Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts"

Christopher J. Borgen
St. John's University School of Law

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The world we have to deal with politically is out of reach, out of sight, out of mind. It has to be explored, reported, and imagined.

–Walter Lipmann

INTRODUCTION

The interrelated concepts of sovereignty, self-determination, and the territorial integrity of states form a Gordian knot at the core of public international law. These concepts encompass not only how we define the classic actors of the international system—states—but also how seriously international law takes claims of civil and
political rights. This Article considers how geographic concepts can be used to try to untangle—or slice through—this knot of issues.

The frozen conflicts of Eurasia are a series of ongoing secessionist crises in the post-Soviet states of Moldova, Georgia, and Azerbaijan. I will use the example of the so-called "frozen conflict" in Moldova as a central illustration. Part I is a discussion of how we "imagine sovereignty"—using techniques of political geography and cartography to designate sovereignty and how this affects our perception of claims. Related to this, I consider how "territory" is both a physical thing—a plot of land—and also an ideological concept—an idea of a homeland. Part II briefly sets out the evolution of the concept of self-determination and how it is used to regulate legal claims for secession. Part III further examines the theory of self-determination through the optic of the conflict in Moldova. This part will also consider the "legal geography" of secessionist enclaves. Part IV will situate these legal arguments in the broader discourse of realpolitik, including whether and how these issues relate to the debate over the final status of Kosovo. Finally, Part V considers implications of these findings and addresses arguments that perhaps it is time to reorder the international system around something other than states.

The frozen conflicts have been considered intractable in part because it is very difficult to find negotiated solutions on purely political bases. Realpolitik has its limits. Perhaps seeing these conflicts through the optic of international law, and that the contested territory has a legal geography as well as a political geography, may provide a framework in which, based on the norms of the international community, some claims will be favored and others viewed as weak. The challenge is to use the norms of self-determination not merely to protect the prerogatives of
states but also to envision a means towards principled and just resolutions of these, and similar, conflicts.

I

MAPS AND STATES: IMAGINING SOVEREIGNTY

States and sovereignty are a leap of the imagination. In the early 19th century British Foreign Minister Lord Castlereagh said that Italy was no more than a "geographical concept," and that its unification into a single state was "unthinkable." But people dared to think the unthinkable and Italy, Germany, and other such previously fanciful notions are now well-established states.

The modern state has been at the center of the international system since the Peace of Westphalia ended the Thirty Years' War in 1648. Westphalia codified the doctrine in the European state system that no entity—emperor, pope, or other decision-maker—was above the level of the state. The state became the main actor in the international system and also the pinnacle of the hierarchy of power.

The Westphalian system that developed was not only about vertical hierarchies of power, but also about horizontal relations among states, affecting notions of territory, space, and jurisdiction. Sovereignty included full and exclusive authority over the territory in question. Each state was the supreme authority within its territory and had no right of action within another's territory.

In the wake of Westphalia, then, territory became increasingly compartmentalized. Consequently, "[i]n world

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politics space can only be divided between actual states and states-in-making.” And so the goal of many national movements has been to become recognized states.

Although there is no single text that explains what is required to be a “state,” the 1933 Convention on the Rights and Duties of States, better known as the Montevideo Convention, sets forth a series of benchmarks which are generally accepted in the international community. The Restatement (Third) of the Foreign Relations Law of the United States gives the modern synopsis of the requisites of statehood:

Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

With this focus on territory, the language of international law and the language of political geography overlap. As one geographer put it:

The world is actively spatialized, divided up, labeled, sorted out into a hierarchy of places of greater or lesser ‘importance’ by political

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5 The state as a person in international law should possess the following qualifications:
a) a permanent population;
b) a defined territory;
c) government; and,
d) capacity to enter relations with other states.
6 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §201 (1986) [hereinafter RESTATEMENT (THIRD)].
geographers, other academics and political leaders. This process provides the geographical framing within which political elites and mass publics act in the world in pursuit of their own identities and interests.7

The symbols of cartography—hard lines, dotted lines, and the like—are used in an attempt to graph borders and jurisdictions, to image sovereignty, to take its picture, via mapping. In attempting to portray the image of sovereignty, we are also trying to imagine the existence of a sovereign entity, a state, and its area of control.

But the Westphalian system is now being challenged and, moreover, maps can be misleading. Journalist Robert Kaplan, reflecting on his travels through the Caucasus, Northern Iraq, and West Africa, noted that he began to “develop a healthy skepticism toward maps, which, [he] began to realize, create a conceptual barrier that prevents us from comprehending the political crack-up just beginning to occur worldwide.”8

This Article is about understanding how concepts from geography inform legal norms concerning one aspect of this “political crack-up”: secessionist conflicts. We will first look at international law concerning self-determination and then apply these rules to the conflict in Moldova.9

7 AGNEW, supra note 4, at 3.
9 This Article in part draws from a report of which I am the principle author, Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova. See, Special Committee on European Affairs, Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova, 61 REC. OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK 196 (2006) [hereinafter Bar Report]. A differently paginated version is available at http://www.abcny.org/Publications/record/vol_61_2.pdf. In late May 2005 the Association of the Bar of the City of New York, through its Special Committee on European Affairs, sent a
II

BLOOD AND SOIL: MANAGING SECESSION

A. The Evolution of Self-Determination

Self-determination is one of the most-often invoked and least understood concepts of international law. The norm of self-determination gained international prominence in Woodrow Wilson's Fourteen Points. Since then it has had a tumultuous existence, ranging from post-World War decolonization to post-Cold War ethnic conflicts. Writing the concept of "self-determination" into the UN Charter caused the idea to evolve from a principle to a right without ever fully defining the underlying concept. According to Hurst Hannum of the Fletcher School of Law and Diplomacy, self-determination in the 1960's was simply another term for decolonization. However, even at this
point "self-determination did not allow for secession; instead, the territorial integrity of existing states and most colonial territories was assumed." The rhetoric of self-determination then changed in the period from the late 1970's until today, in which the Wilsonian discourse concerning the ethnic and cultural rights of minorities was mixed with the territorial concerns of the era of decolonization. While there is still controversy as to what this norm is and is not, there is a basic consensus from which we can draw conclusions.

In sum, the basic norm of self-determination is the right of a people of an existing state "to choose their own political system and to pursue their own economic, social, and cultural development." It is not a general right of secession.

The concept of self-determination is actually comprised of two distinct subsidiary parts. The default rule is

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12 Id. at 4. See also the discussion of uti possidetis infra notes 25 through 28.

13 Carley, supra note 10, at 3.

14 Daniel Thurer, Self-Determination, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 364, 367 (R. Bernhardt, ed. 2000). See also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 553 (6th ed. 2003) (stating that the right to self-determination is "the right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups.").

15 See, e.g., Thurer, supra note 14, at 367 (stating "[t]he principle of self-determination does not seem to include a general right of groups to secede from the States of which they form a part."). The US Institute for Peace/Department of State roundtable stated that the right to self-determination must be separated from right to secession and the establishment of independent statehood. Carley, supra note 10, at vi. State practice in the cases of Tibet, Katanga, Biafra, and Bangladesh supports the view that states have not recognized such a right of secession under customary international law. Thurer, supra note 14, at 367–68.
"internal self-determination," which is essentially the protection of minority rights within a state. As long as a state provides a minority group the ability to speak their language, practice their culture in a meaningful way, and effectively participate in the political community, then that group is said to have internal self-determination. Although self-determination was mentioned in the U.N. Charter,\textsuperscript{16} and in article 1 of both the Civil and Political Rights Covenant and the Economic, Social and Cultural Rights Covenant,\textsuperscript{17} jurists even in the last decade have found that "international law as it currently stands does not spell out all the implications of the right to self-determination."\textsuperscript{18} Nonetheless, the International Court of Justice's ("ICJ's") \textit{Western Sahara Advisory Opinion} confirms "the validity of

\textsuperscript{16}\textquoteleft\textquoteleft Article 1, paragraph 2 of the Charter states:

\begin{quote}
\textbf{Article 1}  \\
The Purposes of the United Nations are: ...  \\
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;
\end{quote}

U.N. Charter art. 1, para. 2.

\textsuperscript{17} Both Covenants have the following language in each of their first articles:

\begin{quote}
\textbf{Article 1}  \\
1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
\end{quote}


\textsuperscript{18} Conference on Yugoslavia Arbitration Commission Opinion No. 2, 31 I.L.M. 1497, 1497 (1992) [hereinafter Badinter Commission]. The Badinter Commission was organized by the E.C. to sort through the legal issues concerning the status of Yugoslavia and its possible successor States.
the principle of self-determination" under international law.\textsuperscript{19}

The assumption is that such a pursuit of economic, social, and cultural development would occur under the auspices of an existing state, and would not require the establishment of a new state. This conception of internal self-determination makes self-determination closely related to the respect of minority rights.\textsuperscript{20}

In some instances, though, aggrieved groups claim a "right of secession." No such "right" exists under international law. Actually, international law is silent as to secession, which is viewed as a matter of domestic law and politics, not international law.\textsuperscript{21} The general view is that separation from a state as a method of self-determination is a legally-sanctioned solution only in the context of decolonization.\textsuperscript{22}

\textsuperscript{19} Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31–33 (Oct. 16). See also Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J 16, 31 (June 21) and Case Concerning East Timor (Port. V. Austl.), 1995 I.C.J. 90, 102 (June 30); BROWNLIE, supra note 14, at 554 n. 121.

\textsuperscript{20} Furthermore, modern views of self-determination also recognize the "federalist" option of allowing a certain level of cultural or political autonomy as a means to satisfy the norm of self-determination. Daniel Thurer, Self-Determination, 1998 Addendum, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 364, 373 (Rudolf Bernhardt ed., 2000).

