
Volume 25 | Issue 3

1993

National Self-Determination and Secession: The Slovak Model

Holly A. Osterland

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Holly A. Osterland, *National Self-Determination and Secession: The Slovak Model*, 25 Case W. Res. J. Int'l L. 655 (1993)

Available at: <https://scholarlycommons.law.case.edu/jil/vol25/iss3/7>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

National Self-Determination and Secession: The Slovak Model

*For there are very few so foolish,
that they had not rather governe
themselves than be governed by others.¹*

I. INTRODUCTION

National self-determination² as a governing principle of international law enjoyed a brief but colorful period of acceptance in the aftermath of World War I.³ The international order which developed

¹ THOMAS HOBBS, *THE LEVIATHAN* 211 (C.B. Macpherson ed., 1987).

² National self-determination has been defined as the right of each "nation" to constitute an independent state and determine its own form of government. ALFRED COBBAN, *THE NATION STATE AND NATIONAL SELF-DETERMINATION* 39 (1970). This phrase is used throughout this Note to designate a form of self-determination which would grant the right to secede from a pre-existing sovereign state based on a group's status as a "nation." The unmodified principle of "self-determination" merely denotes the right of a sovereign state to self-governance, free from intervention or subjugation by an alien state, i.e. "sovereign self-determination." See, e.g., Universal Declaration of Human Rights, art. 21(3), G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948) (stating that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 29, at 123, U.N. Doc. A/8028 (1970) (stating that "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter . . . all peoples have the right freely to determine, without external interference, their political status"). A distinction must also be made between the right of self-determination owing to sovereign states and the use of the principle in the human rights context. As a human right, self-determination generally denotes the right of a culturally distinct people, subsumed within a sovereign state, to enjoy some degree of cultural autonomy in order to preserve its heritage. See S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 13 HUM. RTS. Q. 403, 409 (1991) (stating that "[s]elf-determination may be understood as a right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics"). As a human right, self-determination will hereafter be referred to as "cultural self-determination."

The term "nation" can be distinguished from "state" in that the latter consists of a separately governed political community, while the former can be defined as a community whose allegiance is based on culturally objective criteria. COBBAN, *supra* at 39.

³ COBBAN, *supra* note 2, at 74.

around the Treaty of Versailles⁴ attempted, in practice,⁵ to legitimize this principle by realigning the geographic boundaries of Eastern and Central Europe along national lines which evidenced a belief that the "nation" and the "state" should coincide⁶ in an effort to restore a lasting democratic peace to a historically troubled area.⁷ As the ineffectiveness of the Versailles system became apparent,⁸ the principle of national self-determination fell into disrepute and became a symbol of the Pyrrhic victory achieved by Wilsonian idealism.⁹

However, despite this failed history, national self-determination remains a powerful emotional and political principle¹⁰ and the refusal of the international community to recognize its validity has contributed to the unprincipled, often violent, dismemberment and destruction of

⁴ Treaty of Peace between the British Empire, France, Italy, Japan, and the United States (the Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, and Uruguay, and Germany, June 28, 1919, 225 Consol. T.S. 188, reprinted in 13 AM. J. INT'L L. SUPP. 151 (1919) [hereinafter Treaty of Versailles].

⁵ See LEAGUE OF NATIONS O.J., Spec. Supp. 3, at 5 (1920) (World Court decision of the Aaland Islands dispute between Finland and Sweden which held that the right of national self-determination was not a rule of international law).

⁶ HAROLD S. JOHNSON, SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS 19 (1967).

[A] nation may be conceivably, and indeed has often been actually, something different from a state, and . . . may seek, under such conditions, to vindicate its liberty against the state in which it is included. But its effort in such a case, is directed, after all, to the achieving of an identity between nation and state — primarily for itself, but secondarily, and in consequence, for the state from which it secedes, and which it reduces, by its secession, to a basis more purely national.

COBBAN, *supra* note 2, at 109 (quoting SIR ERNEST BARKER, REFLECTIONS OF GOVERNMENT 8 (1942)).

⁷ "All over Eastern Europe, ethnic linguistic and religious issues are matters of intense conflict . . . [These conflicts] are caused by hostilities and suspicions that go back for decades, centuries, or even millennia." Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 450 (1991).

⁸ COBBAN, *supra* note 2, at 74.

⁹ *Id.*

¹⁰ Alfred Cobban states:

The demands of nationalism . . . still stand on the agenda of world politics. We may hail the nation-state as the supreme political achievement of Western civilization, or we may regard nationalism as a disease which if not taken in time will destroy civilised life . . . but neither approval nor disapproval is very relevant to something that may be regarded . . . as a natural force, a mighty torrent which is equally capable of serving the purposes of man or destroying him. Our duty is not to shut our eyes to it and not to pretend it does not have the consequences which it does have.

Id. at 17.

long-settled unified States.¹¹

The most recent evidence of the continuing political force of national self-determination has occurred since the last months of 1989, when Communist regimes across Eastern and Central Europe crumbled.¹² In the post-Communist era, these countries have embarked on the difficult task of forming new governmental, economic and social structures, and the resurgence of nationalist¹³ sentiment, suppressed under the Communist regimes,¹⁴ has forced the dismemberment of long

¹¹ See, e.g., *Half a Million Refugees from Croatia Violence*; CARE, AGENCE FRANCE PRESSE, Dec. 20, 1991, available in LEXIS, Nexis Library, Agence France Presse File; Elizabeth Neuffer, *Violence Flares in Soviet Republics*; *Blood is Shed in Georgia and Moldavia*, BOSTON GLOBE, Sept. 26, 1991, at A2; *New Ethnic War Spreads in U.S.S.R.; Central Asia: Thousands Have Massed to Avenge 48 People Killed in Violence Between the Soviet Republics of Kirghizia and Uzbekistan*, L.A. TIMES, June 7, 1990, at P2; Daniel Sneider, *Violence Shakes Soviet Republic*, CHRISTIAN SCI. MONITOR, Dec. 11, 1990, at 6 (describing ethnic violence in the republic of Tashkent).

¹² See generally Wiktor Osiatynski, *Revolutions in Eastern Europe*, 58 U. CHI. L. REV. 823 (1991) (book review synthesizing current historical motivation for and progress of the revolutions in Eastern Europe, with helpful bibliography).

¹³ JOHNSON, *supra* note 6, at 25.

Nationalism is a revolutionary doctrine in that it suggests that any group of people who desire a separate status ought to be given an opportunity to have one. . . . [It] stimulates a desire for self-determination on a national basis, an insistence that the sovereignty exercised by the state should be identified with the solidarity of allegiance and community consciousness found in the nation.

Id.

¹⁴ Marxist theory initially viewed nationalist sentiment as counterproductive:

National differences, it seemed to Marx . . . were rapidly disappearing before the growth of international capitalism. The workers, the disinherited of bourgeois civilization, had no fatherland: to conduct their struggle against the bourgeois international successfully they must recognise this fact and form a strong workers' international.

COBBAN, *supra* note 2, at 188-89.

This view was accepted by Slovak socialists as well. In Slovakia prior to World War I, the Slovak Social Democratic party was forced to merge with the Hungarian Social Democrats after the Hungarians became alarmed by the Slovak party's close ties to the Czech Social Democrats. The Hungarian leaders "frowned on any attempt to organize workers on an ethnic bases as being a manifestation of bourgeois nationalism and a threat to the unity of the proletarian movement in Hungary." Victor S. Mamatey, *The Establishment of the Republic*, in A HISTORY OF THE CZECHOSLOVAK REPUBLIC 1918-1948, at 3, 14 (Victor S. Mamatey & Radomir Luza eds., 1973) [hereinafter Mamatey & Luza].

Later in the development of his socialist theory, Marx was forced to recognize the power of nationalism and concede that socialism must first prevail within particular countries. COBBAN, *supra* note 2, at 189. Lenin and Stalin later developed their own theories of national socialism which embraced self-determination in principle. *Id.* at 190-92. However, the supremacy of the Communist Party in the governments of Eastern Europe after World War II meant that political allegiance, in practice, was directed toward Moscow rather than the cultural nation or political

settled, unified States.¹⁵

The attainment of independent statehood by Slovakia is but one of the latest manifestations of nationalism's resurgence in the form of demands for independent statehood. The Slovak example is unique, however, in that secession from the parent state took place with little of the rancor and none of the violence attendant other secessionist movements.¹⁶ Although, from a legal standpoint, there can no longer be an argument that Slovakia did not have the right to secede from the Czech and Slovak Federative Republic (CSFR),¹⁷ its parent state, by analyzing the character of Slovakia's claim, a useful model might be developed for dealing peacefully and constructively with future claims to statehood via secession.

This Note argues that the principle of national self-determination, encompassing a remedial right to secede, must be recognized by the international community where a separatist "nation" amounts to a "proto-state" which, but for the pre-existence of the unified state, would be capable of recognition by the international community as an independent state.¹⁸ Secondly, it suggests a basic framework for determining the legitimacy of separatist claims by analogizing the elements of national

state. See *infra* notes 255-77 and accompanying text.

¹⁵ See, e.g., Richard F. Iglar, Comment, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. INT'L & COMP. L. REV. 213 (1992). "Nationalism has encouraged ethnic minorities to voice demands for recognition, the restructuring of governments, and even the redrawing of borders." *Id.* at 214.

¹⁶ See, e.g., comment of Vladimir Balas, Deputy Director of the Czechoslovak Academy's Institute of State and Law, that "[i]t is not so much important whether the breakup of Czechoslovakia happens in a constitutional or unconstitutional way, but it should be done in a peaceful way." *Better Peaceful Than Constitutional Breakup*, CTK NAT'L NEWS WIRE, July 20, 1992, available in LEXIS, Nexis Library, CTK File. Unlike the Yugoslav case, Slovak arguments for increased autonomy and eventually statehood, were not marred by the hatred and violence which seems to have made a satisfactory settlement in the former Yugoslavia unattainable. See Marvin Ott, *Czechs and Slovaks Go Their Own Ways*, CHRISTIAN SCI. MONITOR, Oct. 2, 1992, at 19.

¹⁷ See LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 375 (1988) (stating that "[a] state may lawfully consent to the secession of a part of its territory"). This Note originally argued that the Slovak Republic should have a cognizable right to secede from the CSFR. Events since that time have rendered this argument moot. In July of 1992, the Slovak government declared its independence from the CSFR, see *Havel to Quit; Slovaks Declare Sovereignty*, L.A. TIMES, July 18, 1992, at A10, with subsequent acquiescence by the federal government. See Ariane Genillard, *Czechs and Slovaks Set Divorce Terms: Two Prime Ministers Finally See Eye to Eye over Ending 74-year-old Union*, FIN. TIMES, Aug. 28, 1992, at 2. Thus, the secession of Slovakia is perfectly legal since it is clearly within the right of a sovereign state to voluntarily relinquish control over a secessionist subpart. The Slovak situation is nonetheless an instructive model for the peaceful resolution of national claims to independent statehood.

¹⁸ See, e.g., Lawrence M. Frankel, *International Law of Secession: New Rules For a New Era*, 14 HOUS. J. INT'L L. 521, 552 (1992).

self-determination to those criteria applicable to the recognition of statehood in international law. Within this framework, this Note employs the Slovak claim to illustrate how a determination of validity might be made and suggests that even in the absence of the parent state's approval, the Slovak nation would nevertheless have been capable of satisfying the suggested requirements for recognition as a state. Finally, this Note recommends that a narrow right to secede be recognized and delineated to insure future domestic and international stability and progress toward economic equality.¹⁹

The former Czech and Slovak Federative²⁰ Republic (CSFR), overthrew the Communist Party in the "Velvet Revolution" of November 1989, so named for its remarkably peaceful character.²¹ In June of 1990, elections were held to fill positions in the Federal Parliament, as well as in the Czech and Slovak Republican Parliaments.²² Federal President Vaclav Havel and his coalition government were elected with a mandate to write a new federal constitution.²³ Similarly, the Czech and Slovak parliaments were to adopt constitutions for their respective republics.²⁴ The provisional term of the new governments expired in June of 1992, at which time no satisfactory governmental structure establishing the respective competencies of the Federal and Republican

¹⁹ The CSFR applied for and received associate membership in the European Community as a prerequisite to eventual full membership. *Nationalist Trends Slow European Integration*, CTX NAT'L NEW WIRE, May 3, 1991, available in LEXIS, Nexis Library, CTX File. Membership in the EC, to which the Slovaks raise no objections, would necessarily entail the delegation of a considerable degree of sovereignty by the Slovaks now that independence has been achieved. It is ironic that the Slovaks would appear amenable to the derogation of their sovereignty in favor of an association with which they have no significant ties or experience and yet be unwilling to delegate sovereignty to a unified, federal state with the Czech Republic.

