act of secession.").

59. This, of course, presupposes a system that assigns significant legal weight to acts of recognition, as in the constitutive theory of statehood. *Id.* ("The ultimate success of such a secession would be dependent on recognition by the international community.").

60. Crawford, *supra* note 33, at 262.

61. See Sterio, *supra* note 55, at 140 (arguing that the current norm of external self-determination "inappropriately mixes the legal with the political realms").

the legal principles of secession, and given the absence of any governing international legal body,<sup>62</sup> political incentives often play a more significant role than legal norms in motivating states to recognize seceding territories as independent states.<sup>63</sup>

The influence of politics on the legal issue of self-determination makes the successful exercise of this right more difficult,<sup>64</sup> and possibly arbitrary,<sup>65</sup> for less influential nations. There is evidence that, in practice, in addition to meeting the legal requirements of secession, secessionists must also gain the approval of a powerful nation in order for legitimacy.<sup>66</sup> Some argue that the problem with the latter step is that it depends entirely on the will and motives of the powerful nation,<sup>67</sup> as opposed to the legal soundness of the secessionists' claims to self-determination.<sup>68</sup> At least one commentator suggests that this practice makes the sovereignty of less-powerful nations slightly less important than that of more-powerful nations.<sup>69</sup>

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

63. Sterio, *supra* note 55, at 170 (“Finally, the self-determination-seeking people must prove that external actors, including the Great Powers, view its struggle as legitimate and are ready to embrace it as a new sovereign power. I allege that this ultimate criterion is the most important one, and that it routinely determines the fate of various peoples struggling for the recognition of their rights across the globe.”). Sterio uses the term “Great Powers” to refer to the “most powerful nations.” *See id.* at 137.

64. *Id.* at 172 (“[I]f peoples are seeking to separate from a Great Power, as in the case of Chechnya struggling to gain independence from Russia, their quest for self-determination will most likely fail. . . . The Great Powers seem to be immune from pressures of self-determination, and their borders are unlikely to yield to secessionist movements.”).

65. *Id.* at 174 (arguing that strong nations will “choose to support [self-determination] . . . only when their own interests are served by such exercise of external self-determination by a specific people”).

66. *See id.* at 173–74 (contrasting the situations of Kosovo and East Timor, both of which had support from powerful nations as they seceded, with the situations of Chechnya, South Ossetia, and Abkhazia, all of which currently are in opposition with the interests of powerful nations).

67. *Id.* at 173 (“[I]t is the Great Powers’ support, or lack thereof, toward a people’s struggle for self-determination that determines the outcome of such a struggle.”).

68. *See id.* at 175 (“The legal criteria for the external self-determination have become somewhat mooted by the necessity to obtain the political support of the Great Powers for any struggling on our planet.”).

69. *Id.* (“[T]he rule by the Great Powers inherently undermines state equality and the entire sovereignty-based system of global international relations.”).

## E. DEFERENCE TO TERRITORIAL INTEGRITY

Though the right of self-determination is highly regarded within international law, various international documents attest to the fact that the right to territorial integrity is at least as important a right—Article 2 of the United Nations Charter is foremost among these documents.<sup>70</sup> Though some commentators have called for a relaxation of the current standards protecting territorial integrity,<sup>71</sup> the majority view defers to the existing laws as codified in various international legal instruments.<sup>72</sup>

Related to the issue of territorial integrity is the principle of *uti possidetis juris*: “The right to self-determination must not involve changes to existing frontiers at the time of independence.”<sup>73</sup> The original purpose of this doctrine was to maintain the borders of former colonies upon decolonization.<sup>74</sup> The Badinter Commission, created in 1991 to find solutions for the problems in the Balkans,<sup>75</sup> utilized this doctrine in its management of the dissolution of former Yugoslavia.<sup>76</sup> In that case, the Commission concluded that *uti possidetis juris* had a broader meaning, implying that it also applied in instances of

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70. U.N. Charter art. 2, para. 4 (“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, or in any other manner inconsistent with the Purposes of the United Nations.”); *see also*, Vienna Convention on the Succession of States in Respect of Treaties, pmbl., done Aug. 23, 1978, 1946 U.N.T.S 3 (recalling the territorial protections observed by the United Nations Charter); Declaration on Friendly Relations, *supra* note 31, at art. 1 (“The territorial integrity and political independence of the State are inviolable.”); Montevideo Convention, *supra* note 11, at art. 11 (“[T]he territory of a state is inviolable.”).

71. *See* Thomas M. Franck, *Opinion Directed at Question 2 of the Reference, in SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED* 75, 82 (Anne Bayefsky ed., 2000) (arguing that the respect for territorial integrity is less observed than the multitude of international legal instruments make it seem).

72. *See* Borgen, *supra* note 25, at 8 (“[T]erritorial integrity of states [is] a cornerstone of the UN framework as stated in Article (2) of the Charter.”); Orakhelashvili, *supra* note 35, at 288 (“If the policies consistently accepted as fundamental by the international community, namely the principle of territorial integrity of States, are violated on certain occasions under the pressure of political will, they will, sooner or later, be violated on other occasions as well.”).

73. Malcolm N. Shaw, *Peoples, Territorialism and Boundaries*, 8 EUR. J. OF INT’L L. 478, 482 (1997).

74. For a broader discussion of *uti possidetis juris*, *see* Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565 (Dec. 22).

75. Richard Falk, *Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in *THE SELF-DETERMINATION OF PEOPLES: COMMUNITY, NATION, AND STATE IN AN INTERDEPENDENT WORLD* 52 (Wolfgang F. Danspeckgruber, ed. 2002).

76. *See* Badinter Commission, *supra* note 31, at 1498.

self-determination unrelated to decolonization, as was the situation in Yugoslavia.<sup>77</sup>

#### F. THE SEARCH FOR AN OBJECTIVE TEST OF STATE FAILURE

There are many conceptions of “state failure,” most of which are derived from classical definitions of statehood.<sup>78</sup> Most commentators agree that failed states arise when a government loses its ability to govern.<sup>79</sup> Also important in the definition of a failed state is the loss of its legitimacy.<sup>80</sup> Some commentators also emphasize the failed state’s inability to “sustain[] itself as a member of the international community.”<sup>81</sup>

The study of failed states has produced a variety of tests aimed at creating an objective test for determining “failure.” The foci of these tests vary, but many emphasize the importance of governmentally enforced security,<sup>82</sup> including physical security from violence<sup>83</sup> and economic security.<sup>84</sup> Only through security

77. See *id.* (“However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”).

78. See generally Jonathon Di John, *Conceptualising the Causes and Consequences of Failed States: A Critical Review of the Literature* 3–10 (Crisis States Research Centre, Working Paper No. 25, 2008), available at <http://www.crisisstates.com/download/wp/wpSeries2/wp25.2.pdf> (discussing the link between the historical conceptions of Hobbes, Machiavelli, and Weber, and the current analyses of failed states corresponding to the theories of those writers).

79. See I. William Zartman, *Introduction: Posing the Problem of State Collapse, in COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY* 1, 1 (I. William Zartman ed., 1995) (“[‘Failed State’] refers to a situation where the structure, authority (legitimate power), law, and political order have fallen apart . . . . For a period, the state itself, as a legitimate, functioning order, is gone.”).

80. Robert I. Rotberg, *Failed States, Collapsed States, Weak States: Causes and Indicators*, in *STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR* 1, 9 (Robert I. Rotberg ed., 2003).

81. Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, *FOREIGN POLICY*, Winter 1992–93, at 3 (discussing the “disturbing new phenomenon [that] is emerging: the failed nation-state, utterly incapable of sustaining itself as a member of the international community”).

82. See Rotberg, *supra* note 80, at 6; Di John, *supra* note 78, at 9 (citing Crisis States Research Center, *CRISIS STATES WORKSHOP* (2006) available at <http://www.crisisstates.com/download/drc/FailedState.pdf>); Fund for Peace, *Methodology Behind CAST*, [http://www.fundforpeace.org/web/index.php?option=com\\_content&task=view&id=107&Itemid=145](http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=107&Itemid=145) (last visited Mar. 2, 2010).