\textsuperscript{21} PATRICK DAILLIER & ALLAIN PELLET, NGUYEN QUOC DINH'S DROIT INTERNATIONAL PUBLIC, sec. 346, 500 (1994), ("la sécession n'est pas prise en compte en elle-même par le droit international.").

\textsuperscript{22} Report of the Group of Experts Concerning the Territorial Integrity of Québec in the Event of the Attainment of Sovereignty, at sec. 3.07, available at http://www.tamilnation.org/selfdetermination/countrystudies/quebec/quebec2.htm [hereinafter Quebec Commission]. The Commission consisted of Thomas M. Franck, Murry and Ida Becker Professor of Law and Director, Center for International Studies, New York University School of Law; Rosalyn Higgins, Q.C., Professor, London School of Economics, member of the Human Rights
However, some jurists argue that in certain extreme cases, even outside of decolonization, there is the possibility of "external self-determination," or secession from a state. This is "the subject of much debate." Whether and how a group may secede from an existing state—put more bluntly, when a country may be dismembered—is a politically charged question that goes to the heart of the stability of the modern state system. The answer given in particular examples is often driven by the national interests of the states involved. For example, as will be discussed below, the EU member states that disagreed with the EU's general policy for recognizing Kosovar sovereignty were countries that themselves had domestic concerns of secession (such as Spain, Cyprus, and Romania) and/or a good diplomatic relationship with Serbia (for example, Romania).

Notwithstanding the political context of state practice concerning self-determination and secession, there are nonetheless legal principles that have been expounded in cases and incidents such as in the report of the international commission of jurists asked to arbitrate the attempted secession of the Aaland Islands in 1921, the Badinter Commission; Alain Pellet, Professor of Public Law at the University of Paris X-Nanterre and at the Paris Institut d'Études politiques, member of the International Law Commission of the United Nations; Malcolm N. Shaw, Professor, Faculty of Law, University of Leicester; and Christian Tomuschat, Professor, Institut für Völkerrecht, Bonn University, President of the International Law Commission of the United Nations. (Institutional affiliations listed were those at the time of the work of the Quebec Commission.)


24 In the 17th century the Aaland Islands were administratively part of Finland, which in turn was part of the Kingdom of Sweden. In the 19th century Sweden ceded Finland, including the Islands, to Russia. In 1917, Finland declared independence from Russia during the course of the Russian Revolution. At this time the Aaland Islanders, who were nearly all Swedish, sought reunification with Sweden. Finland and
Commission opinions concerning the former Yugoslavia in the 1990's, the Canadian Supreme Court opinion concerning Quebecois self-determination, as well as from other examples of state practice. The central question is one imbued with the languages both of law and of political geography: what is the relationship between political boundaries and the right of self-determination?

State practice shows that self-determination, properly understood, does not allow the redrawing of boundaries. During the Yugoslav War, the Conference on Yugoslavia Arbitration Commission, better known as the "Badinter Commission," established by the European Community, found that the exercise of self-determination "must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the states concerned agree otherwise."25 This is reiterated in Opinion 3, which notes that uti possidetis has become recognized as a "general principle" of international law.26 The Helsinki Final Act also provided for inviolability of borders, although it does allow for border changes if through peaceful means and based on an agreement.27 The

Sweden brought the case to the League of Nations, who in turn referred the case to a Commission of Jurists to assess the legal issues. The two opinions issued by the Commission, one concerning applicable law and the other on substantive results, have become very influential in questions of self-determination and secession.

25 Badinter Commission, supra note 18.


affirmation of the principle of *uti possidetis* is found in a host of declarations, decisions, and treaties.\(^ {28}\)

However, although self-determination does not allow for the redrawing of boundaries, this does not mean that secession itself is illegal as a matter of international law. James Crawford argues that "[i]t is probably the case that the use of force by a non-State entity in exercise of a right of self-determination is legally neutral, that is, not regulated by international law at all (though the rules of international humanitarian law may well apply)."\(^ {29}\) Secession is merely treated as a fact: it either has occurred or it has not. It is not a matter of international legal regulation and it is not a matter of right. Thus, there is no right of secession.

However, some argue that there may be a possibility of a "legal" secession in certain extreme cases. These views are based on an interpretation of the Friendly Relations


As for *uti possidetis* in judicial opinions, the ICJ had written in *Burkina Faso v. Mali* that *uti possidetis*:

* is not a special rule which pertains solely to one specific system of international law. It is a general principle which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.

Case Concerning the Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554, 565 (Dec. 22).

Resolution of the UN General Assembly, a special resolution that was passed at the twenty-fifth anniversary of the founding of the United Nations to restate the basic principles of the organization. The resolution excludes secession as a means of forming a sovereign state when the existing state respects equal rights and the self-determination of peoples, but some have interpreted it as implying that secession may be a legal privilege when a state does not respect internal self-determination.\(^{30}\) For example, in *re Secession of Quebec*, the advisory opinion issued Supreme Court of Canada on the issue of secession, the Canadian court found that "[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances..."\(^{31}\)

Based on this interpretation, any attempt to claim a privilege of secession—that is, where secession trumps *uti possidetis*—must at least show that:

(1) the secessionists are a "people;"

(2) the state from which they are seceding seriously violates their human rights; and

(3) there are no other effective remedies under either domestic law or international law.

In the *Secession of Quebec* opinion, the Canadian Supreme Court noted that the meaning of the term


"people" is "somewhat uncertain." At various points in international legal history, "people" has been used to signify citizens of a nation-state, the inhabitants in a specific territory that is being decolonized by a foreign power, or an ethnic group. The definition of "people" from the time of decolonization, "the entire population within a state," was meant to support the existing state system by essentially making the term co-terminus with the state itself.

By contrast, in recent state practice the term "people" has often been used to refer to an ethnic group, or a "nation" in the classic, ethnographic, sense of the word. Equating the term "people" with "nation" has been criticized by some for being too restrictive, as it is difficult to show that a group is the near totality of an ethnic nation. Others have argued that defining people based on ethnicity opens too many possible arguments for rights of self-determination, such that concerns for international stability led states to deny that there was a right of self-determination to ethnic groups within colonial territories.

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32 Id.
33 See Guntram H. Herb, National Identity and Territory, in Nested Identities 12, 12 (David H. Kaplan & Guntram H. Herb eds., 1999).
34 The Aaland Islands report also added that, for the purposes of self-determination, one cannot treat a small fraction of people as one would a nation as a whole. The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106 (1921) [hereinafter Aaland Islands 1921 Report]. Thus, the Swedes on the Aaland Islands, who were only a small fraction of the totality of the Swedish "people" did not have a strong claim for secession in comparison to, for example, Finland, when it broke away from Russian rule since Finland contained the near totality of the Finnish people.
Consequently, various commentators have attempted to reframe the analysis by defining the idea of "the self-determination of peoples" on non-ethnographic terms. Professor James Crawford of Oxford argues that the "units" to which the principle of self-determination applies can be best understood by not focusing on the term "people," but on the idea of territory. He writes:

The units to which the principle applies are in general those territories established and recognized as separate political units; in particular it applies to the following:

(a) trust and mandated territories, and territories treated as non-self-governing under Chapter XI of the [UN] Charter;
(b) States, excluding for the purposes of the self-determination rule those parts of States which are themselves self-determination units as defined;
(c) other territories forming distinct political-geographical areas, whose inhabitants are arbitrarily excluded from any share in the government either of the region or of the State to which they belong, with the result that the territory becomes in effect; with respect to the remainder of the State, non-self-governing; and
(d) any other territories or situations to which self-determination is applied by the parties as an appropriate solution.\(^{36}\)

The second requirement for a possible claim of a privilege of secession, after showing that the claim is being made on behalf of a "people," is that the claimants can show serious violations of their human rights by the pre-existing state. The Aaland Islands report actually stated this principle in the negative; the Commission explained that its

\(^{36}\) CRAWFORD, supra note 29, at 127.
finding that there was not a right to secede did not include the case of "a manifest and continued abuse of sovereign power to the detriment of a section of population." It is an unfortunate fact that human rights abuses exist in every country and that in many countries such abuses are serious and pervasive. However, it is exceedingly rare for the international community to ratify a secession, regardless of the reason upon which it was based. Consequently, we must give a narrow reading to the idea of "serious violations of human rights" in the context of secession.

Third, those claiming secession as a legal right must show that there are no other options under either domestic or international law. The Aaland Islands Commission, for example, found that if secession and subsequent incorporation into Sweden was the only means of protecting the rights of the Islanders, then this would have been a solution, but there were, in fact, other means of protecting their rights. More recently, the Canadian Supreme Court wrote in re Secession of Quebec that there may be a rule evolving in international law that "when a people is blocked from a meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession." There are two points worthy of emphasis: first, that the Canadian Supreme Court did not come to a conclusion that such a rule actually existed, it simply noted that some have argued that there is such a rule. And, second, even if this rule did exist, secession would only be allowed as a last resort.


38 Thurer, supra note 14, at 367, citing to Aaland Islands 1921 Report, supra note 34, at 22–23.
B. Geography and External Self-Determination

Thus, secession is disfavored as a method of addressing self-determination. While the 1975 Helsinki Final Act mentioned self-determination, it also reiterated that territorial boundaries were inviolable.\(^{39}\) Similarly, one of the first acts of the Organization for African Unity was to issue a resolution to respect borders at the time of independence.\(^{40}\) Consequently, claims for self-determination that are most likely to be viewed as legally legitimate must not only pay respect to peoples but to borders.

Secessionist entities that are able to point to some previously existing boundaries to which they will conform have claims that are more likely to be viewed as legally legitimate. By analogy, one can look to the claims that were made in the wake of the dissolution of Yugoslavia. The leaders of Bosnia and Croatia could claim that their new states conformed to pre-existing administrative boundaries that had been within Yugoslavia. This was viewed as more legitimate than the claims of the Krajina Serbs, which had no pre-existing boundaries and were essentially a grouping of ethnic communities within Croatia.