²⁰ The federative arrangement is a continuation of the previous federal system constitutionalized by the Communist government in 1968. Under Communist rule, federation was supposed to constitutionalize the principle of national sovereignty in relations between Czechs and Slovaks, excluding constitutionally and politically the possibility that Czechs could dominate Slovaks on issues of mutual concern. ROBERT W. DEAN, NATIONALISM AND POLITICAL CHANGE IN EASTERN EUROPE: THE SLOVAK QUESTION AND THE CZECHOSLOVAK REFORM MOVEMENT 38 (1972). The reform, however, was largely ineffectual so long as the centralized Communist Party governed. *Id.* at 38-49.

²¹ See, e.g., William H. Luers, *Czechoslovakia: Road to Revolution*, FOREIGN AFF., Spring 1990, at 77, 77 (stating "what was clearly the most gentle and complete disestablishment of Communism in Eastern Europe . . . came together to create that 'velvet revolution'"). For an excellent first hand account and analysis of the Velvet Revolution, see generally BERNARD WHEATON & ZDENEK KAVAN, *THE VELVET REVOLUTION: CZECHOSLOVAKIA 1988-1991* (1992).

²² Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 512 (1991). For a breakdown of party representation at the federal level, see WHEATON & KAVAN, *supra* note 21, at 150-51.

²³ Cutler & Schwartz, *supra* note 22, at 512.

²⁴ *Id.*

governments had been achieved.²⁵

In the CSFR, the resurgence of a Slovak separatist movement,²⁶ fueled by economic hardship felt disproportionately in the Slovak republic, was the primary factor contributing to the inability of the provisional government to codify an acceptable distribution of power between the federal and republican governments.²⁷ In July of 1992, after considerable debate concerning the establishment of a State Treaty which would have explicitly recognized that the CSFR was the result of an agreement between two consenting sovereign states,²⁸ demands for Slovak autonomy finally broke apart the union of the two "nations"²⁹ which had existed for over seventy years.³⁰

²⁵ Anthony Robinson & Ariane Genillard, *Czechs and Slovaks Reconsider the Federation*, FIN. TIMES, June 8, 1992, at 15. In September of 1991, the presidiums of both the Czech and Slovak Parliament delegated representatives to work with delegates of the federal parliament to construct a State Treaty containing the basic principles for the future federal constitution. *Federal Constitution to be Ratified by National Parliament*, CTK NAT'L NEWS WIRE, Sept. 5, 1991, available in LEXIS, Nexis Library, CTK File. By contrast, Vladimir Meciar, Slovakia's prime minister from mid-1990 to April 1991, promised to put the future state set-up to a popular referendum should he win elections in June of 1992. Francine S. Kiefer, *Future of Czechoslovak Union Turns on Prospects for Economy*, CHRISTIAN SCI. MONITOR, Feb. 19, 1992, at 1 [hereinafter *Future of Union*]. See also *Federal Deputy Premier Explains Czechoslovak Differences Over Constitution*, BBC SUMMARY OF WORLD BROADCASTS, May 16, 1991, available in LEXIS, Nexis Library, Summary of World Broadcasts File; *Constitutions Must be Adopted in Legitimate Way*, CTK NAT'L NEWS WIRE, April 3, 1991, available in LEXIS, Nexis Library, CTK File. President Havel himself had proposed a referendum on whether to continue as a unified state in order to diffuse the nationality issue. John Tagliabue, *Havel Seeks Vote on Czech-Slovak Unity*, N.Y. TIMES, March 16, 1991, sec. 1, at 3. In October of 1991, Slovak public opinion was shifting away from desire for a federal system to a looser confederate arrangement. *Slovak Constitution Must be Drafted Separately*, CTK NAT'L NEWS WIRE, Oct. 3, 1991, available in LEXIS, Nexis Library, CTK File. At that time, a separate State Treaty document was being contemplated which would have expressly delegated certain powers to the federal government, namely defense, the federal budget, and foreign policy. *Id.* By February of 1992, the idea of a State Treaty seemed relegated to the back burner, when the Slovak National Council, which consisted of Slovakia's major political leaders, quashed a draft treaty which would have given either republic the right to leave the federation based on a popular referendum, saying that the treaty required too many concessions. Charles T. Powers, *Slovak Issue May Imperil Prague's Economic Reforms, Havel's Future*, L.A. TIMES, Feb. 23, 1992, at A5 [hereinafter *Slovak Issue*]. See also *Czech-Slovak Agreement in Brief*, BBC SUMMARY OF WORLD BROADCASTS, Feb. 17, 1992, available in LEXIS, Nexis Library, Summary of World Broadcasts File.

²⁶ Ott, *supra* note 16 at 19. "[T]he new climate of freedom allowed expression of long simmering ethnic tensions." *Id.*

²⁷ *Slovak Issue*, *supra* note 25, at A5. See also *Czechoslovakia, Compare and Contrast*, ECONOMIST, July 13, 1991, at 53.

²⁸ *Slovak Issue*, *supra* note 25, at A5.

²⁹ CAROL SHALNIK LEFF, NATIONAL CONFLICT IN CZECHOSLOVAKIA: THE MAKING AND REMAKING OF A STATE 1918-1987, at 11 (1988).

³⁰ Slovakia briefly attained independent statehood during World War II under the tutelage of Nazi Germany. See Jorg K. Hoensch, *The Slovak Republic*, in Mamatey & Luza, *supra* note 14,

Although a majority of Slovaks still favored union with the Czechs,³¹ the delay in establishing the essential instruments of political organization in the CSFR³² and the adverse economic conditions resulting from the attempt to quickly convert to a market economy,³³ exacerbated national tensions and contributed to widespread Slovak acceptance of the desire for independence.³⁴

II. NATIONAL SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW

Although the right to self-determination, "in the specific context of colonialism, has acquired the status of an established rule of customary international law,"³⁵ international law does not currently recognize the right to secede as the logical, although drastic, and ultimate form of national self-determination.³⁶

The principle of national self-determination combines the desire for internal self-government,³⁷ with the desire to achieve external sover-

at 271, 275-76. For an analysis refuting the concept of Slovakia as a Nazi "puppet" state, see KURT GLASER, *CZECHO-SLOVAKIA: A CRITICAL HISTORY* 54 (1961).

³¹ Edward Moritimer, *Scotland on the Danube*, *FIN. TIMES*, Nov. 6, 1991, at 21. In February of 1992, only twenty-three percent of Slovaks favored a loose confederation or outright independence. *Slovak Issue*, *supra* note 25.

³² *See supra* note 25.

³³ *Future of Union*, *supra* note 25.

³⁴ *Id.* (noting that Slovakia's unemployment rate was three times higher than that of the Czech republic as a result of federal government's new economic policies).

³⁵ Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 *CASE W. RES. J. INT'L L.* 257, 259 (1981). "Today, there is no doubt that self-determination, as defined in U.N. and general international practice, is a principle of international law which yields a right to self-government that can be claimed legitimately by *bona fide* dependent peoples." *Id.* at n.8 (quoting W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 147 (1977)). *See also* THOMAS GARRIGUE MASARYK, *THE MAKING OF A STATE* 386 (1969) (the architect of the Czechoslovak state suggesting that the right of self-determination is a claim limited to "nations" or "peoples," but not to minorities). *Cf.*, HEATHER WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 78 (1988) (arguing that there is a legal right to self-determination).

³⁶ *See Nanda*, *supra* note 35, at 259. Beyond the context of colonialism, "there seems to have developed little consensus among publicists and politicians alike on the content and scope of the principle." *Id.* Lloyd Cutler points out that most scholars deny that "people" includes "a national, racial, religious, or linguistic minority within a sovereign state," thus denying a minority the ability to assert a right to self-determination. Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 *U. ILL. L. REV.* 575, 589.

³⁷ "The internal aspect of the right of self-determination of peoples and nations . . . [asserts that] people are entitled to freely choose the form of government under which they want to live and have the right to independently pursue their economic, social and cultural development." Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace*, 8 *J. HUM. RTS.* 49, 54-55 (1990).

eignty,³⁸ and asserts that all "nations" have the right to self-governance, including the right to form and be recognized by the international community as an independent state.³⁹ The self-governance aspect of national self-determination rests on traditional notions of popular sovereignty championed by the American and French Revolutions which averred that the legitimacy of government rests on the consent of the governed.⁴⁰ External sovereignty rests on the logical extension of the argument that "popular sovereignty can be understood to encompass the right to rebel against rule by another national or ethnic group just as it includes a right to rebel against one's own government."⁴¹ Thus, a nation subordinated to rule by "another" within a unified state may also be entitled to some degree of autonomy within that state, or full independence from the dominant group. The ultimate effect of recognizing a right of national self-determination based on the shared community belief that subordination to the unified state is undesirable would, however, logically lead to an unlimited right of secession.⁴²

The definition of "nation" then becomes critical to an understanding of which groups should be afforded self-determination and whether the self-determination right of that group should include the right to secede.⁴³ Central European nationalists believed that the nation could be defined by objective criteria such as culture, language, and religion,⁴⁴ whereas English and French writers have argued that nationality is "primarily a subjective fact of the individual's political or social consciousness."⁴⁵ The objectively homogeneous nation then could assert a right to self-government, evidenced by a subjective desire to form an appropriate political arrangement based on consent.⁴⁶ The form of this self-governance or self-determination should provide the opportunity for the nation to form its own sovereign state.⁴⁷

³⁸ The external right of self-determination has been defined as "the right to choose freely from foreign interference the political status which a people want to adopt." Alexandre Kiss, *The People's Right to Self-Determination*, 7 HUM. RTS. L.J. 165, 170 (1986).

³⁹ See *infra* note 141 and accompanying text.

⁴⁰ WILSON, *supra* note 35, at 55-56. See also Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 171, 179-80 (1991).

⁴¹ Brilmayer, *supra* note 40, at 180.

⁴² A self-determination right based solely on consent would require that "states be willing to subdivide indefinitely into an infinitely larger number of infinitely smaller political entities," creating anarchy in the international order. See Brilmayer, *supra* note 40, at 182. See also COBBAN, *supra* note 2, at 137.

⁴³ "There is no object in conceding rights, whether absolute or not, to an unidentifiable possessor." COBBAN, *supra* note 2, at 109.

⁴⁴ *Id.* at 107.

⁴⁵ *Id.* at n.2.

⁴⁶ *Id.* at 107.

⁴⁷ *Id.* at 145.

This simple formula, however, did not make the application of national self-determination in the aftermath of World War I a simple matter.⁴⁸ In practice, the determination of which communities constituted a "nation," whose demands for self-governance should be recognized in the form of independent statehood, was fueled by political expediency rather than any principled quasi-legal analysis of claims.⁴⁹

A. *National Self-Determination and the Versailles System*⁵⁰

National self-determination first achieved the general recognition of the international community during World War I and at the Paris Peace Conferences concluding hostilities.⁵¹ "To the tribes of man, sickened by four years of carnage, the product of a generation of imperialism and centuries of power politics, it appeared as the light of salvation, beckoning humanity onwards to a happier future."⁵² Thus, it was generally believed, by the international community in general and the national groups subjected to the domination of the Austro-Hungarian empire in particular, that the principle of national self-determination would be the guiding principle of the Paris Peace Conference when it opened in 1919.⁵³

President Woodrow Wilson in his Fourteen Points address to the

Self-determination in a separate state . . . is necessary where there is an established tradition of sovereignty, or where, as a result of a combination of historical influences, the desire for political independence has reached such a degree of intensity that it is not to be satisfied even by the removal of all the grievances from which in the beginning it may have sprung.

Id.

⁴⁸ Przetacznik, *supra* note 37, at 49-50. "[T]he Treaty of Versailles . . . serve[s] as [an example] of the inability to establish a genuine and durable peace, because they had neither recognized nor guaranteed the right of self-determination of peoples and nations." Accordingly the system was destined to fail. *Id.*

⁴⁹ COBBAN, *supra* note 2, at 83-84.

⁵⁰ An examination of the Versailles System is particularly appropriate in the context of Czechoslovakia. Carol Shalnik Leff argues in her excellent analysis of modern Czech and Slovak political relations that,

[t]he construction of the state of Czechoslovakia after World War I occurred under conditions that stamped all future patterns of ethnic relations Czechoslovakia shared with other new East European states a tempered artificiality. Emerging from the ruins of the Austro-Hungarian Empire, . . . [it] had never experienced a common administration, still less a common self-government.

LEFF, *supra* note 29, at 11.

⁵¹ Przetacznik, *supra* note 37, at 72. See generally *id.* for a concise history of the philosophy of self-determination from a variety of political perspectives.

⁵² COBBAN, *supra* note 2, at 57.