83. See Fund for Peace, *supra* note 82.

84. See Liana Sun Wyler, *Weak and Failing States: Evolving Security Threats and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE, app. A (2007), available at [http://pdf.usaid.gov/pdf\\_docs/PCAAB679.pdf](http://pdf.usaid.gov/pdf_docs/PCAAB679.pdf) (defining a failed state as one which is

can a country gain political independence.<sup>85</sup> And through political independence comes strong leadership from a legislative or executive power, both of which aid in stabilizing a country.<sup>86</sup> The existence of an independent judiciary<sup>87</sup> and the significance of the rule of law<sup>88</sup> are also elements often considered in tests for failure. Notably, at least one test includes a time element—arguing that a state has failed only once a power vacuum has existed for several years.<sup>89</sup>

#### G. THE HISTORY OF SOMALIA AND SOMALILAND'S PUSH FOR SECESSION

Until 1960, Somaliland, a northern region of modern day Somalia, was a colony under the British Empire.<sup>90</sup> Five days after Britain granted the colony independence<sup>91</sup> it united with the southern half of modern day Somalia,<sup>92</sup> which had recently gained independence from Italy.<sup>93</sup> Political turmoil between various clans and regions within the country tainted the unification process.<sup>94</sup> Nevertheless, a nationalistic fervor for a “Greater Somalia” drove this effort onward.<sup>95</sup> Over time, the

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“unable or unwilling to assure the provision of vital services to significant parts of its territory”).

85. See Rotberg, *supra* note 80, at 3; Fund for Peace, *supra* note 82.

86. See Fund for Peace, *supra* note 82.

87. See Rotberg, *supra* note 80, at 6; Fund for Peace, *supra* note 82.

88. See Rotberg, *supra* note 80, at 3; Fund for Peace, *supra* note 82.

89. See Di John, *supra* note 78, at 9–10 (discussing one formulation, a requirement of which is that the authority of the government has been absent for several years).

90. See Richard W. Rahn, *Curious Case of Somaliland*, WASH. TIMES, Jan. 6, 2005, at A16.

91. See *id.*

92. Said S. Samatar, *Historical Setting*, in SOMALIA: A COUNTRY STUDY 1, 26 (Helen Chapin Metz ed., 1992).

93. *Id.* at 20. Italy ruled the southern half of Somalia prior to World War II, and though it maintained conditional control over the country after the war, it was only temporary. By U.N. agreement, Italy controlled the region for only ten more years until 1960, when it ceded full control to the Somali people. See *id.* at 14–15, 20.

94. See *id.* at 27 (citing the north's concern over the democratic power of the south, most clearly demonstrated by a constitutional referendum in 1961 which passed but without a majority in the north).

95. See I.M. Lewis, *Pan-Africanism and Pan-Somalism*, 1 J. MOD. AFR. STUD. 147, 147–51 (1963) (discussing the cultural and historical impetus behind the efforts for a unified Somalia); see also Samatar, *supra* note 92, at 28 (explaining that the catalyst behind the movement for a “Greater Somalia” was the desire to protect historical territorial integrity from the other newly independent colonies in the region).

infighting subsided somewhat, allowing for the establishment of a functioning democratic government,<sup>96</sup> and the northern and southern regions of the country remained unified for the rest of the 1960s.<sup>97</sup>

In 1969, however, General Mohammed Siad Barre engineered a successful coup and became president, effectively ending democratic rule.<sup>98</sup> One of his aims was to inject modernity into Somali society by replacing its traditional and cultural underpinnings.<sup>99</sup> His methods, described by some as an amalgamation of Soviet orthodoxy and the teachings of the Qur'an,<sup>100</sup> and which he termed "scientific socialism,"<sup>101</sup> included suppression of the ancient clan system,<sup>102</sup> an emphasis on central planning of the economy,<sup>103</sup> and extreme violence against opposition groups.<sup>104</sup> Siad Barre maintained his grip over the country through the 1980s, losing control only after the commencement of the civil war that continues today.<sup>105</sup>

Because of the civil war that began in 1991 and continues today, the conditions in Somalia are anarchic.<sup>106</sup> At least one study has listed the country at the top of the list of "failed states."<sup>107</sup> There is virtually no government presence in the

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96. See NINA J. FITZGERALD, *SOMALIA: ISSUES, HISTORY AND BIBLIOGRAPHY* 34 (2002) (discussing the attribute of the Western style democracy that developed throughout the early years of Somali independence, including high voter participation rates and universal suffrage).

97. Rahn, *supra* note 90, at A16; see also Draper, *supra* note 1, at 76–77 (discussing indicators of the newly unified Somalia's growing stability throughout the 1960s, including political development, growth of its international ties, and domestic self-reliance).

98. FITZGERALD, *supra* note 96, at 34–35.

99. *Id.*

100. *Id.*; see also ROBERT G. PATMAN, *THE SOVIET UNION IN THE HORN OF AFRICA: THE DIPLOMACY OF INTERVENTION AND DISENGAGEMENT* 118 (1990).

101. See PATMAN, *supra* note 100, at 117–18.

102. FITZGERALD, *supra* note 96, at 34.

103. 3 *ENCYCLOPEDIA OF THE DEVELOPING WORLD* 1405 (Thomas M. Leonard ed., 2006).

104. See Samatar, *supra* note 92, at 50–52 (describing the brutalities committed by the Siad Barre regime against the opposition clans—the Majeerteen, the Isaaq and the Hawiye—including various massacres (including of women and children), mass rape, spoilage of natural resources, and immense destruction of personal property).

105. Rahn, *supra* note 90, at A16.

106. See *id.*; Daniel Howden, *Africa's Best Kept Secret*, *INDEPENDENT* (London), May 6, 2006, at 22.

107. See generally The Fund for Peace, *FAILED STATES INDEX 2009*, available at <http://www.fundforpeace.org/web/>. Somalia has failed more significantly than even Sudan, Iraq, and Afghanistan, three of the most prominent recent examples of

southern part of Somalia.<sup>108</sup> Al-Qaeda-backed groups have gained a foothold in the region and these groups perpetuate a vicious cycle of instability in two ways. They suppress the populace with daily violence,<sup>109</sup> and use economic and religious incentives to lure young Somali males into the only steady jobs available—as foot soldiers in the civil war.<sup>110</sup>

The official government of Somalia, the Somali Transitional Government,<sup>111</sup> has no real control or influence over the day-to-day affairs of the country.<sup>112</sup> Though the government controls parts of Mogadishu,<sup>113</sup> the rest of Somalia is controlled by clans, pirates, and al-Shabaab,<sup>114</sup> a fundamentalist Muslim terror group.<sup>115</sup> The Transitional Government receives financial support from the United States and the African Union has pledged financial and military aid.<sup>116</sup> Nevertheless, much of this aid remains undelivered and Somalia's nearest neighbors are reluctant to get involved in the instability.<sup>117</sup>

In the north, in Somaliland, however, the situation is markedly different. Relative to the atmosphere of the rest of the country, Somaliland is a portrait of stability.<sup>118</sup> A few rocky years after declaring their independence from Somalia in 1991,<sup>119</sup> the northern clans came together, deciding to give up violence and resolve the differences that had ignited under the

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extreme state disaster. *Id.*

108. Howden, *supra* note 106, at 22.

109. See Draper, *supra* note 1, at 87.

110. *Id.*

111. *Id.* at 76.

112. Abdinasir Mohammed & Sarah Childress, *Suicide Bombing Kills Somalia Ministers*, WALL ST. J., Dec. 4, 2009, at A11.

113. *Id.*

114. *Id.*

115. Al-Shabaab's role in the stability of the country has evolved over the last several years. In 2006 it acted as a governmentally sanctioned militia. Once that government collapsed, al-Shabaab became a destabilizing force in the country, responsible for multiple suicide bombings. As the current government has waned, al-Shabaab has again increased its influence in the country, perhaps even controlling elements of the government. See *id.*; see also *Somalia and Its Jihadists: A Government under the Cosh*, ECONOMIST, June 27, 2009, at 56.