This move from ethnographic argument to geographic argument is made all the more explicit in Crawford’s four-part formulation.

Thus, in an attempt to impose a bright line rule on the messiness of ethnic conflict and separatism, the international community gives weight to cartography and political geography. Being able to show a delineation on a


\(^{40}\) *Id.* at 70.
map may not be dispositive of a claim for external self-determination, but it helps. This is a rule that favors the cohesion of states and disfavors claims purely made on issues of ethnic identity or "nationhood" (in the classic, ethnographic, sense). Some would argue that a better rule would be the reverse, one in which the aspirations of peoples for a homeland were favored instead of maintaining the status quo order of states. I will turn to the broader question of what type of rule is desirable in Part IV. Before discussing that issue, though, I want to apply the existing legal framework to the separatist crisis in Moldova by way of example of how geographic concepts are deployed to manage claims of secession.

III

THE LEGAL GEOGRAPHY OF SECESSIONIST ENCLAVES: LESSONS FROM THE TRANSNISTRIAN CASE

A. The Frozen Conflicts of Eurasia

Although the dissolution of the USSR in late 1991 was a generally peaceful event, it nonetheless sent tremors throughout Eurasia. The geopolitical quake in Eurasia was most pronounced in the Russian "near abroad," the ring of newly independent states that surround Russia. No longer republics within the USSR, they were now fully sovereign states having to muster their own (much diminished) resources to address the various domestic ills that befell them. Some of these states found that they had to contend with dissatisfied groups who did not "buy-in" to the new state or who yearned for the USSR, or who wanted their own state as well. Thus, there arose separatist problems in Moldova (Transnistiria) and Georgia (Abkhazia and South Ossetia), as well as the long-term conflict over Nagorno-Karabakh in Azerbaijan. Although each of these conflicts has its own unique causes and set of ongoing dynamics,
they are generally called the "frozen conflicts" of Eurasia, referring to their supposed intractable natures and that they have persisted for many years without much hope of resolution.\footnote{Dov Lynch of the European Union Institute argues that the term "frozen conflict" is somewhat misleading because the situation in Moldova (and in the other conflicts typically described as frozen conflicts) has actually been quite dynamic. \textit{DOV LYNCH, ENGAGING EURASIA’S SEPARATIST STATES: UNRESOLVED CONFLICTS AND DE FACTO STATES 42 (2004).} I use the term here in recognition that, although the situation has evolved in significant ways, the overall result is no closer to substantial resolution as of this writing than it was in 1992.}

The Georgian conflicts and Nagorno-Karabakh have received relatively more attention in the West than the Moldovan conflict. Located between Romania and Ukraine, with a majority of ethnic Romanians, Moldova is the poorest country in Europe.\footnote{The Soviets, however, labeled this population as ethnically "Moldovan", and asserted that they were not ethnically Romanian. The USSR also called the Romanian language "Moldovan", and underscored this by outlawing the use of the Latin alphabet and requiring the use of Cyrillic letters. Although the reason for this nomenclature was political, rather than ethno-linguistic, it was carried over by the current Moldovan government after independence.} At issue is who should control a strip of land between the Nistru River (also known as the Dniestr River) and the border of Ukraine. Variously called Transnistria, Trans-Dniester and, by Russian speakers, Pridnestrov’ia, this region is less than 30 kilometers wide, with 4,118 square kilometers in total area, making it roughly the size of Rhode Island. Transnistria has a population of approximately 580,000, while the rest of Moldova has 3.36 million inhabitants. Nonetheless, Transnistria contains Moldova’s key industrial infrastructure, power plants, and, importantly, a significant stockpile of Soviet-era arms. Since 1994, it has been under
the effective control of a separatist regime that calls itself the Transnistrian Moldovan Republic ("TMR").

The Transnistrian conflict will provide an optic through which we can analyze the rules of self-determination and the role of geography on the definition and application of these rules.

B. The History of the Transnistrian Conflict

The region in which Moldova is located is a crossroad of cultures. Historically, the west bank of the Nistru River was called Bessarabia. "Transnistria" referred to the east bank. Prior to the Soviet period, Transnistria "was, at an even deeper level than in Bessarabia, a classic borderland where ethnic identities were fluid and situational, and where Russian, Ukrainian, Romanian, Jewish, and German influences combined to create a mixed culture." Unlike Bessarabia, Transnistria was not part of traditional Romanian territory. From the ninth to the fourteenth centuries Transnistria was part of Kievan Rus' and Galicia-Volhynia. Bessarabia was once a part of an independent Moldovan state that emerged briefly in the 15th century under Stefan the Great, but subsequently fell under Ottoman rule in the 16th century. After the Russo-Turkish War of 1806-12, Bessarabia was ceded to Russia, while Romanian Moldova (west of the Prut River) remained in Turkish hands. Transnistria was also part of Russia, but was in the districts of Podolia and Kherson.

During the upheaval of the Russian Revolution, Bessarabia announced independence as the Moldavian Democratic Republic and subsequently sought unification with the Kingdom of Romania.

44 Id. at 179.
By the mid-1920’s Josef Stalin had been successful in recapturing for the Soviet Union most of the provinces that Russia had lost during the revolution. Bessarabia, however, remained part of Romania. In 1924, Stalin established the Moldovan Autonomous Soviet Socialist Republic (or “MASSR”) as an autonomous province within the Ukrainian Soviet Socialist Republic. This was spurred by Moscow’s desire to reclaim Bessarabia and attempt to have a colorable claim to this “Moldavian” territory. Transnistria became part of the MASSR. In 1939, the USSR and Germany signed the secret Molotov-Ribbentrop Pact, which, among other things, provided for the USSR’s annexation of Bessarabia, which had by then been part of Romania for more than twenty years. In 1940, Romania was forced to cede Bessarabia and northern Bukovina to the USSR via an exchange of communications on June 26-28, 1940. Stalin merged Bessarabia and the MASSR into the Moldavian Soviet Socialist Republic (or “MSSR”), which became the fifteenth republic within the USSR.

While a sense of history is important in any discussion of Moldovan politics, the current crisis can be traced to more recent events. Contemporaneously with the events leading to the fall of the Berlin Wall, from August to December 1989, the MSSR parliament passed a series of language laws that made the Moldovan language the official state language and that also began a transition from Cyrillic to Latin script. On April 27, 1990, the Supreme Soviet of Moldova adopted a new tricolor flag and a national anthem that was the same as that of Romania.

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45 Kolsto et al., supra note 27, at 978.
47 Kolsto et al., supra note 27, at 981.
48 Case of Ilascu (Ilascu v. Moldova) 311 Eur. Ct. H.R., at para. 29
Then, in the summer of 1990, the MSSR declared sovereignty, changing its status within the USSR.

A group of Russian speakers led by Igor Smirnov, a factory manager who had come to Moldova in November 1987 to become a director of the Elektromash factory in Tiraspol, expressed concern that the newly sovereign MSSR would soon seek reunification with Romania and take Transnistria along with it.

On September 2, 1990, Transnistria declared its separation from Moldova and its existence as a republic within the USSR. Soon after this announcement, separatists began taking over police stations and government institutions in Transnistria.49

Moldova sought independence from the USSR.50 On May 23, 1991, the Moldavian Soviet Socialist Republic changed its name to the Republic of Moldova.

On August 27, 1991, the Moldovan parliament, in the aftermath of the attempted putsch against Gorbachev, declared that Moldova was an independent republic. By contrast, Igor Smirnov, the leader of the Transnistrian separatists, praised the putschists as saviors of the Soviet state.51 Smirnov, arguing that independence was necessary to protect the Russian minority in Transnistria from the possible reunification of Moldova with Romania, rallied the Transnistrian separatists in the creation of the TMR.

On December 3, 1991, the Soviet 14th Army occupied Grigoriopol, Dubasari, Sobozia, Tiraspol, and Ribnita, all

49 KING, supra note 43, at 189; see also Kolstø et al., supra note 27, at 984.


51 KING, supra note 43, at 191.
of which are in Transnistria. Thus, if the Government of Moldova wanted to send troops into its cities to prevent any attempted separation, they could have faced opposition from Russian troops.

The situation boiled over in the summer of 1992. Much of the fighting took place in and around the city of Bender. The 14th Army, which had been garrisoned in Moldova, intervened on the side of the Transnistrians and, in part due to the 14th Army’s positions, the Moldovan Army was unable to take control of Bender or Dubasari. The fighting resulted in approximately 1,000 deaths and 130,000 people either internally displaced or seeking refuge in other countries. On July 21, 1992, the fighting ended with Moldova signing a cease-fire agreement that was notably countersigned by Russia, as opposed to the Transnistrians.

The result of the Russian intervention was that Transnistria became effectively partitioned from the rest of Moldova. The fighting cooled, and was replaced by a frozen conflict.

As the years since the 1992 war passed, observers became increasingly concerned that Smirnov and his associates had no intention of allowing formal reintegration into Moldova as that might thwart increasingly profitable smuggling activities. The end of the 1990’s saw another series of attempts to resolve the conflict, including plans for a federal state and for Transnistrian autonomy within a

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52 Case of Ilascu, supra note 48, at para. 53.
Moldovan state, none of which succeeded.\textsuperscript{55} Russia and, to a lesser extent, Ukraine were closely involved in the ongoing situation as "guarantors" of regional peace and stability.

The U.S. and the EU have also both joined the Moldova-Transnistria mediation process. The new "5+2" talks include Moldovan leadership, TMR leadership, Russia, Ukraine, and the OSCE as the main five stakeholders and the U.S. and the EU as the official observers.