⁵³ *Id.*

United States Congress stated that “[n]o peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.”⁵⁴ The Allies, believing that it would be unwise to express reservations to the principle, publicly proclaimed their acceptance of the principle of nationality and of “the right of people to dispose of their own destiny.”⁵⁵ Having expressed little or no limitation to the right of national self-determination, “the victorious Allies were committed to the principle of self-determination in its most absolute form, and [world opinion] expected it to be clearly and unequivocally put into practice.”⁵⁶ The difficulties in applying an absolute right of national self-determination, however, would ultimately lead to confusion at best, and renunciation of the principle at worst.

As a practical matter, national self-determination represented a challenge to the colonial empires of the Allied powers and in order to retain their global power, the Allies were forced to make convoluted and indefensible arguments as to why the principle should be used to dismember the defeated empires, but not their own.⁵⁷ Secondly, the vast number and often small populations of “nations” in Eastern and Central Europe made it impossible to dismember the defeated empires and create new nation-states without creating new minorities.⁵⁸

As a legal matter, in order to establish the post-war boundaries of the new states, delegates to the peace conference had to define which people or nations were to be granted a national self-determination right equivalent to the recognition of independent statehood. The concept of the “nation” as being the beneficiary of a right of self-determination suffered from the difficulty of defining a generally valid framework of conditions a nation should satisfy before conferring upon it a right to self-determination.⁵⁹ “The lethal weaknesses of the doctrine of national self-determination were its assumptions that ‘nations’ would generally be

⁵⁴ 54 CONG. REC. 1742 (1917). This sentiment parallels that of philosopher Jean Jacques Rousseau, who stated, “[i]t makes fools of people to tell them seriously that one can at one’s pleasure transfer peoples from master to master, like herds of cattle, without consulting their interests or their wishes.” JEAN JACQUES ROUSSEAU, POLITICAL WRITINGS 340-41 (C.E. Vaughan ed., 1915) quoted in COBBAN, *supra* note 2, at 32.

⁵⁵ COBBAN, *supra* note 2, at 57-58.

⁵⁶ *Id.* at 58.

⁵⁷ See generally *id.* at 58-66 (exploring the concept of self-determination as held by the Allies individually).

⁵⁸ *Id.* at 68. The newly created Czechoslovakia in particular incorporated a large German minority which would prove problematic in maintaining the integrity of the nascent state. See *infra* notes 225-31 and accompanying text.

⁵⁹ *Id.*

self-evident entities and that only nations, as history had delimited them, would constitute natural political units having a compelling desire for self-government."⁶⁰ Confusion was an inevitable result of the failure to specify whether the international community would recognize only national-determination (referring to "nations" which had historically enjoyed some measure of self-government) or whether it had endorsed self-determination (meaning by this a concept of "natural" political units).⁶¹

This confusion as to the definition of "nation," was reflected in the failed attempt to determine the beneficiaries of a right to self-determination by language and consent.⁶² The general tendency was to believe that commonality of language was a legitimate test for nationhood.⁶³ "In Central and Eastern Europe, the growing consciousness of Nationality had attached itself neither to traditional frontiers nor to new geographical associations but almost exclusively to mother tongues"⁶⁴ However, it was not true that all "nations" claiming self-determination could assert a common language. Rather, each nation clung to linguistic commonality as a prerequisite for statehood only in so far as it strengthened their claims.⁶⁵ Plebiscites⁶⁶ were used indiscriminately and suffered from the same manipulative treatment as the consideration of language.⁶⁷ Even where plebiscites were held to determine the boundaries of the new states, the wishes of the people were also subject to boundary alterations based on the particular geographical and economic conditions of the area.⁶⁸

As a result of this definitional confusion and practical manipulation, "nationality" as a pre-requisite for the attainment of independence was replaced by the broader concept of "a self-conscious community that was subject to an alien group."⁶⁹ Thus, a further element was added to

⁶⁰ LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 5 (1978).

⁶¹ *Id.*

⁶² COBBAN, *supra* note 2, at 69-73.

⁶³ ARNOLD J. TOYNBEE, *THE WORLD AFTER THE PEACE CONFERENCE* 18 (1926).

⁶⁴ *Id.*

⁶⁵ COBBAN, *supra* note 2, at 69. For example, the Poles claimed territory from Germany on the basis of the language spoken by its inhabitants, but refused to follow the same principle in the Russian provinces or in East Galicia where non-Polish tongues were spoken. The Germans claimed border populations at least partly on the basis of language, but severely criticized the language test when applied to East Prussia observing that "although they used a different language no one believed that Welsh or Bretons or Basques should be separated from the states of which they formed part." *Id.* at 70.

⁶⁶ See generally SARAH WAMBAUGH, *PLEBISCITES SINCE THE WORLD WAR* (1933).

⁶⁷ COBBAN, *supra* note 2, at 73.

⁶⁸ 16 DAVID HUNTER MILLER, *MY DIARY AT THE PEACE CONFERENCE OF PARIS* 11 (1925).

⁶⁹ COBBAN, *supra* note 2, at 107.

the "nation" wishing to make a prima facie case for independence — alien subjugation. Not only did the nation have to show objective homogeneity and a subjective political desire, but it also was required to establish that an element of subjugation had prevented it from attaining the self-governance to which it was entitled.

Although the principle of self-determination had received much lip service in the aftermath of World War I, its application was limited to the defeated powers,⁷⁰ and was nowhere included in the Covenant of the League of Nations.⁷¹ In addition, it was not maintained that minorities could attain the status of a political state while part of a pre-existing sovereign state.⁷² In 1938, the Allied powers acquiesced to Hitler's demands for *lebensraum*⁷³ and the annexation of Czechoslovak territory incorporating heavy German minorities in the Munich Agreement.⁷⁴ This Agreement represented a virtually complete denunciation of the Versailles system. Ironically, it was precisely the principle of self-determination which Hitler used to justify the annexation of the Sudetenland, an area with a heavy concentration of Germans incorporated into Czechoslovakia after World War I.⁷⁵

B. "People," "Nations," and the United Nations

A further examination into the meaning of "peoples" in the Charter and practice of the United Nations is necessary,⁷⁶ to determine precise-

⁷⁰ COBBAN, *supra* note 2, at 66.

⁷¹ See LEAGUE OF NATIONS O.J. 5 (Spec. Supp. 3, 1920) (decision of the Aaland Islands dispute between Finland and Sweden which held that the right of self-determination was not a rule of international law).

⁷² LEAGUE OF NATIONS O.J. 35 (Spec. Supp. 9, 1922). "While the Assembly recognises the primary right of Minorities to be protected by the League from oppression, it also emphasizes the duty incumbent upon persons belonging to racial, religious or linguistic minorities to co-operate as loyal fellow-citizens with the nations to which they now belong." *Id.*

⁷³ Keith Eubank, *Munich*, in Mamatey & Luza, *supra* note 14 at 239.

⁷⁴ See generally R.W. SETON-WATSON, A HISTORY OF THE CZECHS AND SLOVAKS 364 (1965).

⁷⁵ Although Hitler's annexation of the Sudetenland, pursuant to the wishes of the German minority in Czechoslovakia, might be seen as a further extension of the principle of self-determination, his subsequent invasion of Czechoslovakia proper, demonstrated the international community's decided ambivalence toward the concept of self-determination as a governing principle with objective limitations. "By [the Munich Agreement] an independent nation was torn asunder by nations that had previously recognized her independence." Eubank, *supra* note 73, at 251.

⁷⁶ DJURA NINCIC, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS 35 (1970).

The Charter is not, however, merely the constitution of the United Nations It is, according to a view which seems to be gaining ground both in the doctrine and . . . practice of international law, the *constitution*

ly which groups should be afforded the right of self-determination. The Charter of the United Nations expressly refers to the principle of self-determination on two occasions. Article 1(2) of the Charter asserts that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."⁷⁷ Article 55 states that the objectives of the organization shall be pursued "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination."⁷⁸ The difficulty in finding support for the right to national self-determination, and therefore secession, is the result of the organization's inability to formulate a consistent definition of "nations," "states," and "peoples."⁷⁹ On the one hand, if nations were to be defined as a community less than the state, the principle of self-determination would operate to grant them self-governance and a related claim to secede.⁸⁰ On the other hand, if the term "nation" were used as a synonym for "state," then the principle would conform only to a right of internal self-governance, excluding secession by virtue of the superior right to territorial integrity granted only to sovereign states.⁸¹ The current text of the Charter was approved without resolving the question raised by these divergent definitions,⁸² and one commentator has gone so far as to say that "[t]he term 'self-determination' was crowded into Article 1 of the Charter without relevance and without explanation"⁸³

If the text of the U.N. Charter itself, and the *travaux preparatoire* provide little insight into identifying what was meant by the use of the three ambiguous terms, the practice of the United Nations in supervising the decolonization of dependent territories after World War II may be dispositive. In the decolonization setting, the United Nations consistently applied the principle of self-determination solely to the inhabitants of the

of the international community, a source of the general international law of the present-day world, establishing a universal legal order. The Charter has acquired these dimensions . . . owing to the fact that it actually constitutes a codification of the general rules of international conduct (and not merely rules governing the relationship between member states).

Id. It necessarily follows, therefore, that the conduct of the Organization, in furtherance of the Charter's principles, also constitutes a source of general international law.

⁷⁷ U.N. CHARTER, art. 1, para. 2.

⁷⁸ *Id.* art. 55.

⁷⁹ BUCHHEIT, *supra* note 60, at 74.

⁸⁰ *Id.* at 75-76.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Clyde Eagleton, *Excesses of Self-Determination*, 31 FOREIGN AFF. 592 (1953).

pre-existing political state. "In [the colonial] context, relevant actors conceived of self-determination as the right of contemporary inhabitants of colonized territories to be free from outside domination, a right derived from notions of freedom, equality and peace."⁸⁴ Thus, the United Nations, in supervising the decolonization of Africa, accepted the territorial divisions of the colonial powers despite the arbitrariness with which they were originally drawn.⁸⁵ The practice of the U.N. in overseeing the decolonization process, therefore, suggests that the right of self-determination means merely the right of self-governance free from external interference and extends only to the people of a unified pre-existing territorial unit rather than to any distinct minority within it.⁸⁶ This interpretation would thus deny a "people" or "nation" the right to secede.

C. *The Opponents View*

Opponents of the right to secede raise both legal and political objections to the recognition of a right of national self-determination which would permit a separatist movement to secede from the existing state. As a matter of international law, recognition of a claim to secede, prior to the separatist's group achieving *de facto* status as an independent state, would improperly interfere with essential domestic matters of states in violation of the United Nations Charter.⁸⁷ Definitionally, the inability to adequately define which groups constitute a legitimate "nation" or "people" for the purposes of self-determination would make the application of a right to secede difficult to apply in a consistent, coherent way which would properly limit recognition of secession to separatist groups with legitimate claims.

As a political matter, sovereign states will oppose the recognition of separatist demands for independence from the unified state where recognition would seriously hamper the original state's relative power or destroy it altogether:

Entities blessed with recognition as independent States . . . are reluctant to permit part of their population and territory to be removed . . . [since this would] invariably result in a diminution of the unified

⁸⁴ Anaya, *supra* note 2, at 408.

⁸⁵ Brilmayer, *supra* note 40 at 182.

⁸⁶ *Id.* "[I]nternational law currently supports the position that anti-colonial movements can invoke the right of self-determination, but not groups seeking to secede from established states. Once free of colonial rule, the newly established state becomes entitled to territorial sovereignty." *Id.* at 182-83.

⁸⁷ U.N. CHARTER, art. 2, para. 7. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . ." *Id.*

State's wealth, resources, and power, thereby lowering its economic stamina, defensive capability and potential international influence.⁸⁸

Consequently, these political concerns have operated to deny recognition of the right to secede as the ultimate consequence of a nation's right to self-governance.

Perhaps the most important legal limitation on international recognition of a right to secede is the principle of territorial integrity as codified both in the U.N. Charter and the U.N. instruments discussed below.⁸⁹ "The principles of territorial integrity and self-determination are complementary opposites. All legal rules travel in pairs of complementary opposites; the principle of territorial integrity is complementary to the principle of territorial disintegration, i.e. self-determination."⁹⁰

Since World War II, the United Nations has consistently refused to recognize the right of self-determination for national groups or populations with less than sovereign statehood.⁹¹ Rather it has subordinated the right of self-determination to the guarantees of territorial integrity and non-intervention by limiting the application of self-determination to the internal functioning of the state whose territorial integrity is guaranteed by the U.N. Charter.⁹²

Left undefined in the Charter itself, the principle of self-determination is limited in its application by Article 2, paragraphs 4 and 7⁹³ of the Charter. Paragraph 4 states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."⁹⁴ This provision would seem to preclude any legal recognition of self-determination in the form of separation from the existing state where any support of separatist movements would necessarily threatened the continued exis-

⁸⁸ BUCHHEIT, *supra* note 60, at 27.