116. Mohammed & Childress, *supra* note 112, at A11.

117. See *Somalia and Its Jihadists*, *supra* note 115, at 56 (“Kenya and Ethiopia are loth to step in. . . . [T]he Shabab says it ‘will destroy the tall glass buildings in Nairobi’ unless Kenya pulls its troops back from the border.”).

118. Draper, *supra* note 1, at 86.

119. Despite the declaration of independence, little has changed politically for the region, especially as regards their position within the sphere of international relations—though they do maintain some autonomy over their own affairs. See Baldauf, *supra* note 7, at 6.



Siad regime.<sup>120</sup> Today, violence is rare.<sup>121</sup> Somaliland has engaged in efforts to combat the systemic instability in the south.<sup>122</sup> There are even signs of basic economic development in the capital city of Hargeysa.<sup>123</sup> Perhaps most importantly for the long-term stability of the region, Somaliland observes a rough form of Western-style democracy.<sup>124</sup> Despite some lingering problems,<sup>125</sup> Somaliland has become a relatively stable, autonomous region.<sup>126</sup>

Somaliland's leaders actively promote its secession from Somalia.<sup>127</sup> They cite their region's recent history of stability, its democratic government, and the failure of the Somali state in support of their claims.<sup>128</sup> A few commentators have also argued for Somaliland's formal independence, both as a matter of law and as a matter of international public policy.<sup>129</sup> However,

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120. See Draper, *supra* note 1, at 86.

121. *Id.*

122. See *Trying to Behave like a Proper State*, ECONOMIST, Oct. 1, 2005, at 43–44 (detailing the circumstances surrounding the arrest of seven al-Qaeda members for a plot to assassinate “leaders and foreign aid workers”).

123. See Draper, *supra* note 1, at 86 (“Somaliland’s capital city of Hargeysa is an almighty wreck of sledgehammered streets, ungoverned traffic, litter, and refugee camps, but there are two things you will not find in Mogadishu . . . a construction boom . . . [and] currency-exchange booths everywhere on the streets . . .”).

124. See Baldauf, *supra* note 7, at 6; see also *The Nation Nobody Knows*, *supra* note 9, at 42. Somaliland’s government has a bicameral legislature of sorts—the upper house consists of clan elders and the lower of democratically elected representatives. *Id.*; see also Howdens, *supra* note 106, at 22. In 2009, Somaliland was due for its first presidential election since 2003, but disagreements have postponed it several times. See Matt Brown, *Somaliland Readies for Presidential Election*, NAT’L (Abu Dhabi), Oct. 20, 2009, <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20091021/FOREIGN/710209864/1135>.

125. Since October of 2008, as many as thirty suicide bombings (presumably carried out by terror cells associated with al-Qaeda, such as al-Shabaab) have killed several Somalilanders, challenging the stability of the region. See *Al-Qaeda on the March*, ECONOMIST, May 23, 2009, at 48. Though the government is a functioning democracy, it struggles with political corruption. See, e.g., *Somaliland Stability ‘Under Threat,’* BBC NEWS, Oct. 8, 2009, <http://news.bbc.co.uk/2/hi/africa/8292773.stm> (last visited Mar. 30, 2010) (“[T]he presidential election . . . was due to have been held on 27 September. This is not the first time the vote has been delayed . . .”). Finally, certain human rights issues remain unresolved—for instance, female genital mutilation affects as many as 95% of Somali women. U.N. Children’s Fund [UNICEF], *Advocacy Paper, Eradication of Female Genital Mutilation* (2004), available at [http://www.unicef.org/somalial/SOM\\_FGM\\_Advocacy\\_Paper.pdf](http://www.unicef.org/somalial/SOM_FGM_Advocacy_Paper.pdf).

126. See Draper, *supra* note 1, at 86.

127. *Id.* at 86–87.

128. See *id.* at 86; Baldauf, *supra* note 7, at 6; Howden, *supra* note 106, at 22.

129. See, e.g., Alison K. Eggers, Note, *When is a State a State? The Case for the Recognition of Somaliland*, 30 B.C. INT’L & COMP. L. REV. 211, 222 (2007) (arguing

though many countries maintain relationships with the region, no country officially recognizes Somaliland's existence independent of Somalia.<sup>130</sup>

## II. UNDER CURRENT INTERNATIONAL LAW, SOMALILAND HAS NO CLAIMS TO INDEPENDENCE

### A. MERELY SATISFYING THE REQUIREMENTS OF STATEHOOD IS INADEQUATE TO JUSTIFY SECESSION

Some contend that Somaliland meets the requirements of statehood, and that for this reason, is already independent of Somalia.<sup>131</sup> The legality of such a claim depends upon an evaluation of the legal status of Somaliland using the declarative or constitutive theory of statehood. The constitutive theory of statehood requires recognition by other states and international organizations, and the applicability of the declarative theory is contingent upon several social, geographical, and political factors.

#### 1. *The Constitutive Theory*

Under the constitutive theory of statehood, Somaliland could meet the requirements of statehood upon recognition of independence by other nations or international bodies.<sup>132</sup> It is unclear how this theory would apply in practice to the case of Somaliland. What actions are sufficient to indicate recognition?<sup>133</sup> What are the legal implications if some states recognize a region but others refuse to offer recognition?<sup>134</sup> How

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that because Somaliland meets international legal standards for "statehood" it should be recognized as a state); Poore, *supra* note 15, at 124 (arguing that Somaliland might have never actually united with Somalia in the 1960s and therefore can justifiably declare itself an independent state).

130. See Draper, *supra* note 1, at 86.

131. See Eggers, *supra* note 129, at 219–20.

132. See generally Poore, *supra* note 15, at 136 (discussing broadly the requirements of the constitutive theory of statehood).

133. Worster, *supra* note 19, at 135 ("Even the practice of state recognition can be opaque in terms of what acts may constitute recognition. Practice, in terms of seeking legitimacy in either theory, evolves.")

134. Compare *id.* at 168 (discussing the "classic constitutive theory," which "says that the state exists only upon recognition since it is a purely legal creation of rights and obligations, yet the other states have no constraints on them in law in recognizing the purported state"), with Vidmar, *supra* note 32, at 827–28 (arguing that "the situation in which one state may be recognized by some states, but not by

much discretion do existing states have in their duty to recognize other states?<sup>135</sup> Despite differing views as to the minimum requirements under the constitutive theory, even under the most liberal standards of recognition, Somaliland's relationships with other nations are not significant enough to constitute recognition. Currently, no nations or international bodies formally recognize Somaliland's statehood.<sup>136</sup> They will not interact with Somaliland as a sovereign state,<sup>137</sup> nor will they circumvent the Somali Transitional Government to interact on a political level with the region.<sup>138</sup> In short, Somaliland is unable to engage in official relations with other nations, who are concerned about the political ramifications of recognizing a breakaway state.<sup>139</sup>

## 2. *The Declarative Theory*

Under the declarative theory of statehood, a region attains statehood by declaring itself a state,<sup>140</sup> by having a permanent population, by having a defined territory, by having a government, and by having the capacity to enter into relations with other states.<sup>141</sup> Considering each of these factors,

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others, is an evident problem and thus a great deficiency of the constitutive theory”).

135. Compare Worster, *supra* note 19, at 153 (discussing the argument defending state discretion, stating that that “there is no reason why it should be unacceptable for states to ignore other purported states”), with CRAWFORD, *supra* note 33, at 23 (emphasizing the importance of recognition—that “it might be argued that recognition . . . is central rather than peripheral . . .”).

136. See Draper, *supra* note 1, at 86.

137. *Id.* (“[N]o government has recognized [Somaliland] as a sovereign nation.”); *The Nation Nobody Knows*, *supra* note 9, at 42.

138. See *The Nation Nobody Knows*, *supra* note 9, at 42 (“Saudi Arabia . . . is firm friends with the transitional government in Somalia, which maintains that Somaliland remains within its orbit.”); Abdullahi Del, Letter to the Editor, WASH. TIMES, Jan. 11, 2005, at A16 (discussing reasons why the United States is interested in supporting the aims of the Somali Transitional Government: “[T]he government of Somalia is very aggressive in supporting Western standards in all phases of governance, economic development and fighting terrorism. Somalia is strategically located and has the strategic resources and desire to become a great friend to the United States.”); Howden, *supra* note 106, at 22 (“The UK recognised Somaliland at independence in 1960 but London would have to upset powerful allies to renew that step.”).