At this point the TMR is playing a waiting game; as the then-Chairman of its so-called Supreme Soviet, Grigoriy Marakutsa said in 2003: "Every year we are getting closer to our international recognition."\textsuperscript{56} As will be discussed below, the situation in Kosovo (as of this writing) has affected the public stance of the TMR leadership.

\textbf{C. The Legal Claims Concerning Sovereignty}

For over fifteen years political negotiations have been unsuccessful at breaking the impasse in the Moldovan conflict. In 2008, the fundamental positions of the parties are no different than in 1992: the TMR's leadership wants to maintain complete control over Transnistria, the Moldovan government seeks effective reintegration of Transnistria into Moldova, and the Russians actively and tacitly support the TMR, at least to the extent of frustrating Moldova's attempts at reintegration, but without recognizing the TMR as a sovereign State. An implicit

\textsuperscript{55} See, e.g., Memorandum for the Bases of Normalization between the Republic of Moldova and Transdniestria, 8 May 1997, available at http://www.osce.org/documents/mm/1997/05/456_en.pdf; see also Herd, supra note 54, at 3, referring to agreements "granting further autonomy and calling for more talks."

\textsuperscript{56} Herd, supra note 54, at 4.
argument in the New York City Bar Report is that after so many years of realpolitik not being able to find a way beyond this impasse, there is the possibility that international law can provide a means to clarify the strengths and weaknesses of the parties’ positions in regards to international norms and, perhaps, provide a framework for fruitful settlement discussions.

1. A People

Before the 1992 conflict, Transistria had an ethnic mix that was about 40-percent Moldovan/Romanian, 28 percent Ukrainian, and 25 percent Russian.\(^{57}\) There are many familial ties across the Nistru River. As Pal Kolsto and his co-authors explain, the conflict was less ethnic than internecine: Orthodox Christians killed Orthodox Christians and ethnic Moldovans, Ukrainians, and Russians fought on both sides.\(^{58}\) They argue that it would be a “gross oversimplification” to call the conflict one between ethnic Moldovans (or Romanians) and Russophones.\(^{59}\) One must remember that “the history of Moldova is one of constant change and contestation of territory and so identities and loyalties.”\(^{60}\)

Consequently, arguing that there is a distinct Transnistrian ethnicity would be quite difficult. Rather, TMR leadership argues that the definition of “people” should be broader than an ethnicity and should be broad enough to include likeminded groups. TMR “Foreign Minister” Valeriy Litskai has argued that Transnistria is a social and cultural region.\(^{61}\) Rather than a single ethnicity,

\(^{57}\) Kaufman, supra note 50, at 119.

\(^{58}\) Kolsto et al., supra note 27, at 975.

\(^{59}\) Id.

\(^{60}\) Herd, supra note 54, at 1.

\(^{61}\) Notes from meeting of May 19, 2005 with Valeriy Litskai
though, he argues that it is a community of three ethnic groups.\textsuperscript{62} There is some support for saying that Transnistrians have different political proclivities than “right bank Moldovans.” For example, Transnistria had already been collectivized in the 1920’s and 1930’s and thus was always more “Soviet” than the Bessarabian part of Moldova.

Even assuming Litskai’s formulation that political proclivities could make a “people,” the facts in this case would not support his claim. Should the simple fact of having had one part of a population more “sovietized” than the other all of a sudden mean that they were a different “people?” By this logic, East Germans would be a different people than West Germans. Yet that is not how the international community approached the issue of the status of Germany; clearly they are more similar than different, despite part of Germany having been part of the Soviet Bloc and the other part of the “West.”

It is important to keep in mind that identity is socially constructed; in pursuing its claim for secession the TMR has put effort into socializing Transnistrians towards having a group identity distinct from, and hostile to, the rest of Moldova.\textsuperscript{63} Inasmuch as the leaders of the TMR have

\textsuperscript{62} Id.; see also Bar Report, supra note 9, at 241.
\textsuperscript{63} Transnistrian textbooks, for example, state the following concerning the 1992 Battle of Bender:

The traitorous, barbaric, and unprovoked invasion of Bender had a single goal: to frighten and bring to their knees the inhabitants of the Dnestre republic... However the people’s bravery, steadfastness, and love of liberty saved the Dnestre republic. The defense of Bender against the overwhelming forces of the enemy closed a heroic page in the history of our young republic. The best sons and daughters of the people sacrificed their lives for peace and liberty in our land.

This is Charles King’s translation of a passage from N.V. Babliunga
socialized children and adults into believing that they are a people separate from those across the Nistru, it would not be surprising if there was a sense of "otherness" by some in Transnistria in comparison to the rest of Moldova. But this alone does not equate to a valid claim for secession.

It has been consistently held that, as the Commission of Jurists stated in *Aaland Islands*, there is no right of national groups to separate by the simple expression of a wish. For example, the *Aaland Islands* Commission found that the ability to choose fate by plebiscite must be decided by the state itself (in this case the Republic of Moldova); otherwise such a formulation would infringe upon the sovereign right of states. Thus states, as opposed to nations (or peoples) are favored.

2. Serious Violations of Human Rights

The TMR leadership proposed three sources of serious violations of human rights by Moldova:

(1) violations of linguistic, cultural, and political rights;
(2) the brutality of the 1992 War; and
(3) the denial of economic rights.

Taking into account the significant changes in Moldova since 1992, none of these claims is convincing today.

First, regarding cultural and political rights, since the

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64 *Aaland Islands*, supra note 37. Note that here the assumption is the existence of a national group — usually meaning an ethnicity, rather than simply a like-minded group.

65 *Id.*
end of the 1992 War Moldova has improved its respect of minority rights. Moldova’s human rights track record has had its share of setbacks—press freedoms are narrow, for instance. However, it is nonetheless more respective of human rights than the TMR: in the 2004 Human Rights Country Report for Moldova, the State Department wrote that “[t]he Government [of Moldova] generally respected the human rights of its citizens; however, there were problems in some areas, and the human rights record of the Transnistrian authorities was poor.”66 Thus, it is difficult for the TMR’s leadership to make a credible claim that formal secession is required due to Moldova’s human rights abuses when the TMR itself has a comparatively poor human rights record throughout the territory it controls, including a lack of due process, persecution of religious minorities, and retaliation against political dissenters.

As for the 1992 War, the heart of the Transnistrians’ claim can be summarized as “We Transnistrians did not go into Moldova to fight, they brought the battle to us.”67 In particular, claims have centered around the fighting in and around Bender. The fighting was, for a time, quite fierce, with a total death toll on both sides of about one thousand.68 Litskai explained that the real issue, though, is that due to the bad feelings that still exist, there is no guarantee that the war could not flare up again in the future.69

The Transnistrian argument is not persuasive. This is

67 Notes from meeting of May 19, 2005 with Igor Smirnov [hereinafter Smirnov Meeting Notes].
68 KING, supra note 43, at 178.
69 Litskai Meeting Notes, supra note 61.
not to belittle the fact that one thousand people died, but rather to recognize that the international community sets a high bar as to what can justify dismembering a state.\(^70\) This recognizes a reality of international politics: there is a deep aversion to allowing secession. In light of this, an argument that a single battle fifteen years ago should be dispositive in a claim for secession today flies in the face of state practice, particularly when one takes into account that the current human rights situation in Moldova is much improved and there is very little ethnic tension.

War by its nature is brutal. But not all wars—actually, as a matter of state practice, very few—lead to accepted claims of a right to secession. If they did, the world would be rife with secessionist conflicts. The 1992 Battle of Bender and its related skirmishes do not rise to the level of such a war.

\(^70\) Consider Biafra. The Biafran attempt to separate from the rest of Nigeria from 1967–1970 was in part (if not mostly) due to ongoing violence by the government of Nigeria against the Igbo people who live in Biafra. Yet, for the nearly one million people that died in that secessionist conflict, the Republic of Biafra was recognized by only five states: Tanzania, the Ivory Coast, Gabon, Zambia, and Haiti. Those states that did recognize Biafra as a new state often focused on the brutality of the conflict. See David A. Ijalaye, \textit{Was “Biafra” At Any Time a State in International Law?}, 65 AM. J. INT’L L. 551, 554 (1971).

The brutality of the conflict was used as a reason for accepting secession: Tanzania explained its recognition was in part due to the real and well-founded fears of the Biafrans based on previous pogroms against them; Gabon and Zambia had similar explanations, though more focused on brutality of the civil war.

Yet, although other countries (notably Portugal, France, and Israel) assisted the Biafrans, no other state recognized the secession. The Organization of African Unity, for its part, strongly supported Nigeria and the norm against the dismemberment of states. The emperor Haile Selassie of Ethiopia said that “[t]he national unity and territorial integrity of member states is not negotiable. It must be fully respected and preserved.” \textit{Id.} at 556.
Finally, the economic rights claim, which was actually about allocation of tax revenues, does not lead to a legal right to dismember a state.\footnote{Bar Report, supra note 9, at 249–50.} This argument is really about policy, not the form of a polity.

Besides these observations, it is also important to note that there is a general sense among commentators, opinions, and decisions, that the human rights violations that are cited in support of a claim of secession must be ongoing violations. Although Moldova still has many possible pitfalls on its road to becoming a fully modern democratic state, it is clear that it is nonetheless traveling the road in the right direction, albeit with some fits and starts. Thus, the second prong—ongoing serious violations of human rights—is not met.

3. Availability of Other Options

The third prong asks whether there are any other options available besides secession. The conflict in Moldova has been frozen not so much because there are no other options under domestic and international law besides secession, but because the separatists have chosen to make the conflict seem intractable by repeatedly refusing any options short of effective sovereignty for the TMR.\footnote{Id. at 250–52.} For example, while Moldova has sought to decrease ethnic tensions, the TMR has attempted to exacerbate them and subsequently claim that separation is necessary in order to avoid ethnic conflict and possibly genocide. Such “gaming the system” is not persuasive.