⁸⁹ Brilmayer, *supra* note 40, at 178. "The principle of territorial integrity often explicitly qualifies U.N. declarations recognizing self-determination." *Id.* at n.5. See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 67 [hereinafter G.A. Res 1514]. "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." *Id.*

⁹⁰ Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779, 796-97 n.70 (1976).

⁹¹ "Regarding . . . self-determination, I think this concept is not properly understood in many parts of the world. Self-determination of peoples does not imply self-determination of a section of a population of a particular Member State." 7 U.N. MONTHLY CHRON., Feb. 1970, at 36 (statement of U.N. Secretary General U Thant, on January 9, 1970).

⁹² U.N. CHARTER, art. 2, para 4.

⁹³ *Id.* art. 2, paras. 4 & 7.

⁹⁴ *Id.*

tence of a sovereign state. The principle of self-determination is further identified by the United Nations in the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁹⁵ and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the U.N.⁹⁶

Here again, limitation on the right of self-determination is expressed in that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."⁹⁷ Moreover,

nothing in the [Declaration on Friendly Relations and Co-operation] shall be construed as authorizing or encouraging any action which would dismember or impair . . . the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples* as described above and thus *possessed of a government representing the whole people belonging to the territory* without distinction as to race, creed or colour.⁹⁸

The conflict between these two fundamental legal norms, self-determination and territorial integrity, in both the U.N. Charter and subsequent declarations and practice, would appear to deny any legal justification to secessionist movements.⁹⁹

However, the principle of territorial sovereignty might also include territorial arguments about why existing [state] boundaries should be redrawn.¹⁰⁰ This principle states:

[T]he territorial principle does not necessarily give a state power when its exercise of territorial sovereignty is illegitimate. If secessionists argue that the current exercise of territorial power is illegitimate, and that the territorial sovereignty in fact belongs to the minority group rather than the majority, then the secessionists can base a right to secede upon a territorial claim, rather than on a personalistic one. In other words, tacit consent can be attributed to a state's inhabitants only

⁹⁵ G.A. Res. 1514, *supra* note 89.

⁹⁶ G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124 (1970).

⁹⁷ G.A. Res. 1514, *supra* note 89, para. 6.

⁹⁸ G.A. Res. 2625, *supra* note 96 (emphasis added).

⁹⁹ Lea Brilmayer argues that "a [secessionist] minority cannot justifiably claim the remedy of secession unless it can convincingly assert a claim to territory." Brilmayer, *supra* note 40, at 193.

¹⁰⁰ *Id.* at 178 n.7.

when the state has legitimate power over its territory.¹⁰¹

Paragraph 7 further limits any recognition of separatist claims by forbidding a state to "intervene in matters which are essentially within the domestic jurisdiction of any state."¹⁰² Thus, any external aid to or recognition of a separatist movement within a sovereign state would appear to violate the U.N. Charter. In the decolonization setting, the U.N. has defined the right to self-determination of peoples as consisting of two component parts, one internal and the other external.¹⁰³ The "internal autonomy" component includes the right of all segments of society to influence the constitutional and political structure under which they live.¹⁰⁴ The "external independence" element conveys the notion that groups of people are entitled to pursue their political, cultural, and economic objectives without interference or coercion by a foreign state.¹⁰⁵ This analysis was invoked to compel decolonization of the dependent territories after World War II.¹⁰⁶

Those opposed to recognition of a right to secede focus on the "internal autonomy" component of this definition of self-determination and argue that the right of self-determination involves matters purely within the competence of the sovereign state.¹⁰⁷ The principle of self-determination is merely a "theory about the relationship that should prevail between the nation and the state, the latter being understood as any separately governed political community."¹⁰⁸ Thus the international legal right of self-determination exists only to ensure that a sovereign state governs in accordance with the will of its citizens.¹⁰⁹

Proponents of the right to secede rest their argument on the "external independence" component of this definition of self-determination and argue that when the separatist group is being coerced by an alien regime, it has lost its ability to freely pursue its political, economic, and cultural objectives.¹¹⁰

Recognition of a legal right of self-determination in the decolonization context is hardly a matter of controversy.¹¹¹ Where a foreign sovereign colonizes an independent state, an award of self-governance from

¹⁰¹ *Id.* at 186-87.

¹⁰² U.N. CHARTER, art. 2, para. 7.

¹⁰³ Przetacznik, *supra* note 37, at 54.

¹⁰⁴ *Id.*

¹⁰⁵ BUCHHEIT, *supra* note 60, at 14.

¹⁰⁶ *Id.* at 15.

¹⁰⁷ *Id.* at 39.

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., Brilmayer, *supra* note 40, at 180.

¹¹⁰ BUCHHEIT, *supra* note 60, at 14.

¹¹¹ See Brilmayer, *supra* note 40, at 181-83.

the international community neither implicates the territorial sovereignty of the colonizer, nor does it require intervention in that which is wholly a matter for domestic law. By including the element of territoriality in testing the legitimacy of secessionist claims, a theory of secession can properly accommodate the right of territorial sovereignty previously understood to prohibit secession from the sovereign state.¹¹²

D. *Jurisdiction Over Secessionist Claims*

A corollary international legal principle which must be overcome is that of non-intervention in the domestic affairs of sovereign states.¹¹³ Self-determination has been strictly limited to a phenomenon within the sovereign state and unreachable by U.N. command of non-intervention. International law is inapplicable to any political entity less than a sovereign state.¹¹⁴ In this light,

only States can have rights or duties under international law, [and the] so-called right of peoples to self-determination can at best place an obligation upon a State to accord its citizens a measure of self-determination, assuming that it has subscribed to treaties or international agreements requiring that it do so.¹¹⁵

It would be a mistake however to view secessionist demands as wholly within the domestic jurisdiction of a pre-existing sovereign state.

A secessionist movement is a matter of international cognizance despite the sovereignty of the unified state for two reasons. First, a separatist claim asserts that the group has the right to exercise sovereignty over a particularly significant territory.¹¹⁶ If the movement is successful in extricating itself and its territory from the existing state, both the new state and the smaller remnant of the original state will require the recognition,¹¹⁷ or at least acquiescence of the international community in order to achieve the benefits of membership in the United Nations¹¹⁸ and sovereign equality in international law.¹¹⁹

The second reason for bringing secessionist movements within the purview of international law is that secessionist demands threaten world peace.¹²⁰ When sovereign states logically find it in their best interest to

¹¹² *Id.* at 186.

¹¹³ U.N. CHARTER, art. 2, para. 7.

¹¹⁴ BUCHHEIT, *supra* note 60, at 22.

¹¹⁵ *Id.*

¹¹⁶ Brillmayer, *supra* note 40, at 193.

¹¹⁷ *See infra* note 141 and accompanying text.

¹¹⁸ U.N. CHARTER, art. 4.

¹¹⁹ *Id.* art. 2, para. 1.

¹²⁰ *Id.* art. 39. "The Security Council shall determine the existence of any threat to the peace,

aggressively resist secessionist claims,¹²¹ both the separatist group and the government of the state from which they desire to secede will likely resort to force in an attempt to vindicate their competing claims. Armed conflict within one state may easily spill over to the surrounding areas and threaten states not party to the dispute. In addition, both sides frequently attempt to enlist the assistance of a third states, thereby escalating the conflict and further extending the fighting beyond internal borders.¹²² Should a separatist group achieve success through armed struggle, the resultant political entity may lack the full requirements for statehood and be unable to defend its sovereignty, inviting conquest by other states or requiring outside economic and military assistance to remain an artificially viable state.¹²³

From the above discussion, it is clear that separatist demands do impact on the international community and may come within the jurisdictional powers of the United Nations.¹²⁴ However, this does not explain why secessionist movements, in and of themselves, amount to a matter of international law absent any threat to peace.

Absent a threat to peace, secessionist claims should nonetheless be cognizable under international law because the existence of sovereign states is protected by international law. First, the principle of territorial integrity,¹²⁵ and the related guarantees of non-intervention¹²⁶ and prohibition of the use of force¹²⁷ require Member States of the United Nations to uphold and protect the sovereignty and territorial integrity of recognized fellow Members.¹²⁸ Were a right to secede recognized, it would amount to a denial of sovereign status to existing states in direct violation of the right of territorial integrity.¹²⁹

breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken" *Id.*

¹²¹ BUCHHEIT, *supra* note 60, at 27.

¹²² *Id.*

¹²³ *Id.* at 12-14. This was precisely what occurred in the aftermath of World War I. Despite the Allies' attempt to fashion a new world order based on the primacy of the "nation-state," the "Versailles System" as it was known, was unable to accommodate all the various smaller minorities by granting independent statehood. See generally COBBAN, *supra* note 2, at 57-84.

¹²⁴ U.N. CHARTER, art. 39.

¹²⁵ *Id.* art. 2, para. 4. "All members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state." *Id.*

¹²⁶ *Id.* art. 2 para. 7. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." *Id.*

¹²⁷ *Id.* art. 2, para. 4; art. 2, para 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered").

¹²⁸ *Id.* art. 2, para. 4.

¹²⁹ *Id.*

Secessionist demands threaten the existence of sovereign independent states where, unlike claims for some nominal or intermediate form of autonomy, demands for a separate state do not concern the internal structure of self-governance.¹³⁰ Instead, separatist movements aim to dismember the sovereign entity by redrawing political boundaries and thus can rarely be satisfied by internal political reforms.¹³¹ In this regard, "autonomy" must be distinguished from "sovereignty." "Autonomy" is an internal aspect of self-governance.¹³² It denotes "the right of a human community to determine the conditions of its own existence, to establish its government in accordance with its own principles and ideas and for a certain purpose, to decide upon its legislation without any interference from outside."¹³³ It is a negative right in that it merely proscribes what may not be done by one sovereign to another. By contrast, "sovereignty" implies an external aspect governing relations among sovereigns.¹³⁴ Sovereignty is a positive right in that a recognition of sovereignty confers a special, equal status upon the political entity seeking recognition.¹³⁵ Because the protection of state sovereignty is a matter of international law, the legitimacy of separatist demands which directly threaten the existence a previously recognized sovereign state must command the attention of the international community when the dismemberment of that sovereign state is threatened.

Second, despite a lack of international recognition and support for the separatists' demands, the secessionist group may achieve by force that to which it is not legally entitled.¹³⁶ In this case, the new sovereign political entity will require eventual recognition by the international community in spite of the original illegitimacy of the separatists' action.¹³⁷

Were national self-determination to be recognized in the international community, a separatist group might take its claim directly to the unified government and, with some leverage against its sovereignty, attempt to negotiate a more equitable power sharing arrangement within the unified state. If internal evaluation is impracticable, the U.N. might establish a permanent commission similar to that which oversaw the decolonization of Africa in the 1960's. Separatist groups would be rec-

¹³⁰ Brillmayer, *supra* note 40 at 177.

¹³¹ *Id.*

¹³² NINCIC, *supra* note 76, at 13.

¹³³ *Id.*

¹³⁴ *Id.* (stating that "freedom of a state implies its right to internal autonomy and to independence (i.e. to sovereignty) in its external relations").

¹³⁵ *Id.*

¹³⁶ BUCHHEIT, *supra* note 60.

¹³⁷ Brillmayer, *supra* note 40, at 180.

ognized by the commission for the limited purpose of evaluating their claims.¹³⁸ The unified state would have to present its case against secession and the party with a superior right to sovereignty would be legitimized. In the process, a compromise solution might be reached in which the separatist group, though not rewarded with independence, might attain a satisfactory degree of autonomy within the unified state.

E. Secession as a Remedy In Extremis

As an initial matter, it must be noted that the self-determination principle encompasses and promotes a variety of political remedies:

Periodic elections of legislators or governors according to some prearranged constitutional formula, plebiscites to determine political status or affiliation, the voluntary division of an independent State, or free cession of territory to another State in accordance with the inhabitants' wishes are all instances of a peaceful implementation of self-determination.¹³⁹

It follows, therefore, that recognition of national self-determination does not always require the simultaneous recognition of a right to secede. Rather, where statehood is demanded, the "[c]ircumstances, in the end, are the determining factor."¹⁴⁰

Recognition of secession as the ultimate form of self-determination is required where there is an established tradition of independent sovereignty, or where, as the result of a combination of historical influences, the desire for political independence has reached such a degree of intensity that it is not to be satisfied even by removal of all the grievances from which in the beginning it may have sprung. [The right to secede] comes into play here, not as the first, but as the last step, not as a panacea for all national dissatisfactions, but as a remedy to be administered *in extremis*, when all else has failed.¹⁴¹

Consequently, only where a particular "nation" has a compelling contemporary *and* historical justification for the extreme remedy of secession should the international community recognize the legitimacy of the separation.

¹³⁸ "[I]nternational Law recognizes for certain purposes the legal capacity of international organizations whose objectives are forward upon transnational cooperation of states in matters pertinent to the concerns of international law." J.D. van der Vyer, *Statehood in International Law*, 5 EMORY INT'L L.R. 9, 10-11 (1991).