139. See Rahn, *supra* note 90, at A16.

140. Poore, *supra* note 15, at 136; see also Huang, *supra* note 10, at 126–27; Montevideo Convention, *supra* note 11, at art. 3.

141. See Montevideo Convention, *supra* note 11, at art. 1; Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J.

Somaliland has a colorable argument that it meets the theoretical requirements of statehood. Somaliland's population is relatively stable, unlike in the south, which has suffered a steady exodus of refugees since the civil war began.<sup>142</sup> Somaliland's borders from its days as a British colony still serve as a hypothetical line of demarcation, albeit informally and without legal effect because of its unification with Somalia in 1960.<sup>143</sup> Somaliland can point to the relative success of several peaceful local elections as evidence of the existence of government.<sup>144</sup> Finally, as previously discussed, although no nation recognizes Somaliland, it still maintains some informal contacts with other nations.<sup>145</sup> On these bases, Somaliland appears to have a strong claim to statehood.

At least one commentator on the issue of Somaliland's independence has argued that because it meets the requirements of the declarative theory, Somaliland deserves independence.<sup>146</sup> However, it is one thing to suggest that a region satisfies theoretical requirements of statehood, but quite another to argue that this constitutes a legal basis for independence. There is no legal precedent indicating that the four requirements of statehood are a *prima facie* basis for

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INT'L ECON. L. 753, 807–08 (1996) (“At times, the United Nations has admitted as members and the international community has recognized states that failed to meet each of the four characteristics. Nevertheless, compliance with these factors is usually required for statehood.”).

142. See Steve Bloomfield, *Somalia War-Refugee Crisis Surpasses Darfur in its Horror*, INDEPENDENT (London), Nov. 22, 2007, at 34 (discussing the impact of the refugee crisis in Somalia—estimating that as many as 600,000 people have fled from the capital city of Mogadishu).

143. Somaliland's most notable border dispute is with the neighboring region of Puntland, a region that also wishes to break away from Somalia. They disagree as to the location of the border between them. See *Somalia's Puntland Sold Exploration Rights in Somaliland*, AFROL NEWS, Feb. 1, 2006, available at <http://www.afrol.com/articles/17937> (discussing contracts that Puntland granted to foreign companies for mineral exploration on soil that Somaliland claims as its own).

144. See Baldauf, *supra* note 7, at 6; *The Nation Nobody Knows*, *supra* note 9, at 42. For example, in 2003 the country held a peaceful presidential election in which the margin of victory was only eighty votes. Rahn, *supra* note 90, at A16.

145. See, e.g., Eggers, *supra* note 129, at 219; *The Nation Nobody Knows*, *supra* note 9, at 42. The government of Ethiopia has invited officials in the Somaliland government to attend celebrations for the 105th anniversary of the establishment of Ethiopia's second capital, Diredawa. See *Ethiopia Invites Somaliland Parliament Leaders*, SOMALILAND TIMES, Nov. 28, 2009, available at <http://www.somalilandtimes.net/sl/2009/409/3.shtml>.

146. See Eggers, *supra* note 129, at 222 (“Somaliland has operated as an independent state for fifteen years and as it meets international legal standards for ‘statehood’ is, in fact, a state.”).

independence. Such a precedent would be disastrous to the idea of state sovereignty.<sup>147</sup> Any region the least bit dissatisfied with its government and able to meet the requirements of the declarative theory of statehood could legally declare independence from its parent state.<sup>148</sup> If there is a legal justification for Somaliland's independence from Somalia, it cannot be simply because it meets the four theoretical requirements and it declares its statehood.

#### B. THE SCOPE OF SOMALILAND'S RIGHT TO EXERCISE SELF-DETERMINATION

The proponents of independence for Somaliland argue for a broad construction of the right to self-determination—that is, that the people of Somaliland should have a right to form a country independent of Somalia.<sup>149</sup> The first justification that Somaliland might claim lies in its history as a British colony. A colony has a legal right to exercise self-determination independent of its colonizer.<sup>150</sup> Some make the argument that Somaliland, as a former colony, may exercise its right to self-determination because it has not yet done so, despite gaining independence in 1960.<sup>151</sup> When Somaliland joined Somalia in 1960 to create a “Greater Somalia,” there was no national referendum or popular vote on the matter.<sup>152</sup> Because there was no national vote, proponents of this position contend that unification of the north and south parts of Somalia was invalid.<sup>153</sup> “If there was no union, then Somaliland still exists as an independent entity, and discussions pertaining to secession

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147. See generally Huang, *supra* note 10, at 111–12 (discussing, within the context of Taiwan's statehood efforts, the requirements of statehood, including the additional “indispensable” requirement of sovereignty).

148. For example, a U.S. state like Minnesota meets the requirements of statehood under the declarative theory: it has a permanent population, a defined territory, a government, and could reasonably enter into relations with other nations, if other nations opted to recognize Minnesota's statehood. Under that logic, Minnesota could legally declare its independence from the United States. Cf. Huang, *supra* note 10, at 112 (discussing “exclusive sovereignty and the legal right to govern a territory under international law” as the factors that lend legitimacy to claims of statehood).

149. See generally Poore, *supra* note 15, at 146–47 (arguing that in Somaliland's case, the burden of justifying unilateral self-determination is lower).

150. See Declaration of Friendly Relations, *supra* note 31, at 124; Epstein, *supra* note 37, at 135–36.

151. See Poore, *supra* note 15, at 140–42.

152. *Id.* at 140–41; see also Samatar, *supra* note 92, at 26.

153. See Poore, *supra* note 15, at 140.

are moot.”<sup>154</sup>

Several problems call this argument into question. It ignores the fact that Somaliland and Somalia did formally agree to unite in 1960; though there was no national vote on the issue, democratically elected leaders of each former colony oversaw the unification process.<sup>155</sup> These leaders did not act contrary to the will of the people. Rather, they acted in response to a surge of Somali nationalism and anti-colonialism in both the northern and southern parts of the country.<sup>156</sup> Even if we accept the argument that the unification of 1960 is invalid because it lacked a popular referendum, this argument overlooks the decade following unification in which both the northern and southern parts of Somalia existed together as a relatively stable and vibrant democracy.<sup>157</sup> The two decades under the Siad Barre regime were far from tranquil. The entire country, the north as well as the south, was oppressed by this brutal regime.<sup>158</sup> The fact that the country faced oppression during this period should have no bearing on whether it actually unified upon decolonization. Because the north and south freely united upon independence, the argument that Somaliland retains the right to exercise self-determination is tenuous.

The second way that Somaliland could exercise its right to self-determination is through internal self-determination, by using Somalia’s established political procedures and mechanisms of self-rule to realize its policy goals. The circumstances in Somalia, however, make it difficult for

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154. *Id.*

155. See generally Samatar, *supra* note 92, at 25–28 (discussing the development of democracy in the united Somalia throughout the 1960s, including the adoption of universal suffrage, the formation of governmental organizations, and a lively political culture). *Id.* at 26 (“In April 1960, leaders of the two territories met in Mogadishu and agreed to form a unitary state.”).

156. *Id.* at 25–26 (“Political protests forced Britain in 1956 to introduce representative government in its protectorate and to accept the eventual unification of British Somaliland with southern Somalia . . . . Popular demand compelled the leaders of the two territories to proceed with plans for immediate unification.”); Draper, *supra* note 1, at 78 (“In 1960 the colonial powers departed, and a dreamy nationalism seized the Somali people. With visions of a unified country, Somaliland and Somalia confederated.”).

157. See Samatar, *supra* note 92, at 26.

158. See generally *id.* at 48–49 (discussing the repressive actions of the Siad Barre regime against the clans of Somalia). One might argue that, under the Siad Barre regime, Somaliland had no choice but to be part of Somalia. This argument, however, overlooks the entire decade of the 1960s, before Siad Barre came to power, in which the country was, for the most part, a relatively peaceful Western-style democracy. *Id.* at 26.