In summary, there is no solid basis for a claim of secession as a matter of right. First of all, it is generally believed that no such “right to secession” exists as part of the right of self-determination. And, even under theories
that may allow for a privilege of secession under extreme circumstances, the most basic requirements for such a claim are not met here. The bar may seem high, but the rules of international law are pragmatic in this case. Secession is a serious undertaking. In order to prevent a general breakdown of the state system, it must be a last resort.

D. The Law and Politics of Recognition

As a fallback position, the TMR’s leadership has argued that even if the TMR did not have a legal claim to self-determination, it should nonetheless be recognized as a state as (according the them) it meets all of the criteria for statehood.\textsuperscript{73} The extent to which a new state is able to participate in the international community is, in practice, largely determined by the extent of its bilateral relationships with other states, which, in turn, depends primarily on its recognition by them.\textsuperscript{74} By recognizing a state, the recognizing state gives its opinion that the new state meets the requirements under international law for statehood. When recognition is withheld, the position of the entity in question can be in doubt.\textsuperscript{75}

\textsuperscript{73} In 2000, Vladimir Bodnar, the chair of the Security Committee of the Supreme Soviet of the TMR, complained:

\begin{quote}
We are an island surrounded by states... What defines a state? First, institutions. Second, a territory. Third, a population. Fourth, an economy and a financial system. We have all of these!
\end{quote}

LYNCH, \textit{supra} note 41, at 43. Note Bodnar’s replacement of “the capacity to engage in formal relations with states” with “an economy and financial system” in his description of the criteria for statehood.

\textsuperscript{74} 1 LASSA OPPENHEIM, OPPENHEIM’S INTERNATIONAL LAW §39, 129 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM].

\textsuperscript{75} See, Jochen A. Frowein, \textit{Non-Recognition, in} 3 ENCYCLOPEDIA OF
Thus, in the rules for recognition, geographic ideas once again play an important role. In this case, the issue of whether or not a territory is "defined" is of crucial importance. The idea of "defined territory" favors groups that have effective control over territories with clearly defined boundaries. So, for example, this can assist the claim of the TMR while it disfavors, for example, the claims for statehood of ethnic diasporas or even groups that may have an ethnographic "footprint" in a region (such as the Kurds) but that that footprint has no clear borders or edges.

However, while the geographic concept of territory is a necessary ingredient towards recognition, it is not enough in and of itself. There is no obligation to recognize the TMR, even if it does have effective control of territory. 76 There is no obligation to recognize the TMR, even if it does have effective control of territory.

PUBLIC INTERNATIONAL LAW 627 (Rudolf Bernhardt ed., 1992). Recognition itself is not a formal requirement of statehood. Rather, recognition merely accepts a factual occurrence. Thus recognition is "declaratory" as opposed to "constitutive." Nonetheless, no state is required to recognize an entity claiming statehood.

76 Effectiveness in fact should not be confused with legality as a matter of right.

The principle of effectivity...proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized that through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status. In the law of property, for example, it is well known that a squatter on land may ultimately become the owner if the true owner sleeps on his right to repossess the land. In this way, a change in the factual circumstances may subsequently be reflected in change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.

Secession of Quebec, supra note 31, at para. 146.
Rather, there can be compelling reasons for nonrecognition, despite effective control. The jurist Sir Hersch Lauterpacht wrote that nonrecognition "is the minimum of resistance which an insufficiently organized but law-abiding community offers to illegality; it is a continuous challenge to a legal wrong." Non-recognition can be due to policy reasons or for some legal deficiency of the new entity. For example, "[r]ecognition may also be withheld where a new situation originates in an act which is contrary to general international law." Furthermore, the Restatement (Third) notes that:

A state has an obligation not to recognize or treat as a state an entity that has attained the qualification for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.

A frequent reason for not recognizing an entity as a new state is that territorial changes caused by the use of force

77 HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 431 (1947); see also LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS 267 (4th ed. 2001) [hereinafter DAMROSCH ET AL.]. In relation to this, one should note that being unrecognized does not excuse an entity from the norms of international law. The protection of property rights and of treaty obligations are ensured, as the rules of State succession still apply. Haverland, supra note 30, at 358.

78 OPPENHEIM, supra note 74, §54, at 183; id. at 184, n.4. As Daniel Thurer's 1998 addendum on self-determination in the Encyclopedia on Public International Law further explains

Rather than formally recognizing a right of secession, the international community seems to have regarded all these processes of transition as being factual rearrangements of power, taking place outside the formal structures of international law: international law only became subsequently relevant within the context of recognition.

Thurer, supra note 20, at 367.

79 RESTATEMENT (THIRD), supra note 6, §202(2).
are generally seen as unlawful and will not be recognized. Recognition of a territorial acquisition achieved from the threat or the use of force "would be an improper interference in the internal affairs of the state of which the unlawfully acquired territory was a part."^^81

A second reason for not recognizing an entity as a state is its lack of independence in relation to some other state. This argument could be made vis a vis the TMR's relationship to Russia—but for Russian assistance, the TMR would probably not be able to survive as a separate entity as it "relies heavily on external political and material support."^^83

State practice gives ample support that the non-recognition of the TMR is consistent with the recent norms of state practice as well as accepted rules of international law. The secession of Katanga was not recognized by any state. Biafra was another attempted secession that almost no other state accepted. In light of this, whether the predecessor state recognizes the seceding entity as a new state is an important criterion. Where there is an incomplete secession, the fact that the predecessor state

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80 Frowein, supra note 75, at 628.
81 DAMROSCH ET AL., supra note 77, at 267. See also RESTATEMENT (THIRD), supra note 8, §202(2).
82 Jochen A. Frowein, Recognition, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 33, 34 (Rudolf. Bernhardt ed., 2000) (stating that "the reason most frequently used [for non-recognition] is lack of independence in relation to some State which for political reasons wants to use the new State which it has helped come into existence.").
83 International Crisis Group [ICG], Moldova: Regional Tensions Over Transdniestria, at 1, ICG Europe Report No.157 (June 17, 2004) [hereinafter ICG 2004); see also Bar Report, supra note 9, at 259–60.
84 CRAWFORD, supra note 29, at 405.
85 Id. at 406 (stating only five states recognized Biafra unconditionally).
86 Haverland, supra note 30, at 357.
continues to actively deny the validity of the secession is both legally and politically important, though not dispositive. 87

The case of Southern Rhodesia, where a white minority government took control and declared the colony’s independence from Great Britain, shows that a unilateral declaration of independence will not be tolerated if the result would be to then impair the rights of others. 88 Also, in the Namibia Case the ICJ implies that if the UN Security Council finds that a state is “illegal”, the members of the UN would be obligated not to recognize that entity. 89

Cyprus provides a particularly instructive example due to the combination of different ethnic groups within a single state, the role of guarantor powers, and the ongoing question of recognition. In 1960, Cyprus’ population was 80% Greek Cypriot, 18% Turkish Cypriot and 2%

87 “Third States . . . may be prevented from according recognition as long as the injured state does not waive its rights since such a unilateral action would infringe the rights of the latter State.” Karl Doehring, Effectiveness, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 43, 47 (Rudolf Bernhardt ed., 1995). While recognition by a predecessor state is an important criterion, the U.S. has consistently argued that such recognition is not required as a matter of law. See also Bar Report, supra note 9, at 259.

88 Brown-John, supra note 28, at 41. In one basic casebook on international law, the co-authors explain that Rhodesia should have met the traditional criteria for statehood, but the Security Council and General Assembly resolutions denying such recognition were nonetheless accepted as definitive. DAMROSCH ET AL., supra note 77, at 266. Great Britain’s refusal to accept the validity of Rhodesia’s unilateral declaration of independence, for example, seems to have played a part in the refusal of any other state to recognize Rhodesia which thus denied Rhodesia from gaining the capacity to enter into relations with states. See Ijalaye, supra note 70, at 552.

"other". With Britain, Greece, and Turkey playing the role of "guarantor states," the Greek and Turkish Cypriot communities signed a series of agreements in 1960 known as the 1960 Accords. These Accords included the Treaty of Guarantee (in which the guarantor States promised to recognize and guarantee the independence, territorial integrity and security of Cyprus) as well as the Basic Structure (effectively, the constitution of the new state) and the Treaty of Alliance (which set up a means for the guarantor states to cooperate).

There was disagreement and factionalization almost from the point of independence. The guarantor powers unfortunately did more to sow discord than heal wounds: in 1974 Greece engineered a coup in Cyprus and as a response Turkey invaded and took control of the Northern third of the island.

In February 1975, the leaders of Turkish Cyprus announced that they had formed the "Turkish Federated State of Cyprus," ("TFSC") which was not an independent sovereign state, but an autonomous part of a federation with a Greek Cypriot state. In this way, Turkish Cyprus attempted to seize territory first, and then re-negotiate the constitutional order. This has similarities to Moldovan-Transnistrian-Russian relations in the 1990's.

In September 1975, the assembly of the TFSC declared full sovereignty. Although the TFSC has effective control

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91 See Oppenheim, supra note 74, §55, at 189, n. 16.
of northern Cyprus, the TFSC remains generally unrecognized.\textsuperscript{92}

While the Security Council did not call for non-recognition of the island, it did note its regret over the proclamations of the TFSC and did say that no action should be taken by any Member State of the UN that would divide the island.\textsuperscript{93} The situation further devolved with a November 1983 proclamation by what had been the TFSC that the now newly named Turkish Republic of Northern Cyprus ("TRNC") was an independent state. Security Council Resolution 541 (1983) called upon States not to recognize any Cypriot state other than the Republic of Cyprus.\textsuperscript{94} Only Turkey has recognized the TRNC and the Security Council called the proclamation "invalid."\textsuperscript{95} This shows the interplay of the legal doctrine concerning the attributes of a state and the political reality of membership in the international community.