¹³⁹ BUCHHEIT, *supra* note 60, at 12-13.

¹⁴⁰ COBBAN, *supra* note 2, at 145.

¹⁴¹ *Id.*

III. THE CRITERIA FOR DETERMINING THE LEGITIMACY OF SEPARATIST DEMANDS FOR STATEHOOD

Any adequate definition of a right to secede as extending from the principle of national self-determination must employ a framework which limits recognition of secessionist claims based on criteria designed to properly test their legitimacy. Because any valid claim to secede must apply only where it is the last remedy available to correct the historical injustice, an analogy can be made between the recognition of a valid secessionist claim and the recognition of statehood by the international community.

As discussed above, a *de facto* independent state which results from a successful secessionist movement will require the acceptance of the international community in order to enjoy the *de jure* benefits of legal recognition.¹⁴²

In order to establish a right to secede superior to that of the existing state's territorial integrity, a separatist group must show that the unified state's exercise of jurisdiction over the separatist nation's territory and people is invalid. Such a showing must amount to an assertion that the group constitutes a proto-state within the unified state, and that in exercising exclusive jurisdiction over the proto-state without its effective consent, the unified state is in effect violating the sovereignty of the proto-state.

To determine whether a secessionist movement, but for the pre-existence of the unified state, would amount to a sovereign state, the characteristics of a state in international law is instructive. The Montevideo Convention on Rights and Duties of States¹⁴³ establishes the most widely accepted formulation of the criteria of statehood in international law.¹⁴⁴ The state as an international legal person must possess four characteristics.¹⁴⁵ The political entity claiming to be a state must have (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.¹⁴⁶ Apply-

¹⁴² The declarative theory of statehood asserts that the political existence of a state shall be independent of recognition by other states. Van der Vyer, *supra* note 138, at 12. While recognition may not be a prerequisite for statehood, "[t]he normal method for a new state to acquire international personality is to obtain recognition from existing states." For a comprehensive analysis of the role of recognition in statehood, see generally van der Vyer, *supra*.

¹⁴³ Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

¹⁴⁴ MALCOLM N. SHAW, INTERNATIONAL LAW 138 (3rd ed. 1991).

¹⁴⁵ *Id.* See also Montivideo Convention, *supra* note 143, art. 1.

¹⁴⁶ Montivideo Convention, *supra* note 143, art. 1. See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

ing these four criteria to a separatist claim, a legitimate right to secede can be found where a particular group of people constitutes a relatively continuous cultural and political community which has historically been denied exclusive jurisdiction over a defined territory. Because the seceding state will often require the territorial inclusion of ethnic minorities, a further relevant consideration in determining whether the proto-state is capable of entering into relations with other states must also be whether the proto-state can guarantee the civil and political rights of minorities within the new state.¹⁴⁷

A. "People"

In analyzing the relevant criteria applicable to separatist claims, it is helpful, first, to recall the inability of the Versailles system to formulate a consistent definition of "people" to whom national self-determination would be extended.¹⁴⁸ In the case of the Slovaks, this historical examination is particularly instructive where the legal recognition of the Czecho-Slovak state originated in the aftermath of World War I.¹⁴⁹

The definition of "people" to whom the right of national self-determination inures must be capable of distinguishing whether a group's demand for self-determination can be legitimately achieved by secession, or whether reform must be accomplished within the existing state.¹⁵⁰ A permanent population has been defined simply as one that is "permanent and significant,"¹⁵¹ a definition which provides little guidance for determining the degree of self-determination to which a "people" are entitled. However, when combined with the elements required of a "people" discussed earlier,¹⁵² the proto-state must encompass a community whose permanence can be identified by an objective cultural identity

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.

Id.

¹⁴⁷ For a practical understanding of the significance of minority rights in Slovakia in particular, see Chris Sulavik, *Ethnic Hungarians in Slovakia Hasten to Protect Rights*, CHRISTIAN SCI. MONITOR, Sept. 3, 1992, at 6.

¹⁴⁸ See *supra* notes 50-68 and accompanying text.

¹⁴⁹ See generally Mamatey, *supra* note 14, at 20-22 (describing how the Czecho-Slovak state achieved recognition by President Wilson and the Allies).

¹⁵⁰ As discussed earlier, secession should be seen as the most extreme solution to national demands for self-determination. See *supra* notes 139-141 and accompanying text. Where a "people" merely constitutes a minority within a state, the solution must be sought through greater autonomy and self-government within that state. See *supra* notes 107-109 and accompanying text.

¹⁵¹ RESTATEMENT, *supra* note 146 § 201 cmt. c.

¹⁵² See *supra* notes 44-45 and accompanying text.

component evidencing a historical continuity. Clear distinctions may be made among claimant groups using objective criteria generally assumed to evidence "nationality." Such characteristics include a common culture, language, religion, etc.¹⁵³ A second component of permanent population in the context of statehood is the subjective requirement of political allegiance.¹⁵⁴ Therefore, it is necessary to examine subjective evidence of nationality, i.e. a group becomes a "self" only when it perceives itself as distinct and shows evidence of a "group consciousness."¹⁵⁵ The political allegiance component of a permanent population, by contrast, may be evaluated both historically and contemporaneously by consent in the form of a referendum deciding whether the members of the proto-state wish to attain complete independence in the form of statehood.

In order to cure the definitional confusion associated with granting a right to secede to a particular separatist group, the secessionist group must first show that its people represent a community whose permanence can be identified by an objective cultural identity component evidencing a historical continuity. This requirement need not limit criteria to language, but should include other aspects of culture as well.¹⁵⁶ Second, the secessionist group must evidence a political allegiance component of a permanent population, to be evaluated by popular consent in the form of a referendum deciding whether the members of the proto-state wish to attain complete independence in the form of statehood.¹⁵⁷ The above requirements insure that the group seeking separation from the unified state will be able to meet the first element of recognition, that is the existence of a permanent population.

Any legitimate claim for Slovak secession must show that the Slovaks have demonstrated (1) the requisite objective historical, cultural, and political continuity; and, (2) the collective desire to express its nationhood *in the form of an independent political state*:

[C]ollective individualities, animated by one will, the result of common culture which confers upon the still unconscious masses — "the people" in the strict sense of the word — a personality within the compass of political ontology. It is the consciousness of a common destiny and the desire to attain a common end which are the essential criteria

¹⁵³ TORE MODEEN, INTERNATIONAL PROTECTION OF NATIONAL MINORITIES IN EUROPE 17 (1969).

¹⁵⁴ See *supra* note 45 and accompanying text.

¹⁵⁵ BUCHHEIT, *supra* note 60, at 10; MODEEN, *supra* note 153, at 17.

¹⁵⁶ MODEEN, *supra* note 153, at 17.

¹⁵⁷ It is hoped that by first requiring a historical desire to achieve autonomy, a more legitimate determination of whether the people wish to secede can be made, as opposed to recognizing a temporary desire for autonomy based on transitory political issues.

of the nation.¹⁵⁸

If the ultimate goal of such a community is to "become established in the form of an entity, distinguished by an organized power, a technical superstructure, an autonomous statute," then the community in effect wishes to "raise itself to the dignity of a state."¹⁵⁹ It is beyond dispute that the Slovaks objectively constitute a unique cultural community.¹⁶⁰ The more difficult question in determining whether the Slovaks constitute a "people" to whom the remedy of secession should be available is whether, politically, their allegiance and historical and contemporary desire is to form an independent sovereign Slovak State.

1. The Objective Evidence

That the Slovaks now constitute a distinct nationality from the Czechs is not disputed, although the degree to which they are distinct is a matter of some controversy. Originally, "the two peoples were . . . so closely related as to be almost indistinguishable,"¹⁶¹ but from the 10th century, their national development diverged. Primarily, this can be attributed to two main reasons, one political and the other linguistic.

Czechs and Slovaks can trace common political integration back to the 9th century in the form of the Great Moravian Empire.¹⁶² The territory of the Empire corresponded loosely to that of modern Czechoslovakia, but lacked concrete territorial boundaries and internal organization.¹⁶³ While the Empire has been described as "short-lived" and "shadowy,"¹⁶⁴ in a spiritual sense, its memory remains particularly important, especially for the Slovaks since the capital of the Empire is generally believed to have been located at Nitra, in modern day western Slovakia.¹⁶⁵ In the early 10th century, however, the Empire was conquered by the Magyars who divided the Empire leaving the western Slavs unconquered to grow into the Czech nation,¹⁶⁶ and forcing the eastern Slavs to come under direct Magyar rule, "form[ing] an integral

¹⁵⁸ JOSEPH A. MIKUS, *SLOVAKIA: A POLITICAL HISTORY 1918-1950*, at xxiii (1963).

¹⁵⁹ *Id.* at xxiv.

¹⁶⁰ See *infra* notes 161-75 and accompanying text.

¹⁶¹ S. HARRISON THOMSON, *CZECHOSLOVAKIA IN EUROPEAN HISTORY* 241 (1953).

¹⁶² *Id.* at 10

¹⁶³ *Id.*

¹⁶⁴ SETON-WATSON, *supra* note 74, at 250.

¹⁶⁵ *Id.* Jozef Mikus notes the historical importance which Slovaks place upon the Great Moravian Empire: "Today, if the Slovaks still claim Great-Moravia, it is not for the mere luxury of evoking the memory of a brilliant past, rather it is to satisfy the same thirst for liberty which animated their ancestors." MIKUS, *supra* note 158, at xxvi.

¹⁶⁶ THOMSON, *supra* note 161, at 241.

part of the growing Magyar state."¹⁶⁷ This situation "drove a wedge that was to become permanent between the [Czechs and Slovaks], and also . . . ensured the relative isolation of Slovaks until quite recent times."¹⁶⁸ Consequently, Czechs and Slovaks were destined from the 10th century on to develop separately.¹⁶⁹

Linguistic differentiation came much later, in the 19th Century. After the French Revolution, the philosophy of nationalism swept throughout the Hungarian Empire, with the Magyars, the dominant political group in the Empire, emphasizing their racial superiority.¹⁷⁰ As a consequence of this national awakening, a Slovak Catholic priest, Anton Bernolak, published *Grammatica Slavica* in 1790, intending to replace written Czech, used throughout Slovakia, with a Slovak language based on dialects spoken in western Slovakia.¹⁷¹ Bernolak's Slovak, which more closely approximated Czech than the dialects spoken in central and eastern Slovakia, would not take root however, since it was unfamiliar to most Slovaks.¹⁷² In the 1830s, Slovak patriot Ludovit Stur introduced a new written Slovak language based on the dialect of central Slovakia, which became the basis for the modern Slovak language.¹⁷³ "Convinced that it was impossible to maintain Czech as the language of Slovak culture," Slovak nationalists believed choosing the central Slovak dialect "would strengthen the position of the Slovaks in their struggle against the Magyars."¹⁷⁴ This significant differentiation between the Czech and Slovak languages "sufficed to cement and perpetuate a difference which might conceivably have disappeared in the same period of time under more favorable circumstances."¹⁷⁵ Thus, while the nationalism of the 19th century may have served to unite Czechs and Slovaks

¹⁶⁷ *Id.*

¹⁶⁸ SETON-WATSON, *supra* note 74, at 251.

¹⁶⁹ See THOMSON, *supra* note 161, at 242.

The Magyar conquest made any . . . natural development impossible. The Slavs in the eastern part of what had once been Greater Moravia were not allowed to develop as an independent unit, but were incorporated into a state whose Magyar rulers were the conquerors of the previous Slav state. The Slovaks therefore had no opportunity to develop their own culture, written language, political institutions or social concepts in any independent way. Their relationship with the Czechs, their brothers to the west, had, for all practical purposes, ceased to be a reality for them.

Id. at 241-42.

¹⁷⁰ *Id.* at 257.

¹⁷¹ *Id.* at 258. For a more comprehensive analysis of the development of the Slovak language, see generally PETER BROCK, *THE SLOVAK NATIONAL AWAKENING* (1976).

¹⁷² See THOMSON, *supra* note 161, at 258.

¹⁷³ See *id.* at 263.

¹⁷⁴ See SETON-WATSON, *supra* note 74, at 261.

¹⁷⁵ THOMSON, *supra* note 161, at 264.

against their non-Slav rulers, the oppressive style of the Hungarians forced Slovaks to consider their own national preservation first, to the exclusion of Czecho-Slovak unity.