Somaliland to exercise internal self-determination. In fact, any region within a failed state may have little or no opportunity to petition its government in the furtherance of self-determination, simply because it lacks a functioning government. In the case of Somalia, because of the civil war and the political turbulence it has caused, Somaliland has had no opportunity to use the Somali political process since 1991 when the civil war began.<sup>159</sup>

Some commentators argue that Somaliland's inability to exercise internal self-determination is strong enough support for the claim that Somaliland has the right to separate from Somalia.<sup>160</sup> Somaliland is entitled to independence, they argue, because, as a failed state, its claim is distinguishable from other secessionist claims.<sup>161</sup> Under existing legal norms, this argument is insufficient—there is a difference between a right to self-determination and a broad right to independence.<sup>162</sup> Some commentators even suggest that the apparatus of internal self-determination may act as an “organizing principle” within a failed state, giving citizens—with assistance from the international community—the control and authority to bring order out of the chaos within their country<sup>163</sup> as opposed to

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159. See generally Draper, *supra* note 1, at 78 (“In 1991 militias . . . chased [General Siad] Barre out of Mogadishu. The Somali people, weary of occupiers and strongmen, awaited the next iteration of government. Eighteen years later, they are still waiting.”). It is important to note that the government of a state may not take away the right to internal self-determination. See Sterio, *supra* note 55, at 145–46 (discussing the primary importance of the right to internal self-determination and suggesting that an argument for secession becomes much stronger if the parent state fails to grant the right to internal self-determination).

160. Poore, *supra* note 15, at 143 (“In fact, Somalilanders have been irreversibly deprived of their right to internal self-determination and should not be forced to remain shackled to the failed state of Somalia.”).

161. *Id.* (“Proponents believe Somaliland’s case is distinguishable from the overwhelming majority of secessionist claims . . .”).

162. See Nicola Bunick, Note, *Chechnya: Access Denied*, 40 GEO. J. INT’L L. 985, 1013–14 (2009) (“As a result, the Chechens, like all ‘people’ are entitled to internal self-determination. However, a right to internal self-determination is far from a right to independence, or even autonomy. It is merely the threshold requirement for consideration of more sweeping entitlements.”).

163. See Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT’L L. 733, 756 (1995) (reviewing YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994)) (discussing the organization that mechanisms of internal self-determination can provide a failed state with the help of the international community; through “a combination of peace among the warring factions, establishment of democratic processes, guarantees of non-interference, and economic aid[ a failed state] can ensure that they may begin to function in a meaningful way as autonomous political

giving them the power to separate when times get tough.<sup>164</sup>

Moreover, the government of Somalia did not single out the people of Somaliland in order to deny them the right to self-determination. Because of the lack of an effective government, no citizen of Somalia has had a particularly effective way to practice internal self-determination since the beginning of the civil war. The region of Puntland, located in northern Somalia on the tip of the Horn of Africa, also declared itself independent of the government of Somalia in 1998.<sup>165</sup> If an entire country is denied the right to internal self-determination, can the entire country break away from itself? Though international law is largely silent on the issue of self-determination in the case of failed states, in light of the deference shown to territorial integrity in international law,<sup>166</sup> it seems inconsistent to suggest a solution in which a country somehow separates from itself, or, the more likely result, fragments into several regions asserting a right to independence.

### C. SOMALILAND LACKS A LEGAL BASIS FOR SECESSION

Finally, the people of Somaliland might choose to exercise their right to self-determination by opting to secede from Somalia. Perhaps Somaliland's best legal argument for independence in the furtherance of self-determination arises under one of the three legal theories of secession—bilateral, unilateral (“remedial”), or *de facto*. However, under the current circumstances in Somalia, even the theories regarding secession provide an inadequate argument for Somaliland independence.

#### 1. *Bilateral Secession*

Under the theory of bilateral secession, the primary aim is cooperation between the party seeking independence and the

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societies.”).

164. This is not to suggest that international law requires Somaliland to use internal self-determination to work for peace in the south; this would be impractical, and a heavy burden to place upon a region that struggles to maintain its own peace.

165. See Bay, *supra* note 1; see also Hassan Barise, *Somali Warlords Battle for Puntland*, BBC NEWS, May 7, 2002, <http://news.bbc.co.uk/2/hi/africa/1972557.stm>. Unfortunately, though Puntland operates somewhat autonomously of Mogadishu, it still suffers from near-anarchic conditions. Two problems contribute to this: Puntland's border tensions with Somaliland and the prevalence of maritime piracy. See Bay, *supra* note 1.

166. See Borgen, *supra* note 25, at 8; Orakhelashvili, *supra* note 35, at 288.



parent state.<sup>167</sup> Bilateral secession has two requirements. First, Somali domestic law would need to make some provision for secession—whether through adoption of legislation specifically allowing it or some other method. Second, Somaliland would need to engage in “principled negotiations” with the Somali government on the issue of secession.<sup>168</sup> Theoretically, Somalilanders could negotiate with the Transitional Government and make a political push for legislation granting secession. Currently, however, there are two obvious, insurmountable barriers to any efforts at bilateral secession. First, the current state of lawlessness in the country precludes such political or legislative action; and second, even if that were not the case, the Somali government is not favorable to the idea of a breakup of the country.<sup>169</sup>

## 2. *Unilateral Secession*

The theory of unilateral secession requires three elements: that the Somalilanders are a “people,” that the Somali government subjected them to serious human rights violations, and that no other viable options exist.<sup>170</sup> There is, however, little evidence to support such a claim. As to the requirement that the citizens of Somaliland be a common people, the population of Somaliland consists largely of members of the Isaaq clan.<sup>171</sup> The Isaaq, however, are not an ethnic or cultural minority; rather, they are one of the larger clans in Somalia, along with the

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167. Reference re Secession of Quebec [1998] 2 S.C.R. 217, 264–67 (Can.) (discussing the efforts that the secessionist movement in Quebec would need to take to successfully gain independence, including a national referendum, addressing the interests of the provinces and the federal government, and addressing the rights of minorities).

168. See *id.* at 273 (discussing the issue of secession in light of Quebec, stating that it cannot be accomplished without principled negotiations with other participants in the Confederation within the existing constitutional framework).

169. See Del, *supra* note 138, at A16 (“It should be noted that Somaliland was never intended to be ‘independent’ from Somalia.”).

170. See Borgen, *supra* note 25, at 8.

171. United States Bureau of Citizenship and Immigration Services, *Somalia: Somali Government Policy Towards the Isaaq Clan, Somalia*, Jan. 9, 1998, available at <http://www.unhcr.org/refworld/docid/3df0bbc14.html> (stating that the Isaaq clan “make up 80 percent of the former British Somaliland.”); see also Samatar, *supra* note 92, at 50 (“The Isaaq as a clan-family occupy the northern portion of the country [Somaliland]. Three major cities are predominantly, if not exclusively, Isaaq: Hargeysa, the second largest city in Somalia . . . Burao in the interior . . . and the port of Berbera.”).

Hawiye, Darod, Dir, and Rahanweyn.<sup>172</sup>

In nearly all cases of successful secession (and even in many recent unsuccessful ones) the party who argued for independence was an ethnic minority.<sup>173</sup> The most prominent recent case is that of Kosovo, which has arguably been a successful secession thus far.<sup>174</sup> In that case, the people seceding were ethnic Albanians, a minority in Serbia.<sup>175</sup> Another example is South Ossetia's recent attempts to gain independence from Georgia. The people of South Ossetia claim that: "South Ossetians are ethnically distinct from Georgians and have comprised a semi-autonomous community within Georgia for seven hundred years."<sup>176</sup> In these and other cases, those seeking independence are a distinct minority.<sup>177</sup> This is not the case in Somaliland. The Isaaq clan, which makes up a large portion of the population in Somaliland, is not a significant minority within Somalia as a whole, nor are they sufficiently distinct—ethnically, culturally, or religiously—from the rest of the Somali population to constitute a "people."<sup>178</sup>

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172. Draper, *supra* note 1, at 78.