Thus, it is not that the TMR is unrecognized \textit{merely because of politics}; it is unrecognized by even a single state in the world \textit{because it does not meet the most basic standards of legality}.

However, if Transnistria is not a state, then what is it? What is the legal ramification of the effective control by the secessionists over a piece of Moldova?
E. The TMR as a De Facto Regime

The incomplete secession of Transnistria can best be understood by using the doctrine of de facto regimes.

A rebel force may become "so well established in part of the national territory that, although it has not overthrown the established government, it is entitled to recognition as a de facto government, at least in respect of that part of the national territory under its effective control." Remembering the four criteria for statehood (permanent population; defined territory; government; capacity to enter into foreign relations with other states), Dov Lynch argues that the post-Soviet "de facto states fulfill the first three of these requirements and claim to pursue the fourth." This doctrine seems to fit the current facts well: "[e]specially where civil wars last for a long time or parts of a state become factually independent without being recognized as a State, the status of de facto regime has gained acceptance." Such de facto regimes are treated as partial subjects of international law. De facto regimes may undertake normal acts required for the support of its population. They may conclude agreements that are held at a status below

96 Oppenheim, supra note 74, §49, at 162; see also id, §46, n. 6.

97 Lynch, supra note 41, at 16.

98 Frowein, supra note 82, at 40. Examples of de facto states from various points in recent history include Taiwan, Eritrea, the Republic of Somaliland, and the Turkish Republic of Northern Cyprus. Lynch, supra note 41, at 19–21. As for the former Soviet space, Abkhazia (in Georgia), Southern Ossetia (also in Georgia), and Nagorno-Karabakh (in Azerbaijan) are generally considered de facto regimes. See, e.g., Lynch, supra note 41.

99 Jochen A. Frowein, De Facto Regime, in 1 Encyclopedia of Public International Law 966 (Rudolf Bernhardt ed., 1992) [hereinafter Frowein, De Facto] (stating "State practice shows that entities which in fact govern a specific territory will be treated as partial subject of international law.").
treaties. However, the legal effectiveness of their decisions is severely curtailed, as any such decisions will become invalid as a matter of law if the de facto regime is fully reintegrated into the pre-existing state. If, on the other hand, the de facto regime becomes a state, then its acts will be binding on the new state.

This analysis is further supported by analogy to the law of belligerent occupation. If control of territory is gained by military force, the occupation is considered belligerent. It is generally accepted that civil wars are an example of where the law of belligerent occupation can apply in a domestic conflict.

In the law of belligerent occupation, one also draws a distinction between effectiveness and legality. "The occupying power's ability to enforce respect for its legitimate interest is not an authority to create law." An

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100 Id. at 967.
101 Id. (stating "[a]cts of an unsuccessful de facto regime... will become invalid with the disappearance of the regime.") However, the reintegrated state after a failed de facto regime may be held liable for the acts of the de facto regime that were "part of the normal administration of the territory concerned" on the assumption that such acts were neutral. Id. at 967-68.
102 Id. at 967.
104 Michael Bothe, Occupation, Belligerent, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 763 (Rudolf Bernhardt ed., 1997).
105 See, e.g., id. at 764-65.
106 Id. at 764.
occupier is thus considered *de facto* authority, not *de jure*.\textsuperscript{107} In the present case, while Moldova is recognized as having *de jure* control over Transnistria, the TMR has become the region’s effective occupier, its *de facto* regime. Although there is no longer an armed conflict between the Government of Moldova and the TMR, there is still a state of occupation.

The law of belligerent occupation makes the occupier responsible for the well-being of the inhabitants of an occupied territory; this applies essentially to protecting the public health and safety.\textsuperscript{108} It is not a license to remake the domestic system; to the contrary, the occupying power must apply the pre-existing laws of the occupied territory.\textsuperscript{109} In a case of secession, of course, it would seem logical that the seceding entity would want to make new laws and apply its own rules. But the critical point is that at issue is an *incomplete* secession, an *attempted* breakaway that has not been successful in garnering recognition from a single other state. While a successfully seceded entity that becomes a new state may of course issue new laws, the TMR’s ability to make fundamental changes in Transnistria is limited inasmuch as it does not have *de jure* control of the territory. As any other such occupying power, it thus “may issue only such laws and decrees which are necessary from the viewpoint of military security.”\textsuperscript{110} Otherwise, the pre-existing laws of Moldova should be applied until the conflict is resolved.

Besides the right to act in order to support its population, a *de facto* regime may also be held responsible for breaches of international law. Article 9 of the Draft

\begin{flushright}
\textsuperscript{107} \textit{Id.} \\
\textsuperscript{108} \textit{Id.} at 765. \\
\textsuperscript{109} \textit{Id.} \\
\textsuperscript{110} \textit{Id.}
\end{flushright}
Articles on State Responsibility, entitled "Conduct carried out in the absence or default of the official authorities," states:

The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.\textsuperscript{111}

Thus, a \textit{de facto} regime must respect human rights and other rights under international law. In the \textit{Advisory Opinion on South West Africa/Namibia}, the ICJ explained that "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States..."\textsuperscript{112}

In summary, the TMR is an unrecognized entity that has effective control over territory but whose \textit{de jure}

\textsuperscript{111} International Law Commission [ILC], \textit{Draft Articles on State Responsibility}, art. 9, in \textit{THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES} 348, 348 (James Crawford ed., 2002). The commentary specifies that article 9 does not apply to cases when a general \textit{de facto} regime has seized control of a country but \textit{does} apply when a \textit{de facto} regime has seized control of \textit{part of a state}. Professor Crawford wrote:

\begin{quote}
\text{The cases envisaged by article 9 presuppose the existence of a government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general de facto government, on the other hand, is itself an apparatus of the State, replacing that which existed previously.}
\end{quote}

\textit{Id.} at 115.

\textsuperscript{112} South West Africa/Namibia, Advisory Opinion, supra note 19 at para. 118; see also Frowein, \textit{De Facto}, supra note 98, at 966.
control is not accepted by any state. The TMR is thus a *de facto* regime. While it has the right to undertake the basic acts required for the care and security of the population under its effective control, any measures beyond that are legally suspect and may be unwound by the government of Moldova if the TMR is reintegrated into the Moldovan state.

The concept of *de facto* regimes (and of occupation) recognizes that who controls a territory is not the whole story, rather there is a tension between effective control and legitimate title. We have already seen that the concept of territory is the overlay of human beliefs and institutions upon physical geography. In secessionist enclaves, this becomes all the more complex.

**F. The Four Geographies of a Secessionist Enclave**

An incomplete secession, such as in the cases of Transnistria or Abkhazia, turns the secessionist territory into a geopolitical purgatory; it has neither achieved the goal of full statehood nor is it still fully within the sovereign control of the pre-existing state. In considering these territories, we do not see sovereignty, but rather something more complex. The Transnistrian example shows us that secession enclaves need to be described as having four geographies: physical, political, strategic, and legal.

The physical geography of a secessionist enclave is the actual physical territory that is contested. Certain aspects of the physical geography—rivers, mountain ranges, deserts, and so on—may act as natural barriers that may assist or

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impede claims that the territory is part of a unique entity from the pre-existing state. For Transnistria, the physical geography is the strip of land between the Nistru River (with certain perturbations) and the recognized international border of Ukraine.

The political geography of a secessionist enclave asks who has effective control of the physical territory. The law of occupation places responsibilities on the power with effective control.

Territory is also important for its strategic value. Who controls a piece of land can affect other conflicts and struggles in a region. In understanding the interests of the parties, including any third-party states involved in the conflict, one needs to appreciate the strategic importance, if any, of the land in relation to other conflicts.

Finally, there is the concept of legal geography: the issues of where legitimate title lies and of the legal rights and responsibilities of the occupants of a particular territory. Thus the legal geography of a territory may be in contrast to its political geography. For example, in its Ilascu decision the ECHR found that “[o]n the basis of all the material in its possession the Court considers that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, does not exercise authority over part of its territory, namely that part which is under effective control of the [TMR].” 114 Similarly, in Cyprus v. Turkey, 115 the ECHR held that the

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114 Case of Ilascu, supra note 48, at para. 330. The State Department similarly recognizes that the Government of Moldova does not have control over Transnistria. Moldova 2004 Country Report, supra note 66 (stating that “[t]he Government does not control this region.”).

TFSC (although controlling the territory) did not have jurisdiction in northern Cyprus.\(^{116}\)

The overlay of these geographies maps the interaction of law and power: facts “on the ground” versus normative standards. The international community has focused on the final status of Kosovo as a bellweather for the relationship of law and power.

\section*{IV}
\textbf{THE RULE OF POLITICS AND THE ROLE OF LAW}

\subsection*{A. Contrasting Kosovo}

Recent arguments concerning the Transnistria and the other frozen conflicts have to be understood in light of Kosovo. As TMR “President” Igor Smirnov complained in 2006, “[c]urrently they are preparing recognition of Kosovo, but would deny this to Transnistria. If this is a really fair, universal approach to conflict settlement, it must be applied also to Transnistria, and Abkhazia, and South Ossetia, and Nagorny Karabakh.”\(^{117}\) On February 17, 2008, the parliament of Kosovo declared Kosovo’s independence from Serbia.\(^{118}\)

\begin{footnotesize}
\begin{itemize}
\item[116] See also OPPENHEIM, supra note 74, §55, at 189, n. 15.
\item[117] Transnistrian President Jealous About Kosovo Variant, INFOTAG, Feb. 17, 2006. Similarly, in November 2005, then-Speaker of the TMNR’s Supreme Soviet Grigoriy Marakutsa seemed to think that, in light of the decision by Kosovo’s parliament to seek recognition as an independent state, the TMR would soon abandon negotiations: “Parliament may decide to stop talks with Moldova and start building a fully independent state” he told reporters. Moldova’s Rebel Region May Proclaim Independence, Speaker Says, INTERFAX-UKRAINE, Nov. 24, 2005.
\item[118] Full text: Kosovo declaration, BBC News (Feb 17, 2008) http://news.bbc.co.uk/2/hi/europe/7249677.stm.
\end{itemize}
\end{footnotesize}
International reaction has been mixed, ranging from formal recognition by the U.S. the U.K., France, Germany, and certain other EU member states, as well as a host of other countries, to the reaction of states (besides Serbia) such as Russia, Romania, Moldova, and Cyprus that have argued that Kosovo's secession and/or the recognition of that secession would be a breach of international law.