2. The Subjective Evidence

Slovak political demands for autonomy can be divided simply into five major efforts.¹⁷⁶ The Slovak national awakening beginning around 1848 was the first concerted expression of Slovak cultural awareness and desire for greater autonomy within the Hungarian Empire.¹⁷⁷ The second effort occurred in the context of World War I and Slovak political expectations for the Czecho-Slovak state.¹⁷⁸ Third, Slovak disappointment within the Czechoslovak First Republic led, in part, to independent Slovak statehood under Nazi Germany's tutelage.¹⁷⁹ The fourth effort came about during World War II, in contemplation of the restoration of the Czechoslovak state after the defeat of Nazi Germany.¹⁸⁰ Finally, de-Stalinization in the 1960s, led to Slovak demands for increased home rule, culminating in the constitutional federalization of the Czech and Slovak nations.¹⁸¹

Slovak nationalism and demands for political autonomy have historically met with alternating success and disappointment. Within Hungary, Slovak nationalism and aspirations for political autonomy floundered until the 18th century when the French Revolution served as a catalyst to reawaken interest in the national cultural life of communities throughout the Hungarian Empire.¹⁸² In the 1820s and 1830s Slovakia had a rich literary and intellectual culture.¹⁸³ A Catholic priest, Anton Bernolak, had codified the Slovak language which replaced Latin, the official language of Austria, and was used to disseminate nationalist ideas and strengthen their national unity.¹⁸⁴ The resurgence of cultural and national consciousness in Slovakia fueled new demands for political autonomy within the Hungarian empire, culminating in the first formal political program of the Slovaks in modern times, the Declaration of

¹⁷⁶ This historical analysis is not meant to be a comprehensive and exhaustive study of Slovak political aspirations, but rather to illustrate the type of historical examination which should be conducted.

¹⁷⁷ See *infra* notes 182-99 and accompanying text.

¹⁷⁸ See *infra* notes 200-217 and accompanying text.

¹⁷⁹ See *infra* notes 218-237 and accompanying text.

¹⁸⁰ See *infra* notes 238-246 and accompanying text.

¹⁸¹ See *infra* notes 247-276 and accompanying text.

¹⁸² THOMSON, *supra* note 161, at 257.

¹⁸³ See Mamatey, *supra* note 14, at 6.

¹⁸⁴ *Id.* at 6-7.

Liptovsky Svaty Mikulas of May 10, 1848.¹⁸⁵

The Declaration asserted that Slovak political policy would aim toward the establishment of a Slovak Republic within a federative Hapsburg monarchy, the equality of rights among nationalities, a national Diet formed by a National Council, the official recognition of Slovak as a language of administration, the opening of Slovak primary and secondary schools as well as a national university, the right to display its own national flag as a "symbol of the Slovak fatherland," a national guard as military expression of the national will, universal suffrage, liberty of the press, and the granting of legal title to peasants of the lands they possessed.¹⁸⁶ Thus, the Slovaks "proclaimed nothing less than the political independence of Slovakia and invited the whole nation to rise against the Budapest government" at a mass rally in September.¹⁸⁷ At the rally, Jozef Miloslav Hurban proclaimed:

On this solemn occasion we declare ourselves independent of the Magyars; we decline all obedience to the Magyar nation, to its government and ministries. And whosoever within the scope of our power shall continue in some union with them, we shall regard as an enemy of and traitor to our nation.¹⁸⁸

Receiving no concessions from the Hungarian government,¹⁸⁹ the Slovak attempted an ill-fated armed insurrection in order to forcefully assert the cultural "nation's" political demands for independence while consciously opposing the assimilation programs of the Magyars which aimed at destroying multiculturalism within the Empire and creating a pure Magyar national state.¹⁹⁰ It should be noted, however, that the emphasis was on creating a Slovak republic within the Empire rather than complete independence.¹⁹¹

A further, more disciplined, attempt to gain recognition for the Slovaks as an autonomous people was made in the Memorandum of the Slovak Nation of June 7, 1861.¹⁹² The memorandum stated

. . . [W]e do not do it as if we perhaps wished to gain recognition for the principle which today is stirring in the world and . . . taken up by our foremost and very ardent patriots [a reference to demands for sov-

¹⁸⁵ JOZEF LETTRICH, HISTORY OF MODERN SLOVAKIA 29 (1955).

¹⁸⁶ MIKUS, *supra* note 158, at xxviii.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (quoting DANIEL RAPANT, THE SLOVAK UPRISING 1848-1849, at 163 (1943)).

¹⁸⁹ See LETTRICH, *supra* note 185, at 29-32.

¹⁹⁰ MIKUS, *supra* note 158, at xxix.

¹⁹¹ LETTRICH, *supra* note 185, at 29-30.

¹⁹² MIKUS, *supra* note 158, at xxx.

oreign independence]

But we do it because form gives essence to things . . . [a]nd in this regard, it is our patriotic and also national duty to make this known to the legislative assembly of *our country*, to which we express a genuine trust.¹⁹³

Again, the Memorandum did not amount to a demand for independence from the Empire but rather autonomy within it. Still, the Slovak demands were met with continued Magyar compulsion to assimilate, particularly after the Austro-Hungarian Compromise of 1867 under which the Austro-Hungarian Emperor sacrificed the interests of the Hungarian minorities for the sake of coming to an agreement with the ruling classes.¹⁹⁴

In principle, the rights of minority groups within the Empire were to be regulated by the Law of the Equal Rights of Nationalities of 1868 which literally provided for a fair degree of cultural autonomy for non-Magyar nations.¹⁹⁵ In reality, the law was never enforced and the forced assimilation continued.¹⁹⁶ Slovak schools as well as the Slovak Institute of Sciences and Arts,¹⁹⁷ were closed and Magyar schools, with the power to teach only in the Magyar language took their place.¹⁹⁸ But in spite of the regression of national life which prevailed until World War I, the Slovaks "subsisted" within the empire as both a "sociological" and "political" force, united by language and traditions and animated by the constant aim toward political autonomy.¹⁹⁹ As noted above, however, their demand for "autonomy" could not be equated with a demand for independent statehood.

During World War I, the Hungarian government continued to silence Slovak nationalism and political discourse,²⁰⁰ but throughout the War, the exiled leaders in the struggle for Czecho-Slovak independence, the Czech "Maffia," worked toward establishing the political boundaries of a new independent Czecho-Slovak state.²⁰¹ Significantly, the Maffia

¹⁹³ *Id.* at 320-21 (emphasis added).

¹⁹⁴ Mamatey, *supra* note 14, at 7.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ The Academy, which had been founded 1863, was set up and approved by the Hungarian emperor to foster Slovak education, encourage literature and the arts, and improve the material welfare of the nation. LETTRICH, *supra* note 185, at 34.

¹⁹⁸ *Id.*

¹⁹⁹ MIKUS, *supra* note 158, at xxxiii.

²⁰⁰ THOMSON, *supra* note 161, at 293. "For the Slovaks, who were living under a harsher Magyar oppression, . . . a spirit of revolt . . . was an absolute impossibility, at least until much later in the war." *Id.*

²⁰¹ See generally *id.* at 276-325 (detailing the efforts of Czechs and Slovaks abroad to attain

was comprised exclusively of Czech members.²⁰² The inclusion of Slovaks in the creation of the future state came initially only in the form of participation by Slovak colonies living abroad.²⁰³ On October 30, 1918, the Slovaks announced their secession from Hungary in the Declaration of Slovak Nation²⁰⁴ which simultaneously affirmed that by virtue of the principle of self-determination, the Slovaks were uniting with the Czechs in a common state.²⁰⁵

This Declaration needs to be seen in light of prior agreements made concerning the future set-up of the Czecho-Slovak state. First, two American organizations, the Czech Union, the Slovak League, met in Cleveland, Ohio on October 30, 1915 and "proclaimed the inevitable necessity of a 'Union of the Czechs and Slovaks in a confederation of states with complete autonomy for Slovakia.'"²⁰⁶ The Cleveland Agreement emphasized that the new state would be a federative state with complete Slovak national autonomy for Slovakia.²⁰⁷ The Pittsburgh Agreement signed at Pittsburgh, Pennsylvania on June 30, 1918,²⁰⁸ approved the political union of the Czechs and Slovaks in an independent state and Slovakia was promised its own administration, parliament, and judiciary.²⁰⁹ Again, this agreement was negotiated and approved by representatives of American organizations, and "[t]he signatories were in no way representative of any native Czech or Slovak organizations."²¹⁰ The agreement was not a treaty, "but simply the proclamation of a program which the signatories were willing to support."²¹¹ Nevertheless, the agreement has been seized upon repeatedly as evidence of Slovakia's entitlement to autonomy in regional matters and as further evidence of Czech betrayal and subjugation.²¹² In fact, it was not until October 30,

independence).

²⁰² *Id.* at 293.

²⁰³ *Id.* at 294. By the end of 1915, the Maffia had restyled itself as the Czechoslovak National Council and was greatly strengthened by the inclusion of two prominent Slovaks, Milan Stefanik, then a French citizen who served with distinction in the French air force, and Stefan Osusky who had been living in America. *Id.* at 294-95.

²⁰⁴ Reprinted in LETTRICH, *supra* note 185, at 329.

²⁰⁵ *Id.* at 50-51.

²⁰⁶ THOMSON, *supra* note 161, at 290. At this time, the parties believed that federalization within the Empire was the best solution to the problem of autonomy. *Id.*

²⁰⁷ LETTERICH, *supra* note 185, at 52.

²⁰⁸ THOMSON, *supra* note 161, at 314. The Pittsburgh Agreement is also reprinted in LETTRICH, *supra* note 185, at 289.

²⁰⁹ THOMSON, *supra* note 161, at 314.

²¹⁰ *Id.* at 314-15.

²¹¹ *Id.* at 315.

²¹² See, e.g., the *Memorandum of the Slovaks to the Peace Conference of 1919*, in which Slovak National Assembly members argued that,

[n]ever has a nation been as cruelly deluded in its hopes as the Slovak na-

1918 that native Slovaks expressed their political will to join in a Czecho-Slovak union.²¹³

The initial recognition of Czechoslovakia suffered from the same lack of clarity as did the Wilsonian principle of self-determination. At the Paris Peace Conference, the difficulties and limitations of the principle became apparent in the inability to advance a specific definition of "peoples" and "nations" who were to be granted autonomy from the Austro-Hungarian Empire.²¹⁴ The aspirations for Czech and Slovak unity had been primarily driven by a common enemy in the Austro-Hungarian Empire and were based only tenuously on a historical notion of common cultural identity where each nation had developed independently, influenced by opposite poles of the Empire.²¹⁵ As a result, claims for recognition of a Czech and Slovak Union were justified by their common Slavic national connection,²¹⁶ and a pragmatic recognition that the new state must be placed in a geographic position to satisfy its economic requirements and maintain its physical integrity.²¹⁷ The Czecho-slovak First Republic lasted from 1918 to 1938 as a unitary state primarily administered by the more politically and economically advanced Czechs.²¹⁸

tion. In America, [as the Pittsburgh Agreement] shows, it had been agreed that a Czecho-Slovak State would be founded in which the Slovaks would have autonomy, Now this agreement was not put into practice because those who seized the political power no longer want to hear about Slovak autonomy. They are working to create not only a Czecho-Slovak State, but also a single Czecho-Slovak nation, which is an ethnographical monstrosity. In this way, instead of having the liberty promised us, we have become the victims of a new servitude.

Reprinted in MIKUS, *supra* note 158, at 331, 332. See also *id.* at 2-3. Mikus argues that "it was under the federative aspect that the idea of the Czecho-Slovak State was accredited with the great Allied Powers." *Id.* at 3. As evidence, he cites both the Cleveland and Pittsburgh agreements, the "federative aspirations" of 19th century Czech and Slovak nationalists under Austro-Hungarian rule, a declaration by two Slovak deputies in the Hungarian Parliament, and statements made by Benes at the Paris Peace Conference. *Id.* at 2-4. However, the concept of a federative state appears nowhere in the Treaty of Saint-Germain-en-Laye concluded by Czechoslovakia and the Allied and Associated Powers on September 10, 1919. *Id.* at 4-5.

²¹³ LEFF, *supra* note 29, at 40. See also Mamatey, *supra* note 14, at 22-23.

²¹⁴ Gebre Hiwet Tesfagiorgis, Note, *Self-determination: Its Evolution and Practice by the United Nations and Its Application to the Case of Eritrea*, 6 WISC. INT'L. L.J. 75, 82 (1987).

²¹⁵ See *infra* notes 320-29 and accompanying text.

²¹⁶ LEFF, *supra* note 29, at 35.

²¹⁷ See, e.g., MILLER, *supra* note 68, at 11. When considering the border between Germany and Czechoslovakia, the Czecho-Slovak Commission at the Paris Peace Conference noted that it had "attempted to do justice to ethnic claims but economic and strategic considerations had also to be given weight as a purely racial frontier would have left Czecho-Slovakia defenceless and economically crippled." *Id.*

²¹⁸ See LEFF, *supra* note 29, at 19. For a comprehensive political history of the First Czechoslovak Republic, see *id.* at 45-85.