173. Kosovo is the most prominent example of successful secession—ethnic Albanians within a country of Serbs. Borgen, *supra* note 25, at 3. South Ossetia and Abkhazia are both ethnic minorities within Georgia, and both wish to secede. *Id.* at 4–5. *Cf.* Special Comm., *supra* note 45, at 389 (discussing the Transnistrian secessionists, who are ethnically Ukrainian, as is a significant portion of the rest of Moldova).

174. The success of Kosovo's secession is arguably dependent on a case on the issue currently before the International Court of Justice, brought by Serbia, who contests the secession. Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Req. for Advisory Op.) (Order of Oct. 10, 2008), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=0> (last visited Feb. 22, 2010); *see also* Bing Bing Jia, *The Independence of Kosovo: A Unique Case of Secession?*, 8 CHINESE J. INT'L L. 27, 42 (2009). This case poses a problem for the countries who have already announced their position in the Kosovo matter—recognition or non-recognition—because by taking a side while "the issue was a pending matter before the ICJ . . . could be seen by many as flouting the prerogatives" of the ICJ. Borgen, *supra* note 25, at 16.

175. Borgen, *supra* note 25, at 3 (describing the ethnic Albanian population as the majority in Kosovo, but a minority within Serbia).

176. *Id.* at 4.

177. In the case of Abkhazia, as in the case of South Ossetia, the citizens are mostly ethnic Russians, within a country that has an ethnically Georgian majority. Borgen, *supra* note 25, at 20. "South Ossetia and Abkhazia are breakaway provinces within the former Soviet republic of Georgia. These two provinces have functioned as de facto states in recent years." Sterio, *supra* note 55, at 167–68. *See also* Reference re Secession of Quebec [1998] 2 S.C.R. 217, 261–63 (Can.) (discussing the protection of minorities).

178. Draper, *supra* note 1, at 78 ("According to the great Somali ethnographer,

Second, we look to the issue of human rights. Under the oppressive reign of Siad Barre, the Isaaq were certainly victims of atrocity at the hands of the Somali government.<sup>179</sup> During the 1980s, when the abuses of the Siad Barre regime were at their peak, the government destroyed the Isaaq's land and cities, and committed widespread murder and rape.<sup>180</sup> The Isaaq, however, were not the only clan subjected to the cruelty of the Somali government. The situation was nearly identical for the members of the Majeerteen<sup>181</sup> and the Hawiye<sup>182</sup> clans. The common thread running through the persecution of each of the clans was their opposition, often violent, of the Siad Barre regime.<sup>183</sup>

Despite the severity of the human rights abuses perpetrated against the Isaaq, it is unclear whether they are sufficiently significant to support an argument in favor of justified unilateral secession. For example, in the case of Kosovo, the Serbian abuses gave rise to the term "ethnic cleansing,"<sup>184</sup> and on that basis is distinguishable from the case of Somaliland.<sup>185</sup> Other examples of alleged human rights violations committed against secessionist groups provide little guidance in determining a workable test for justification of unilateral secession.<sup>186</sup> Historically, as in the case of Kosovo, the human

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I.M. Lewis, Somalia's occupants 'form one of the largest single ethnic blocks in Africa.'").

179. See Samatar, *supra* note 92, at 51.

180. See *id.* ("An estimated 5,000 Isaaq were killed between May 27 and the end of December 1988. About 4,000 died in the fighting, but 1,000, including women and children, were alleged to have been bayoneted to death.")

181. *Id.* at 50. The Majeerteen are a sub-clan of the Darod clan. WORLD BANK, CONFLICT IN SOMALIA: DRIVERS AND DYNAMICS (2005), fig. A-1, at 55.

182. Samatar, *supra* note 92, at 51.

183. See *id.* at 49-50 (detailing the efforts of these three clans against the government, including an attempted coup d'état by the Majeerteen and the military campaigns of the Isaaq-led Somali National Movement).

184. Condoleezza Rice, U.S. Sec'y of State, Statement Recognizing Kosovo as Independent State (Feb. 18, 2008), available at <http://www.america.gov/st/texttrans-english/2008/February/20080218150254bpuh5.512637e-02.html> (citing "the history of ethnic cleansing and crimes against civilians in Kosovo" as support for U.S. recognition of Kosovo as an independent state). For a discussion of the meaning of "ethnic cleansing," see Alberto Costi, *The 60th Anniversary of the Genocide Convention*, 39 VICT. U. WELLINGTON L. REV. 831, 838 (2009) ("[Ethnic cleansing] involves forcefully removing groups of people from an area, to create an ethnically homogenous zone. This can involve considerable force and terror tactics that, prima facie, could provide a basis for a finding of genocide.").

185. See Rice, *supra* note 184 ("The unusual combination of factors found in the Kosovo situation . . . are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any situation in the world today.").

186. In Moldova, for example, the as-yet unsuccessful separatist Transnistrians

rights violations perpetrated against a people must be more severe than those faced by the Isaaq in order to justify unilateral secession.<sup>187</sup>

Finally, if any other remedies exist, Somaliland must resort to such remedies before seceding.<sup>188</sup> It may be difficult to envision paths that Somaliland might take to hasten peace in the south, especially given its own tenuous grip on stability. The region might push for independence through a national referendum similar to the one of 1960, or suggest a form of federalism and decentralization to gain at least an element of autonomy from the Transitional Government in Mogadishu. Nevertheless, even if other options open to Somaliland are infeasible, it does not meet the other elements of the test. To meet the test, Somaliland must fulfill all the requirements. It fails the first two requirements, and, arguably, it also fails the third. They are not a “people” according to the accepted definition: an ethnic or cultural minority.<sup>189</sup> They have arguably not faced the types of human rights violations that can justify secession.<sup>190</sup> They may have other possible remedies, short of secession.<sup>191</sup>

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cite “a lack of due process, persecution of religious minorities, and retaliation against political dissenters,” and the 1000 deaths in the 1992 war as a basis for their claims of secession. See Special Committee, *supra* note 45, at 384 (arguing that “the events of the 1992 War in and of themselves do not make a persuasive claim of secession as a legal right. If they did, the world would be rife with secessionist conflicts”). On the other hand, in the case of South Ossetia, whose independence only Russia and Nicaragua recognize, it is unclear whether the Georgians or the South Ossetians were the first to use force during the secession efforts. See Borgen, *supra* note 25, at 5–6.

187. The common understanding of human rights violations encompasses more than just infringement of physical security. Equally important are political, social, and economic rights. See Kenneth A. Bollen, *Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984*, 8 HUM. RTS. Q. 567, 567 (1986). The only clear case of what constitutes sufficiently severe human rights violations, however, is the case of ethnic cleansing in Kosovo. See Borgen, *supra* note 25, at 11.

188. See Special Comm., *supra* note 45, at 384.

189. See Borgen, *supra* note 25, at 7–8.

190. See, e.g., *id.* at 11.

191. Some argue that federalism is an antidote to secession and other forms of dissolution. See MALCOM M. FEELEY & EDWARD L. RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 51 (2008) (arguing that a federal system allows decentralization of decision-making power, which may give secessionists sufficient autonomy and allow the country to avoid dissolution). Nevertheless, it seems impractical to suggest that a failed state like Somalia has the capacity to implement such a structural change. For a discussion of other issues arising out of the question of federalism and secession, see WAYNE J. NORMAN, NEGOTIATION NATIONALISM:

### 3. *De Facto Secession*

On one hand one might argue that, since 1991, Somaliland has already gained independence through de facto secession. De facto secession on its own, however, is legally insufficient.<sup>192</sup> Somaliland may have a better argument for legal de facto secession if foreign nations recognized their independence, but no state has done so.<sup>193</sup> What if other nations did recognize Somaliland? Some have held that de facto secession becomes acceptable if enough nations recognize the seceding state.<sup>194</sup> If this view were the legal standard guiding secession, however, it would harm both the separatists and the states from which they secede.<sup>195</sup>

At the most basic level, the argument for the legality of secession emphasizes the right of self-determination; it emphasizes the autonomy of individuals and communities. But if secession efforts depend upon recognition by foreign powers, the focus shifts away from the interests of the people seeking to exercise self-determination and onto the interests of the nations who may or may not opt to recognize them.<sup>196</sup> Foreign governments will—quite understandably—look to their own interests first when considering whether to extend recognition, rather than examining the legal sufficiency of the secession claim.<sup>197</sup> Recognition, therefore, would depend on what the recognizing state might get out of the deal, rather than what is most beneficial to the people seeking recognition.<sup>198</sup> Moreover, it

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NATION-BUILDING, FEDERALISM, AND SECESSION IN THE MULTINATIONAL STATE 178–79 (2006).