The majority of states at the time of this writing have positions someplace in between these two poles. As of June 13, 2008, approximately 43 states have recognized Kosovo's independence. At issue is whether this should have any bearing on the fate of Transnistria.

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119 Wikipedia is a useful resource for keeping track of international reactions to Kosovo's declaration. See, International reaction to the 2008 Kosovo declaration of independence available at http://en.wikipedia.org/wiki/List_of_states_that_have_recognized_the_Republic_of_Kosovo [hereinafter List of States].

120 Russian Foreign Minister Sergei Lavrov said concerning a potential Kosovar secession:

We are speaking here about the subversion of all the foundations of international law, about the subversion of those principles which, at huge effort, and at the cost of Europe's pain, sacrifice and bloodletting have been earned and laid down as a basis of its existence.


The Romanian Defense Minister said that such a declaration "is not in keeping with international law." Romania not to recognize unilateral Kosovo independence, says minister, ChinaView.cn, available at http://news.xinhuanet.com/english/2007-12/12/content_7231934.htm.


121 List of States, supra note 119.
It is no surprise that the Moldovan leadership argues that the situation in Kosovo is a false analogy.122 The United States and other states that have recognized Kosovo have claimed that it is a special case and cannot be viewed as precedent for any other conflict. Secretary of State Rice explained:

The unusual combination of factors found in the Kosovo situation— including the context of Yugoslavia’s breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration— are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today.123

By contrast, the Russian Duma issued a statement that read, in part:

The right of nations to self-determination cannot justify recognition of Kosovo’s independence along with the simultaneous refusal to discuss similar acts by other self-proclaimed states, which have

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122 See, e.g., Kosovo Experience is No Good for Transnistria—Voronin, INFOTAG, Feb. 21, 2006.

123 U.S. Recognizes Kosovo as Independent State, statement of Secretary of State Condoleezza Rice, Washington DC (Feb. 18 2008). Moreover, in a statement to the UN Security Council following Kosovo’s declaration, British Ambassador John Sawers said:

[T]he unique circumstances of the violent break-up of the former Yugoslavia and the unprecedented UN administration of Kosovo make this a sui generis case, which creates no wider precedent, as all EU member States today agreed.

obtained de facto independence exclusively by themselves.\footnote{124}

Even a brief consideration of Kosovo shows that the material facts concerning the status of Kosovo are quite different from those of the Transnistrian conflict.\footnote{125} Secretary Rice is correct in highlighting that the situation in Kosovo is the result of numerous factors including the dissolution of a state (Yugoslavia), the general breakdown of a region, and the bad acts of the government of the pre-existing state (Serbia).

The international administration of Kosovo, due to the humanitarian disaster that was being caused by the government of Serbia, is also of crucial importance. While secessions are primarily an issue of domestic law, Security Council Resolution 1244, which provided a framework for UN intervention and for international mediation to resolve the crisis, internationalized the Kosovo problem using the Council's Chapter VII powers.\footnote{126} It also moved Kosovo from being solely under Serbian sovereignty into the grey

\footnote{124 As quoted by the NY Times in Nicholas Kulish and C.J. Chivers, Kosovo Is Recognized but Rebuked by Others, NY TIMES (Feb 19, 2008), available at http://www.nytimes.com/2008/02/19/world/europe/19kosovo.html?page\_wanted=2&hp.}


\footnote{126 S.C. Res 1244 (10 June 1999), available at http://www.nato.int/Kosovo/docu/u990610a.htm.}
zone of international administration. Although this area of international law is not sharply defined, reintegrating such a territory is different from assessing a claim by a separatist group that, on its own, is seeking to overturn the authority of the pre-existing state and unilaterally secede.

None of the material factors in the Kosovo case apply to Moldova. Consequently, applying these facts to the "extreme cases" framework that is used by some jurists to analyze claims of external self-determination leads to a different result than in the case of Transnistria. While there is an open question as to whether the Kosovar Albanians are a nation unto themselves, they are clearly a distinct people from the Serb majority of the rest of Serbia. Moreover, the Serbs were responsible for serious human rights abuses against the Kosovars, culminating in the commencement of ethnic cleansing which instigated NATO's intervention. As for whether there is a reconciliation possible such that secession from Serbia is not the only option, as of December 2007, the two sides could not seem to resolve their differences and the Troika has declared the political negotiations a failure. Thus, based on at least a cursory consideration, there seems to be a much stronger argument for recognizing the independence of Kosovo as opposed to supporting the sovereignty claim of Transnistria.

That being said, one should note that states that support Kosovo's declaration emphasize that they view the situation as unique. As of this writing, the United States nor other major recognizing states have used the argument that Kosovo is owed sovereignty as a legal right. Consequently, they make no claim to be applying the framework described above. In short, it is too early to tell whether, as a matter of law, the events in Kosovo will lead to a shift in legal interpretation. Regardless, Kosovo has already started to play a role in the evolving political rhetoric of parties involved in secessionist conflicts. So, while there is not (as
of yet) a Kosovo "precedent" in international law, there is
now, based on the reactions of the TMR and other
secessionist entities, as well as Russia, a Kosovo argument
in international diplomacy.

B. Law and Politics in Arguments About Sovereignty

Some commentators look at the frozen conflicts or the
question of the status of Kosovo, and ask whether law has
any role in the middle of a fractious political argument.
Law and politics are intertwined in such cases. States tend
to deploy arguments based on international law when such
arguments favor their national interests. So, for example,
Russia, which has supported the TMR in the face of
arguments of Moldovan sovereignty, turns to international
law in the case of Kosovo and argues that any such
secession would be a violation of international law.127

Certain EU member states—Cyprus, Greece, Romania,
Slovakia and Spain—have also each expressed their
reservations at recognizing Kosovar independence.128
Romanian Defense Minister Teodor Melescanu said at a
press conference in Serbia that "A unilateral decision [for
an independent Kosovo] could have a very negative effect
on the entire region and is not in keeping with international
law."129 With the possible exception of Slovakia, each of

127 See Associated Press, Serbia to Challenge Kosovo Independence,
NEWEN20070035617&ch=12/11/2007%206:32:00%20PM
(concerning Serbia's use of international legal arguments, apparently
coordinated with Russia, concerning the status of Kosovo).

128 Harry de Quettiveau & Bruno Waterfield, EU-US Showdown with
Russia Over Kosovo, TELEGRAPH (U.K.), Dec. 12, 2007,
kosovo111.xml.

129 Xinhua News Agency, Romania Not to Recognize Unilateral
Kosovo Independence, Says Minister, Dec. 12, 2007,
these countries is grappling with some type of secessionist issue in its own domestic politics. For example, Romania not only has had good diplomatic relations with Serbia but also does not want to inadvertently support any claim for secession by the ethnic Hungarian population in Romanian Transylvania. For them, then, reference to international legal norms disfavoring secession has been part of their diplomatic stance concerning Kosovo.\(^{130}\) So it is in each of their national interests to hold off on Kosovar independence, regardless as to whether or not international law would allow “external” self-determination in that case.

Thus, law is deployed as a diplomatic tool because of political deadlock, not in spite of it. In both the Transnistrian case and in the case of Kosovo, \textit{realpolitik} has run its course for years. In neither case has there been a solution based on pure political haggling. However, in both cases, a legal framework exists for assessing such claims of sovereignty. Thus, while there is the rule of politics in such issues, perhaps there is a role for law to clarify the strength of claims based on the standards of the international community.

Martti Koskenniemi analyzed this interplay of law and politics in his magisterial work, \textit{From Apology to Utopia}. According to his nomenclature, “descending patterns” of justification take as a given a normative order that is prior to the state and frames how a state may behave. Conversely, “ascending patterns” attempt to construct a normative order on “factual” state behavior, will and interest.\(^{131}\) An argument can be ascending or descending, but it cannot be both.\(^{132}\) Applying this analysis to

\(^{130}\) \textit{Romania opposes Kosovo independence, Serbianna} (March 30, 2007), \textit{available at} http://news.serbianunity.net/2007/03/30/2019/.

\(^{131}\) \textit{Koskenniemi, supra} note 89, at 59.

\(^{132}\) \textit{Id.}
arguments about sovereignty, Koskenniemi contrasts the descending view in which "law is normative and 'sovereignty' merely a descriptive shorthand for the rights, liberties, and competences which the law has allocated to the State," with the ascending view in which "sovereignty is a matter of fact-description and law a normative consequence thereof."¹³³

Koskenniemi calls the two archetypal approaches to international sovereignty the "legal approach" and the "pure fact approach." Under the legal approach sovereignty is determined by law; "[t]he legal order pre-exists the sovereignty of the State and remains in control thereof."¹³⁴ Consequently "the criteria for the emergence and dissolution of States are not simply questions of fact but established by a rule of law."¹³⁵ He notes that many UN instruments and documents, such as the Draft Declaration on the Rights and Duties of States and the Friendly Relations Declaration, use the rhetoric of the legal approach.¹³⁶ By contrast, under what he calls the "pure fact" approach, "sovereignty is external to international law, a normative fact with which law must accommodate itself."¹³⁷ Koskenniemi argues that the sovereignty doctrine is based on neither one nor the other solely, but rather oscillates between two.¹³⁸ For example, "the 'pure facts' of geography or geology have seemed powerless for creating title unless accompanied by general recognition." Koskenniemi further explains:

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¹³³ *Id.* at 227.
¹³⁴ *Id.* at 228.
¹³⁵ *Id.* at 229.
¹³⁶ *Id.* at 231, n. 20.
¹³⁷ *Id.* at 231.
¹³⁸ *Id.*
It is immediately evident that effective possession cannot constitute an exhaustive rule on what is needed to show title. Not all factual possession results in sovereignty. It seems reasonably clear that illegal occupation, however effective, cannot per se create title. But law cannot interminably divorce itself from fact. Therefore, it is assumed that original illegality may be corrected in a process of consolidation, that is, the passing of time during which it becomes generally accepted to be best to let sleeping dogs lie—quieta non sunt movere.\textsuperscript{139}

Thus, neither the pure fact approach nor the legal approach alone is sufficient, rather there is an oscillation between the two.\textsuperscript{140} While this may point to difficulties of legal argumentation, I believe that it also shows the pragmatism involved applying international legal norms to contentious situations.