The Czechoslovak First Republic, however, was a significant disappointment to Slovaks who had assumed that the constitution of the state would draw on the principles of federalism.²¹⁹ Both the immature character of practical political development in Slovakia²²⁰ and the inability to express and formulate their future demands during the course of the war meant a decided lack of representation in the new state.²²¹ Instead of the federative formula envisioned, Czechoslovakia became a unitary state in which the political experience of the Czechs dominated the country at the expense of the Slovaks.²²²

Slovak nationalists had relied upon union with the Czechs to protect and promote their cultural and political aims in a federal state with considerable national autonomy.²²³ Instead, and perhaps as a result of the aggressive assertion by the predominantly Czech delegation to the Paris Peace Conference that the two nations were substantially the same,²²⁴ they received a unitary state controlled by the Czechs with little concern for the promotion of national diversity between the two nations.²²⁵

As Slovak disillusionment grew, so also did the demands of the German minority trapped within Czechoslovakia at the conclusion of the

²¹⁹ See MIKUS, *supra* note 158, at 7. Kurt Glaser points out that Dr. Benes, the Czech ambassador to the Paris Peace Conference, had presented a memorandum "promising to make Czecho-Slovakia 'a kind of Switzerland' with substantial equality among national elements." KURT GLASER, *CZECHO-SLOVAKIA: A CRITICAL HISTORY* 28 (1961).

²²⁰ LEFF, *supra* note 29, at 32.

²²¹ Of the 270 members of the Revolutionary National Assembly, which appointed and controlled the body responsible for adopting the Czechoslovak Constitution of 1920, 54 represented Slovakia, 12 of whom were of Czech nationality. Proportionately, Slovakia should have had 70 representatives. GLASER, *supra* note 219, at 26.

²²² See Vaclav Benes, *Czechoslovak Democracy and Its Problems 1918-1920*, in Mamatey & Luza, *supra* note 14, at 39, 53-58. For a less charitable analysis, see GLASER, *supra* note 219, at 26-27. Glaser characterizes Czech domination in the First Republic as "systematic 'Czechification.'" *Id.* at 28.

²²³ See ROBERT W. DEAN, *NATIONALISM AND POLITICAL CHANGE IN EASTERN EUROPE: THE SLOVAK QUESTION AND THE CZECHOSLOVAK REFORM MOVEMENT* 5 (1972).

²²⁴ See Benes, *supra* note 222, at 55.

²²⁵ See DEAN, *supra* note 223, at 5.

Thanks to a number of unfortunate circumstances, some deliberately contrived, some unavoidable, . . . [t]he central government in Prague regarded the Pittsburgh pledges as desiderata to be accomplished gradually. This apparent lack of zeal and the dearth of trained Slovak personnel resulted in the administration of Slovakia falling largely into the hands of Czechs.

Id. See also GLASER, *supra* note 219, at 28-33. Glaser points out that in the 1923 Law for the Protection of the Republic, section 14(1) prohibited agitating publicly against the constitutional unitary structure of the state, while at the same time prohibiting incitement to hatred against individuals because of their nationality in section 14(3). *Id.* at 32.

war.²²⁶ The Munich Agreement of September 30, 1938 required Czechoslovakia to cede territory occupied by a significant German minority to Germany.²²⁷ In an opportunistic and subsequently successful attempt to capitalize on both Slovak disappointment and fear, Hitler promised the Slovaks independent statehood, protected by Germany.²²⁸ With the dissolution of the Czecho-Slovak state, the accommodating treatment it enjoyed in the interwar period dissipated and Germany was free to infringe upon the territory of the former state.²²⁹ Immediately after the Munich agreement, the weakened position of the government in Prague encouraged Slovak nationalists to renew their demands for Slovak autonomy.²³⁰ In June of 1938, the Slovak People's party demanded "recognition of the individuality of the Slovak people, exclusive use of the Slovak language in Slovakia, creation of an autonomous Slovak Diet, and the immediate transfer of executive power to the representatives of the [Slovak People's party]."²³¹ The government in Prague yielded to the demands²³² and ushered in the first Czecho-Slovak experience in federalism.

The Second Czechoslovak Republic was to be short-lived. In March of 1939, Hitler issued an ultimatum to Joseph Tiso, minister for the administration of Slovakia.²³³ If Slovakia desired independent statehood, Hitler would support and guarantee her independence.²³⁴ If Tiso

²²⁶ The Paris Peace Conference drew the boundaries of Czechoslovakia with full knowledge that the territory would encompass a German minority of 3,747,000 German inhabitants. J.W. Bruegel, *The Germans in Pre-war Czechoslovakia*, in Mamatey & Luza, *supra* note 14, at 167, 168. See also GLASER, *supra* note 219, at 34-41.

²²⁷ See SETON-WATSON, *supra* note 74, at 367-69.

²²⁸ See Hoensch, *supra* note 30, at 271. See generally *id.* for a comprehensive treatment of the Slovak Republic. The text of the Germano-Slovak Agreement of March 23, 1939 is reprinted in MIKUS, *supra* note 158, at 344-45, and asserted that the Slovak state had "placed itself under the protection of the German Reich" and agreed that "the German Armed Forces shall at all times have the right to set up military installations" in a number of regions and that the "Slovak government shall always conduct its foreign policy in close understanding with the German government." *Id.*

²²⁹ Seton-Watson writes:

What the Western Powers sanctioned at Munich was not the fulfillment of self-determination, but the surrender of a key position to the Pan-Germans. The frontier of Bohemia, one of the oldest in all Europe, and never altered even in the darkest days of national eclipse, ceased, at one stroke, to be defensible, and the whole Danubian area was at the mercy of Germany.

SETON-WATSON, *supra* note 74, at 370-71.

²³⁰ See Theodor Prochazka, *The Second Republic, 1938-1939*, in Mamatey & Luza, *supra* note 14, at 255, 260.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 260, 268.

²³⁴ See *id.* at 268.

did not agree to separation, Hitler would "abandon her to her fate."²³⁵ On March 14, 1939, the Slovak Diet unanimously declared Slovak independence.²³⁶ "Even as a German vassal state the Slovak Republic managed to preserve, perhaps even to extend, a precarious national identity But however unheroic the quisling Slovak republic may have been, this six-year period of pseudo-independence accounted for a considerable increase in the national consciousness."²³⁷

During the war, the Slovak resistance movement organized itself in the form of the Slovak National Council and declared itself "the only representative of the political will of the Slovak Nation at home."²³⁸ It expressed the desire that the future political organization of Czechoslovakia should be "a common state of the Czechs and Slovaks built upon the principle of national equality."²³⁹ Real negotiations on the future set-up of the Czechoslovak state did not occur until 1945 at a conference held in Moscow.²⁴⁰ At the conference, the Slovak contingent represented by the Slovak National Council asserted its demand for future Slovak autonomy in the form of a separate government, parliament, and army units.²⁴¹ The Czech contingent rejected this proposal, preferring to recognize the "special needs of the Slovaks" but insisting that the specific political arrangement should be left to elected representatives after the war.²⁴² When the Czechoslovak government in exile returned to Prague after the war, the Czech National Council, the voice of Czech resistance, was dissolved, while the Slovak National Council continued to function.²⁴³ The SNR then proposed that the new government be a "dualistic, symmetrical organization of Czechoslovakia into two federated states — Slovakia and Bohemia-Moravia — each with a government and Diet of its own"²⁴⁴ with a federal government and parliament in Prague.²⁴⁵ Despite these demands, federalism was rejected by the new government.²⁴⁶

The post-war debate on the configuration of the Czechoslovak state was soon overshadowed by the conflict between democratic and Com-

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ DEAN, *supra* note 223, at 5.

²³⁸ This declaration was contained in the Christmas Agreement of 1943. Anna Josko, *The Slovak Resistance Movement*, in Mamatey & Luza, *supra* note 14, at 362, 371.

²³⁹ *Id.* at 372.

²⁴⁰ *Id.* at 390.

²⁴¹ *Id.* at 391.

²⁴² *Id.* at 391-92.

²⁴³ *Id.* at 395.

²⁴⁴ *Id.* at 396.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

munist forces in Czechoslovakia.²⁴⁷ The rise of Communism in post-war Czechoslovakia was the result of highly complex political situation.²⁴⁸ For present purposes, it is sufficient to note that by February of 1948, the Communists "were left the sole masters of the republic — free to reorganize it according to their beliefs and concepts."²⁴⁹

Under Communist Party rule, Slovaks again experienced the suppression of their cultural and political aspirations.²⁵⁰ While the 1948 constitution provided for a Slovak National Council, a legislative body whose jurisdiction was limited to the fields of culture, education, public health, etc., the central government was at all times free to annul any action taken.²⁵¹ In the years 1950-1954, "subordination of the Slovaks took on . . . grotesque proportions . . . with the arrest and sentencing of the indigenous wartime and postwar leadership on charges of 'bourgeois nationalism.'"²⁵² This political inquisition made it impossible for Slovaks to pursue anything amounting to national interests.²⁵³ Finally, a constitutional change introduced in 1960 abolished the Slovak Board of Commissioners which had functioned as an executive equivalent of the Slovak National Council,²⁵⁴ severely limiting the ability of the Slovak

²⁴⁷ See generally Radomir Luza, *Czechoslovakia Between Democracy and Communism, 1945-1948*, in Mamatey & Luza, *supra* note 14, at 387, 395-415. After 1948, the Communist regime characterized Slovak nationalism as a by-product of economic injustice rather than cultural oppression or political inequality.

National difficulties and rivalries were seen as the inevitable but artificial constructs of the previous capitalist system; artificial because they were sustained solely by the severe economic imbalance which existed between the two nations. Extraordinary ideological importance was attached to the notion that the only obstacle to the acceptance of class, as opposed to national loyalties — and thus the virtual disappearance of national tensions — was the striking social and economic imbalance. A vigorous policy of national industrialization in Slovakia would therefore eliminate national antipathies.

DEAN, *supra* note 223, at 21.

²⁴⁸ See generally Luza, *supra* note 247, at 395-415. See also LEFF, *supra* note 29, at 212-28.

²⁴⁹ Luza, *supra* note 247, at 415.

²⁵⁰ See DEAN, *supra* note 223, at 6-7.

In the May 1948 constitution promulgated by the [Communist] regime Slovak autonomy was recognized in principle, but in fact ultimate authority was retained by the center. Prague kept the prerogative of convening or dissolving the Slovak Parliament (SNC), as well as the ultimate competence to rule on the validity of laws passed by that body.

Id. at 6. See also GLASER, *supra* note 219, at 157-58 (describing the constitution's provision of autonomy as "bogus self-government for Slovakia").

²⁵¹ GLASER, *supra* note 219, at 158.

²⁵² DEAN, *supra* note 223, at 6.

²⁵³ See *id.* at 15.

²⁵⁴ See *id.* at 15 & n. 19.

representatives to influence policy affecting the Slovak nation.²⁵⁵

The final effort of Slovak nationalists to achieve some real measure of autonomy under the Communist regime occurred in the late 1960s. The de-Stalinization process which began in the late 1950s,²⁵⁶ was not felt in Czechoslovakia until the middle of the 1960s.²⁵⁷ Khrushchev's rejection of a monolithic form of Communism meant the rehabilitation of the Slovak "bourgeois nationalists" and permitted a "re-evaluation of the national past that would serve as the intellectual impetus for an invigorated policy of Slovak autonomy."²⁵⁸ A symposium sponsored by the Institute of History of the Slovak Communist Party set forth the position that the solution to the Slovak national question lay in "recognition of the right of Slovakia to self-determination as a nation in the concrete form of autonomy or federation, not merely in a declarative manner or for appearances' sake."²⁵⁹ Further, both Czech and Slovak representatives of the Communist party argued that the "achievement of Slovak self-determination had been prevented by the 'foremost representatives of the Slovak Communist Party during the "personality cult"'"²⁶⁰ By 1967, both Slovak Communists and intellectuals were pushing aggressively for political reform through federation.²⁶¹ Meanwhile, in the Czech lands, the reform movement centered on the need for democratization of the political system.²⁶² Thus, the Czechoslovak reform movement took on a lopsided dualism. On the one hand, the Communist Party of Czechoslovakia, which ruled the central government, pressed for reform by means of greater political pluralism and personal liberties, while the Slovak Communist party, which was subordinated to the central party and had no direct Czech national counterpart, argued that democratization could not take place until national equality between Czechs and Slovaks had been achieved.²⁶³

²⁵⁵ *Id.* at 15.

²⁵⁶ See, e.g., JOSEF KORBEL, TWENTIETH-CENTURY CZECHOSLOVAKIA: THE MEANINGS OF ITS HISTORY 272 (1977).

²⁵⁷ DEAN, *supra* note 223, at 7.

²⁵⁸ *Id.* at 8.

²⁵⁹ *Id.* at 9.

²⁶⁰ *Id.* at 10.