192. See *Reference Re Secession of Quebec*, [2008] 2 S.C.R. 217, 296 (Can.) (stating that recognition is not a “retroactive justification” for secession).

193. See *Draper*, *supra* note 1, at 86.

194. See *id.* at 296 (“The ultimate success of such a [de facto] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.”).

195. See *Worster*, *supra* note 19, at 150–51 (“One problem that unlimited discretion may pose is that it can be manipulated for political ends and may provide a vehicle for more dominant states to control less powerful ones through the overarching goal of promoting security.”).

196. For more discussion of this issue, see *Poore*, *supra* note 15, at 136 and *Worster*, *supra* note 19, at 149–51.

197. *Worster*, *supra* note 19, at 120–21 (“Larger, more powerful states that are secure in their recognition may use recognition as a tool for their continued domination of other states.”).

198. See *id.* The most overt recent display of self-interested recognition was by

is unlikely that *de facto* secession through recognition could even lead to a meaningful legal standard. Because of their competing self-interests, if recognizing nations differ over whether to extend recognition, it would likely be unclear whether the number of recognizing states was sufficient to justify secession.<sup>199</sup> Furthermore, because recognition does not depend on the merits of the secessionists' claim to independence, but on the recognizing state, the rationale may appear arbitrary and provide no guidance for future cases.<sup>200</sup>

Such a legal standard also implicates the rights of the parent state. International law gives great deference to state sovereignty.<sup>201</sup> If other nations, through the act of recognition, hold the power to give or to withhold the right to secession, the parent state's right to sovereignty becomes subject to the caprice of recognizing nations.<sup>202</sup> A parent state has the right to declare secession illegal under domestic law—but other states would render that law worthless by recognizing a seceding region. Such a standard might imply that international law takes precedence over a sovereign state's domestic law—when, in reality, the opposite is true, especially as the law relates to the issue of secession.<sup>203</sup> States also have a right to preservation of their existing borders.<sup>204</sup> Both the rights to territorial integrity

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Nauru. This economically depressed island country in the Pacific Ocean received \$50 million from Russia in return for recognizing Abkhazia as independent of Georgia. See Ellen Barry, *A Tiny New Partner for Abkhazia*, INT'L HERALD TRIB., Dec. 16, 2009, at 3.

199. This is one of the reasons why Kosovo's case is in front of the ICJ. In that case, recognition has proved to be an obscure standard. See generally Borgen, *supra* note 25, at 15–16.

200. Cf. Sterio, *supra* note 55, at 171–73 (discussing the “Great Powers” decisions to support or oppose secessionist movements).

201. See, e.g., U.N. Charter art. 2, para. 4 (enjoining member states to “refrain . . . from the threat or use of force against the . . . political independence of any state”).

202. Dr. Raju G.C. Thomas, Nationalism, Secession, and Conflict: Legacies from the Former Yugoslavia, Paper presented at the 1st Annual Association for Study of Nationalities Convention (April 26–28, 1996), available at <http://www.srpska-mreza.com/MAPS/Ethnic-groups/Self-Determination.html> (“[N]ew state recognition policy proved to be an inventive method of destroying long-standing sovereign independent states. When several rich and powerful states decide to take a sovereign independent state apart through the policy of recognition, how is this state supposed to defend itself?”).

203. See Borgen, *supra* note 25, at 8; see also Special Comm., *supra* note 45, at 383 (“[G]rants of ‘autonomy’ are largely issues of domestic law.”).

204. See, e.g., U.N. Charter art. 2, para. 4 (“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, or in any other manner inconsistent with the

and state sovereignty suffer if recognition is an adequate remedy to illegal secession.

The future of Somaliland's attempts to secede from Somalia, therefore, seems bleak. Though it is relatively stable, no country recognizes it as independent of Somalia.<sup>205</sup> Nor is it of any help that the current principles of international law that speak to Somaliland's situation—the legal basis for statehood, the right to self-determination, justifications for secession, the strong respect for the integrity of national borders—establish a high threshold for secession. Under international law, Somaliland likely lacks justification to secede. This attests to a need for an expansion of the law of secession, to accommodate regions like Somaliland, who may not secede from Somalia, but who are also denied self-determination because of the failure of the Somali government.

### III. THE INTERNATIONAL LAW RELATED TO SECESSION SHOULD BE BROADENED TO ENCOMPASS SECESSIONIST EFFORTS WITHIN FAILED STATES

Under current international law, aspiring secessionists must overcome a high threshold to justify their actions. There are several reasons for such a high bar. First, if the standards were looser and justification for secession easier to attain, state sovereignty would suffer.<sup>206</sup> Because the legality of secession is primarily an issue of domestic law,<sup>207</sup> it would frustrate Somali law to allow Somaliland to secede absent any recognized compelling justification to do so. In the case of Somaliland, no such justification exists. In the prototypical case of international law circumventing domestic law as it pertains to secession, the inhabitants of Kosovo were both an ethnic minority within Serbia and were subject to ethnic cleansing by the Serb government.<sup>208</sup> The Somalilanders can claim neither.<sup>209</sup> Finally,

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Purposes of the United Nations.”).

205. See Draper, *supra* note 1, at 86.

206. See Brock Lyle, Note, *Blood for Oil: Secession, Self-Determination, and Superpower Silence in Cabinda*, 4 WASH. U. GLOBAL STUD. L. REV. 701, 707 (2005) (“[T]oo broad a definition of self-determination makes it impossible to keep countries together. Therefore, the threshold for secession based on self-determination should be very high to avoid fractionalization based on minor divergences of interest.”).

207. See Borgen, *supra* note 25, at 8.

208. See *id.* at 3–4.

209. Though the clans of Somaliland were subjected to violence under the Barre regime, the clans in southern Somalia faced similar abuses that, in some cases, were

some argue that other nations might justify Somaliland's secession by recognizing its statehood.<sup>210</sup> The principle of justified secession through recognition does not help Somaliland. No nation has formally recognized Somaliland,<sup>211</sup> nor would recognition make for a reliable legal standard.<sup>212</sup> Self-interest would motivate the recognizing nations, creating a situation in which competing incentives define the legal standard.<sup>213</sup> Such a standard lacks consistency and would be difficult to apply coherently. Under current legal standards, Somaliland cannot justifiably become an independent state.

This has dubious implications for the future of Somaliland. It is, effectively, in political limbo. No outside government will interact with it on a formal level.<sup>214</sup> Practically, Somalilanders cannot even appeal to their own government.<sup>215</sup> Because they have no practical legal recourse, the people of Somaliland are bound to the anarchy of Somalia. An entire generation of Somalilanders does not know life apart from civil war.<sup>216</sup> Most importantly, the people of Somaliland are not responsible for the current state of the country. The clans of Somaliland settled their grievances in the mid-1990s.<sup>217</sup> The current violence stems directly from the absence of an effective government in Mogadishu in the south.<sup>218</sup> Somaliland, and more broadly, any stable region within a failed state, is condemned to the

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even worse. *See* Samatar, *supra* note 92, at 48–52 (describing Barre's "repressive measures" against various clans including his command that the Red Berets massacre civilians in the Hawiye region which is located in the south central portion of Somalia).

210. *See generally* Vidmar, *supra* note 32, at 827–28.

211. *See* Draper, *supra* note 1, at 86.

212. *See* Vidmar, *supra* note 32, at 827–28 ("[T]he situation in which one state may be recognized by some states, but not by others, is an evident problem and thus a great deficiency of the constitutive theory").

213. *See* Sterio, *supra* note 55, at 172–73.

214. *See The Nation Nobody Knows*, *supra* note 9, at 42 (explaining that Somalilanders are "dangerously reliant on the goodwill of neighbours, and of aid donors who slip it money unofficially without the usual host-donor government contracts").