V

RECONSIDERING WESTPHALIA

The frozen conflicts and the status of Kosovo are intensely political disagreements. But, although these are political matters—if anything because these are contentious political matters—legal principles and due process are all the more important. As one roundtable of legal and political experts noted, “the United States should be less concerned about outcomes in these struggles than about the means used; international political stability is more likely to be maintained by focusing on the process than by trying to manipulate events to arrange a predetermined outcome.”\textsuperscript{141}

\textsuperscript{139} Id. at 284–85.

\textsuperscript{140} Id. at 286.

\textsuperscript{141} Carley, supra note 10 at vi. The United States should, however, make absolutely clear that secession has not been universally recognized as an international right. It may choose, on the basis of
This Article has set out the international legal framework for addressing situations as diverse as the situation in Moldova, the conflict in Abkhazia, and the status of Kosovo. While each of these cases have different material facts, the general legal claims have to do with the interplay of sovereignty, self-determination, and territory. While international law has a framework for analyzing such issues, the question that remains is whether it is a useful and just framework.

International institutions such as the U.N. have a membership of states and thus are biased against allowing secessions. Some have argued that the rules of the international legal system should be revised so that states are no longer favored and that it becomes easier to redraw boundaries to unite co-nationals. For them, the time of Westphalia has passed and we must build something new. Such calls are understandable, given the iniquities of international law such that certain claims, such as those of the Kurds, are systematically undercut. However, although the current balancing between territorial integrity and external self-determination may favor territorial integrity, it is nonetheless preferable to a hypothesized system which allows for an easier ratification of secession.

other interests, to support the secessionist claims of a self-determination movement, but not because the group is exercising its right to secession, since no such right exists in international law. At the same time, an absolute rejection of secession in every case is unsound, because the United States should not be willing to tolerate another state’s repression or genocide in the name of territorial integrity. Secession can be a legitimate aim of some self-determination movements, particularly in response to gross and systematic violations of human rights and when the entity is potentially politically and economically viable. Id. at vii.

As a method of ordering international relations, there is no principled reason to favor nationhood over statehood. Both are more akin to social constructs than independent facts. What makes a Serb different from a Croat different from a Bosnian or a "Transnistrian" from a Moldovan is as much that they are told they are different by their political leaders than any actual social or physical divergences. This is also true for some of the national movement from the 19th century. Ironically nationalism, one of the factors that helped the formation of nation-states in the 19th century, is now being used to undercut the modern state system. The rise of ethnic demands in the 1990s in the years after World War II may have been a reaction of statewide modernizations and consolidations of power by national governments.

Upending the international legal system to favor nations over states would not be more just, it would simply bias one set of social constructs (nations) over another (states). Moreover, in both the transition to this new rule and in the aftermath of the adoption of such a rule, the world would likely be more chaotic and insecure.

The current system is not ideal. It is at times unjust. But it is in all probability a better system than one which would make it easier to secede and start new states. While a

143 Two views of national identity include the essentialist view, which believes that nations are organic and one's nationality is an inherent characteristic, and the constructivist perspective, which views nations as "1) the product of structural change; 2) the project of elites; 3) a discourse of domination; and 4) a bounded community of exclusion and opposition." Herb, supra note 33, at 14.

144 See id. (arguing that the structural change of modernization and advanced capitalism eroded community bonds and nationalism provided the glue for these new societies). But note also that others argue state-building preceded nationalism, leading to the quip from the 19th century: "We have made Italy. Now we must make Italians."

145 Knight, supra note 142, at 220.
refashioned system that would emphasize the law of “peoples” rather than “states” may be rhetorically charming, it is politically naïve, if not dangerous. Consider the resource problems, coordination breakdowns, and conflicts among 195 existing UN member states. Now consider that there are several thousand groups that have a realistic claim to be ethnic “nations” (not taking into account the number of groups that may have unrealistic claims, but would do so anyway). As two geographers put it: “a world political map of nations would be very different and much more volatile than today’s version made up of sovereign states and traditionally defined country boundaries...” In a world of over a thousand national statelets, the coordination problems would be overwhelming and conflict constant.

The rhetoric implies that a world in which ethnic or communal bonds—as opposed to state-based communities—are preferred would lead to a more just world. But we have seen in Iraq what can happen when we let bonds devolve down to the purely communal.

The Westphalian system is without a doubt undergoing transformation. The rising power on the world stage of non-governmental organizations, corporations, supranational organizations such as the EU, and also of individuals means that states are no longer the sole actors. They are still the major players, but also members of a large and varied cast. The rules of self-determination were written by state-representatives and they are admittedly protective of the prerogatives of states. These are rules not to facilitate secession, but to provide a framework for the protection of

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147 *Id.* at 11.
minority rights within a (more or less) stable scaffolding of states.

But it is one thing to describe that the Westphalian system is evolving and quite another to argue that it should be done away with. Such an argument requires more than rhetorical persuasion. It needs some solid examples to show how allowing the easy dismemberment of states will foster peace, justice, and stability. Because any new ordering of the world will seem unjust to some and will prompt a new reordering. Each nationality can be subdivided again and again and again.

This struggle for a new world after Westphalia may well be the defining struggle of our time. Compared to tribes, kingdoms, and empires, states are a comparatively recent invention. Although the “origins of states can be traced back thousands of years and are customarily linked to warfare, the production of food surpluses, or the need to organize irrigation schemes,” it is important to remember that for the better part of human history, humanity has ordered itself by other means than the modern state. Yet, while in their rise to geopolitical primacy states “have crushed all opposition, from empires to tribal confederations...[Some would argue that that] control is coming to an end.”

It is more than that a wider variety of actors, from individuals to corporations to supranational bodies, take part in world politics; that is a transformation of the Westphalian system that is in many cases benign, or at least one in which we can see how positive results can be used to counteract destructive ones.

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149 Herb, supra note 33, at 10.

150 John Robb, Brave New War 16 (2007).
The more troubling aspect of the transformation of the international system is that a wider variety of actors are able to deploy the type of armed violence that had previously been the sole preserve of states. As national security analyst John Robb explained:

Nonstate actors in the form of terrorist, crime syndicates, gangs, and networked tribes are stepping into the breach to lay claim to areas that were once the sole control of states. It is this conflict, the war between states and non-states, that is the basis for the first epochal or long war of this century.

This darker vision of a post-Westphalian future, one in which secessionist entities, armed gangs, and terrorist groups (at times indistinguishable) fight for control is what we see in failed states and conflict zones around the world, ranging from Iraq to Chechnya to Somalia to Haiti. Nonstate actors struggle with each other and with states for a greater share of the spoils of territorial and resource control. Recalling the observations of Robert Kaplan at the opening of this article, we are moving in many parts of the world from an era of state frontiers to opportunistic roadblocks based on local power. The withering away and failure of the Westphalian state in these places does not bring on some new just order based on peoples. It heralds deprivation, strife, and war.

In the corners of the world which are rarely on the front pages of Western newspapers, people like the TMR leadership use the garb of nationalism to dress up corrupt power grabs. As one author put it:

151 VAN CREVELD, supra note 148, at 195–96.
152 ROBB, supra note 150, at 17; see also id. at 197 (stating future wars by groups we today call “terrorists, guerillas, bandits, and robbers,” who will be organized along charismatic lines as opposed to the formal bureaucracy of the modern state).
The tendency of nations to stress antagonisms against other groups is dependent on the strength of their internal cultural content. Nations with few ethnic markers or core values, of which a shared language is the most common element, are more prone to resort to violence.\footnote{Herb, supra note 33, at 15–16.}

Accepting for a moment the "nation" terminology, this is the situation of the TMR: a group that can mostly point to a common language, which maintains internal coherence by fostering a "frozen" conflict with an "Other"—Moldovans from the other side of the Nistru River.

Post-Westphalian Optimists seek a new and just world order. That is commendable, but the reality we see today is that nature abhors a vacuum. If state power is absent, other forms of power rush in to occupy the same space. The winners are not the \textit{most just} but the \textit{best armed}. The ills of the early Westphalian system are recapitulated.

But the Westphalian system as it exists has evolved such that there is an overlay of legal norms mediating the relation of states. This legal system presupposes the existence of a state system and for its proper functioning, it has defined rules concerning secession that protects the existence of states. Geographical concepts such as territory and borders are used to this end. There will always be a tension between politics and law, pure fact versus legalistic approaches. But equilibria can be dynamic and such an oscillation between law and politics can allow for a greater stability.

With the rise of international institutions (on the one hand) and private power (on the other), today's international system bears little resemblance to the original political bargain of 1648. Westphalia is dead. But states are still the core of the increasingly complicated international
system and, absent any showing of a viable alternative, are still the best hope for broad-based approaches to peace and justice. Long live Westphalia.