215. The first question that Somalilanders might ask if they were encouraged to appeal to the Somali government would be: how, and to what effect? The Somali Transitional Government is besieged by clans and al-Shabaab and powerless even within Mogadishu. *See* Mohamed, *supra* note 112, at A11.

216. *See* Draper, *supra* note 1, at 76.

217. *See id.* at 86.

218. *See* Howden, *supra* note 106, at 22 (explaining that "when Barre's government fell in 1991, the north set up its own government within the former colonial borders while the south descended into warlordism" and that "Mogadishu . . . is now among the most dangerous places on earth").



uncertainty and lawlessness stemming from a toothless government, which confines and limits its blameless inhabitants.<sup>219</sup>

For this reason, the international law of statehood and secession should be broadened to fill the analytical void pertaining to secession in the case of a failed state. Two issues are important: the interests of states in preserving state sovereignty and the right of people to exercise self-determination. Currently, the people in a failed state have no hope of exercising their right to self-determination and are condemned to failure if the state lacks the stabilizing hand of an effective government or if other justifications for self-determination or secession do not apply. The law must provide a correction for this error. It would be equally dangerous, however, to shift the balance too far in the opposite direction. If the law legitimizes the right to self-determination to the detriment of state sovereignty, it renders impotent the domestic laws and the traditional rights of states.<sup>220</sup> The state again becomes burdened by an effectually powerless government, just as it is in the opposite extreme. Any broadening of the law to accommodate secessionist efforts within a failed state requires narrow tailoring to bring these interests into equipoise.

To create this balance, a reformed test must include two general requirements. The parent state must have failed, according to an objective standard for failure. Likewise, the secessionist region within the country must exhibit the opposite attributes—demonstrating that it can govern itself where the parent state has failed. In light of the need to balance the interests of people with those of states, and in the spirit of the methodologies of various organizations that evaluate the failure of states,<sup>221</sup> the test must make a fact-specific analysis of the essential factors defining failed states.

Most failed-state metrics emphasize the importance of three elements in determining the strength of a state: security,

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219. The plight of the Somalilanders recalls Thomas Hobbes' classical description of life without the order provided by a functioning government: Citizens live in "continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short." THOMAS HOBBS, LEVIATHAN 41 (Crawford Brough Macpherson ed., Penguin Classics 1981) (1651).

220. See generally JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 112 (2d ed. 2006) (discussing the rarity of secession).

221. See generally Di John, *supra* note 78, at 6–10 (listing various metrics for determining state weakening, collapse, and failure).

political participation, and basic civil services.<sup>222</sup> These represent the basic functions of a state. Without these features, a nation would lack the ability to maintain the order necessary for a stable society. Without security, there is no check on violence or crime, hampering both the health and economic development of the state's citizens.<sup>223</sup> Without the ability to participate in the political process, people lose the right to self-determination, calling the legitimacy of the government into question.<sup>224</sup> Without civil services, the state loses the "institutions to regulate and adjudicate conflicts; [the] rule of law, secure property rights, [and] contract enforcement."<sup>225</sup>

In light of the presumption of deference to state sovereignty, however, the legal test for justifiable secession from a failed state should be narrow. The parent state should be given every opportunity to correct its course before secessionists are allowed to justifiably declare independence. To mitigate this danger, the test should include a time element, as some analysts have suggested.<sup>226</sup> A state must be failing for a reasonable amount of time before the secession can be justified. In addition, the secessionists must overcome a threshold test. As a potential state, it must be capable of the things that the failed state is not. It must be able to provide security to its people.<sup>227</sup> Some mechanism of political participation must exist.<sup>228</sup> The secessionists must have the means to provide civil services.<sup>229</sup> Most importantly, they must be able to operate a stable state for

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222. See, e.g., *id.* at 4–5; Fund for Peace, *supra* note 82 (listing "Progressive Deterioration of Public Services," "Security Apparatus Operates as a 'State Within a State,'" and "Suspension or Arbitrary Application of the Rule of Law and Widespread Violation of Human Rights" as indicators).

223. See Di John, *supra* note 78, at 4–6.

224. See Rotberg, *supra* note 80, at 9.

225. Di John, *supra* note 78, at 5. In addition, "no single indicator provides certain evidence that a strong state has become weak or a weak state is beginning to fail," but taken together, these four indicators provide "a useful starting point to define state failure . . ." *Id.*

226. See *id.* at 9.

227. See Rotberg, *supra* note 80, at 3 ("The state's prime function is to provide . . . security—to prevent cross-border invasions and infiltrations, and any loss of territory; to eliminate domestic threats to or attacks upon the national order and social structure; to prevent crime and any related dangers to domestic human security; and to enable citizens to resolve their disputes with the state and with their fellow inhabitants.").

228. See *id.* ("Another key political good enables citizens to participate freely, openly, and fully in politics and the political process.").

229. See *id.* at 3–4 (listing various fundamental civil services provided by functioning states).

a reasonable amount of time. This test provides citizens of a truly failed state the power to improve their condition and exercise the right to self-determination, but not at the expense of the sovereignty of the parent state, except, perhaps, in the extreme cases when a state cannot even function as such.

One inquiry remains—to apply this test to Somaliland within Somalia. Somalia is a failed state by any objective measure. Some analyses place Somalia at the top of the list of the world's worst failures.<sup>230</sup> Because of the violence of the civil war, the government cannot even provide the most basic functions of a state.<sup>231</sup> Furthermore, because the civil war in the south has been raging since 1991 with no signs of slowing,<sup>232</sup> and there are few signs of improvement from the government,<sup>233</sup> there is a strong argument that a reasonable amount of time has passed since the country had a functioning government. Conversely, during the same time period, Somaliland has shown progression. After peace “broke out” in the region in the mid-1990s, Somaliland has had a vibrant political culture, a form of representative government, and enough security and stability to experience a modicum of economic development.<sup>234</sup> Somaliland's largest city, Hargeysa, even had its first traffic light installed recently.<sup>235</sup> Somaliland has demonstrated the ability to govern itself while Somalia has not. Under the proposed test, Somaliland can justifiably secede from Somalia, because it can provide the basic functions of a government that Somalia cannot, and Somalia has failed long enough to create a power vacuum. Therefore an independent state of Somaliland would not impinge upon Somali sovereignty.

## CONCLUSION

Under the current international legal standards, Somaliland cannot escape the volatility and anarchy of southern Somalia. Internal self-determination is not possible because the Somali state has failed and Somalilanders are unable to exercise

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230. See, e.g., Fund for Peace, *supra* note 107; see also Di John, *supra* note 78, at 4 (“In extreme cases, failure may occur on all dimensions simultaneously as in Somalia.”).

231. See Di John, *supra* note 78, at 4; see also, Draper, *supra* note 1, at 78–79.

232. See Draper, *supra* note 1, at 78.

233. See Mohammed & Childress, *supra* note 112, at A11.

234. See Draper, *supra* note 1, at 86.

235. See *The Nation Nobody Knows*, *supra* note 9, at 42.

their political rights. In addition, international law currently reserves secession for particular circumstances not applicable to Somaliland. Secession is attainable under domestic law through cooperation with the parent state,<sup>236</sup> unilaterally in response to human rights violations,<sup>237</sup> or, arguably, through recognition by other nations.<sup>238</sup> There is a gap in the law of secession, however, as it applies to failed states, such as Somalia. In recognition of the devastating effects that a failed state has on its inhabitants, the law of secession should allow secession when the parent state has been unable to provide security, a functioning political system, and civil services for a reasonable amount of time, and when the secessionists have been able to provide each of these state functions. Such a test improves upon the current laws of secession by permitting those living within a failed state like Somalia to escape the binds caused by the absence of government while preserving state sovereignty by allowing secession in only the most extreme situations.

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236. See *Reference Re Secession of Quebec*, [2008] 2 S.C.R. 217, 273 (Can.).

237. See Sterio, *supra* note 55, 145–46 (discussing the current norms regarding unilateral, or remedial, secession).

238. See Vidmar, *supra* note 32, at 827.