²⁶¹ See *id.* at 28-33. For example, the Slovak Communist party wrote in a Pravda editorial: "We believe that only in a symmetric model can the equal relationship of two nations work satisfactorily on the basis of the socialist solution to the nationalities problem." *Id.* at 30. At the same time, Slovak poet Vojtech Mihalik wrote of his vision of political reform: "Of course I have federation in mind, but federation carried out to the nth degree." *Id.* at 31.

²⁶² *Id.* at 28.

²⁶³ *Id.* Robert Dean writes:

High priority was accorded to achieving a symmetrical, binational federation through constitutional reform, at the expense, according to some, of democra-

Finally, in April of 1968, the Central Committee of the Czechoslovak Communist Party issued its Action Program which declared that Czechoslovakia would, among other things, follow its own road to socialism, would end income equalization, would introduce market mechanisms, and end the concentration of power held by the Party.²⁶⁴ More importantly for Slovaks, the Program asserted that a new constitution would be based on the principle of federation and would preclude the "possibility of outvoting the Slovak nation in legal issues concerning relations between Czechs and Slovaks and the constitutional status of Slovakia."²⁶⁵

Throughout the reform movement, the activities in Czechoslovakia were monitored closely by the Soviets.²⁶⁶ On July 15, 1968, Communist party representatives of five Warsaw Pact countries sent a letter to the Czechoslovak Central Committee expressing "'profound anxiety' over the 'reactionaries' offensive, supported by imperialism against the Party . . . endangering 'the interests of the entire socialist system.'"²⁶⁷ It further stated that they could not permit "'hostile forces' to create the 'threat that Czechoslovakia may break away from the socialist commonwealth.'"²⁶⁸ Finally, the letter warned, "This is no longer your own internal affair."²⁶⁹ But the Czechoslovak leaders refused to heed the Soviets warning, and on August 20, 1968, Warsaw Pact forces invaded Czechoslovakia, putting a violent end to reform.²⁷⁰

In suppressing the effort to liberalize and decentralize the Communist government, however, the Soviets conceded to the reorganization of Czechoslovakia as a federal state in which Slovakia and the Czech lands would be co-equal socialist republics.²⁷¹ "Permission to proceed with federalization was a politically safe way to gratify a significant minority of the population by salvaging a long-term Slovak objective."²⁷² But

tization as it was implemented in the Czech Lands. In Slovakia, reform was cast above all in terms of national rather than personal emancipation. "The rights of citizens and those of nations," one Slovak writer stressed, "are two different things which can neither be confused with each other nor substituted for each other."

Id. at 28.

²⁶⁴ KORBEL, *supra* note 256, at 288-89.

²⁶⁵ *Id.* at 289.

²⁶⁶ For the response of the Soviet Union and the Warsaw Pact, see generally *id.* at 301-5.

²⁶⁷ *Id.* at 303.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 305.

²⁷¹ See LEFF, *supra* note 29, at 243. "Federalization is the sole major institutional legacy of the Prague Spring." *Id.* See also DEAN, *supra* note 223, at 38.

²⁷² LEFF, *supra* note 29, at 243.

federalization suffered from two major weaknesses. First, "the parity principle of equal Slovak representation was at its strongest in just those institutions that tend to be weakest in traditional Communist systems: the constitutional court and the national legislature."²⁷³ Secondly, the initial objective of having both a Czech Communist Party and a Slovak Communist Party, either of which might have on limited occasion, vetoed a decision of the central Czechoslovak Communist Party, was abandoned.²⁷⁴ Instead, the Party was not federalized, "on the contrary, it is unified, and . . . responsible for the work of Communists at all levels, federal as well as national."²⁷⁵ The centralization of the Communist Party effectively meant the re-establishment of a unitary state.²⁷⁶

Finally, in the context of Slovakia's actual secession from the CSFR, it must be noted that no referendum was held in either Republic.²⁷⁷ After elections were held in 1992, 2.5 million Czechoslovaks submitted a petition demanding that a referendum be held on the dissolution of the state,²⁷⁸ but it was "brushed aside" by the leaders of the Czech and Slovak Republics and the separation occurred despite the fact that public opinion polls continued to show that a majority of Czechoslovaks favored continued unity.²⁷⁹ This is perhaps the most problematic feature of Slovak secession: in neither Republic were the people directly consulted on the future of the Czechoslovak union.²⁸⁰

Throughout the historical periods discussed above, Slovaks, whether by fate or design, were unable to enjoy full participation as a nation politically, economically, and socially equal to the Czechs. It seems clear that the thrust of Slovak desire for reform demanded a truly federative arrangement rather than complete independence. After the elections

²⁷³ *Id.* at 245.

²⁷⁴ *Id.* at 245-46.

²⁷⁵ *Id.* at 246 (quoting Gustav Husak who had been elevated to head of the Czechoslovak Communist party after the Soviet invasion).

²⁷⁶ See DEAN, *supra* note 223, at 50. For more comprehensive treatment of the evolution of federalism after the 1968 invasion, see *id.* at 38-49; LEFF, *supra* note 29, at 243-49.

²⁷⁷ Stephen Engelberg, *Czechoslovakia Breaks in Two to Wide Regret*, N.Y. TIMES, Jan. 1, 1993, at A1, A7.

²⁷⁸ *Id.* at A7.

²⁷⁹ *Id.*

²⁸⁰ In the 1992 elections, Vladimir Meciar's party campaigned on a platform of Slovak autonomy, even to the extreme of secession. See William E. Schmidt, *Czechs Right, Slovaks Left: Nationwide Elections Yield No Natural Alloy*, N.Y. TIMES, June 8, 1992, at A7. His party won one-third of the votes in the Slovak Republic. *Id.* Similarly, Vaclav Klaus' party, a proponent of radical economic reform hardly solicitous of the Slovaks, won in the Czech Republic. *Id.* With such divergent aims, it is not surprising that agreement could not be reached on the competencies of the federal government. Nevertheless, their election could not be seen as a mandate for secession in a directly democratic sense, i.e. in the form of a popular referendum.

of 1992, agreement between the leaders of the Czech and Slovak National Parliaments became impossible,²⁸¹ and separation the inevitable result of irreconcilable differences fueled by historical lessons rather than future confidence in a democratic federation.

B. Government

In order for a political entity to be defined as a state, "there must be some authority exercising governmental functions and able to represent the entity in international relations."²⁸² In Slovakia, the Slovak National Council, created in 1944 to combat the fascist regime which ruled the independent Slovak state, had functioned continuously since February, 1945.²⁸³ After the war, "[b]y the time the government was established in Prague in May, the SNR was well entrenched and carried on as a quasi-government."²⁸⁴ After 1948, the Council was effectively replaced by the Communist Party of Slovakia, which had no corresponding Czech party.²⁸⁵ The Czechoslovak Communist Party, responsible for the central government and to which the Slovak Communists were subordinate, however, enforced "*de facto* political unification" of the parties denying any real independent exercise of decision-making in matters of national interest.²⁸⁶ The Slovak National Council still existed, however, and in 1956 was constitutionally recognized as the "national organ of state power in Slovakia."²⁸⁷ Nevertheless, the Council and its Commissioners, the executive body of the Council, remained wholly accountable to the central government.²⁸⁸ Constitutional federalization after 1968, created nominal symmetry with the introduction of Czech national bodies identical to the Slovak.²⁸⁹ As noted above, however,

²⁸¹ See *supra* note 25, and accompanying text.

²⁸² RESTATEMENT, *supra* note 146, § 201 cmt. d.

²⁸³ Luza, *supra* note 247, at 387, 395. The Slovak National Council was actually formed in 1918, just prior to its issuance of the Martin Declaration which first endorsed the principle of Czechoslovak unity. Mamatey, *supra* note 14, at 26. It was quickly disbanded by the Hungarian authorities, however, and after the war, was abolished by the minister for the administration of Slovakia, himself a former member, who regarded the Council's activities "as some sort of aberration" which "drew a veil of official secrecy over its activities." Benes, *supra* note 222, at 136 n.102.

²⁸⁴ Benes, *supra* note 222 at n.22.

²⁸⁵ DEAN, *supra* note 223, at 3.

²⁸⁶ See *id.*

²⁸⁷ *Id.* at 7.

²⁸⁸ *Id.*

²⁸⁹ LEFF, *supra* note 29, at 123. The Czechoslovak Communist Party acknowledged this detrimental imbalance in its May Action Program of 1968 saying that the asymmetrical arrangement was unsuited by its very character to express the relations between two independent nations. The difference was mainly in the

the Communist regime was careful not to relinquish any real amount of control.²⁹⁰ This federal structure was retained up till and after the 1989 revolution. And after the elections of 1990 and 1992, it was the inability of the national governments to come to an agreement as to the competencies of the national governments versus the federal government which eventually led to Czecho-Slovakia's breakup.²⁹¹ Nevertheless, throughout the years of political oppression, a clearly organized entity capable of representing the Slovak people had existed continuously since 1945, fulfilling the secessionist nation's need for a government.

C. Territory

International law does not require that an entity wishing to become a state be finally settled or totally undisputed.²⁹² More importantly, for present purposes, "[a]n entity does not necessarily cease to be a state even if all of its territory has been occupied by a foreign power or if it has otherwise lost control of its territory temporarily."²⁹³ Lea Brilmayer argues that in order for the territorial element of a secessionist's demand to met, the group must show that the land to which they have a historical claim properly belongs to them and only came under the dominion of the existing state by way of some unjustified historic event.²⁹⁴ "Two types of arguments can be used to demonstrate that current state boundaries are illegitimate and that secessionists have a superior claim to the land they seek."²⁹⁵ First, the land may have been "acquired through conquest by the state from which the ethnic group wishes to secede."²⁹⁶ Second, "[a]t some previous point in history, a state with no

fact that the Czech national bodies were identical with the central ones, which, having jurisdiction over all the state, were superior to the Slovak national bodies.

Id.

²⁹⁰ See *supra* notes 271-76 and accompanying text.

²⁹¹ See WHEATON & KAVAN, *supra* note 21, at 165-69 (federalism after the 1990 elections).

²⁹² RESTATEMENT, *supra* note 146, § 201 cmt. b.

²⁹³ *Id.*

²⁹⁴ Brilmayer, *supra* note 40, at 189.

A territorial base is fundamental prerequisite to a community, in that a community, . . . emerges only when a group occupies a certain landmass. Stability in territorial boundaries, therefore, is an indispensable component for the security of the group. A territorial boundary not only physically demarcates the territorial limit of the community, but also increases group cohesion by psychologically sharpening the different identification of community members from others across the boundary.

Id.

²⁹⁵ Brilmayer, *supra* note 40, at 190.

²⁹⁶ *Id.*

current stake in the dispute improperly joined the territories of the currently dominant state and the separatist group.²⁹⁷ In order to justify the extreme remedy of secession however, a third criteria must be met. The claimant group must be able to refute a defense of "adverse possession" by the dominant unified state.²⁹⁸ The separatist group must show first that their historical claim over the territory has not been waived by the passage of time:

The further in the past the historical wrong occurred, the more likely that it is better now to let things remain as they are. At one extreme, if an illegitimate annexation occurred only a few months earlier, the proper remedy would be to return the territory to its rightful inhabitants.²⁹⁹

In other words, the separatist group must show that they have kept their claim alive.³⁰⁰ "In such cases, there has been no adverse possession because the minority group has never acquiesced in the loss of its territory. Expectations cannot become settled around new state boundaries when there are constant reminders of the historical illegitimacy of the annexation."³⁰¹ Finally, separatists must show that the claim to territory has not expired by the voluntary allegiance of a separatist groups members oriented toward the unified state rather than toward the smaller nation.³⁰² A valid claim to secede, therefore, must show that the territorial integrity of the existing state is invalid and would not be upset by the separatist group's secession.

Undoubtedly, the Slovaks can assert a valid historical claim to the territory in which they now reside. After the original configuration of its borders following World War I, the territory of Slovakia has been settled since 1945. The dispositive factor in the case of the Slovaks is whether they have waived the right to the independent governance of the territory historical evidence of consent and allegiance to the unified state. As discussed above in the context of consent to the political arrangement between the Czechs and Slovaks, the matter can not be

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 199.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 200.

³⁰¹ *Id.*

³⁰² Professor Brilmayer's states this requirement as the "extent to which the territory has now been settled by members of the dominant group." *Id.* However, the controversial nature of this element, must be noted in that it may serve as an incentive to the dominant group to engage in a large scale migration of its members into the territory of the separatist group in order to defeat their claim. Because this involves action over which the separatist nation most probably has little control, the author would diverge from Professor Brilmayer's otherwise helpful analysis.

definitively answered.³⁰³ If the Slovaks view themselves as Slovaks in the cultural sense, but perceive themselves politically as Czechoslovaks, the unified state may be able to show a waiver of the Slovak claim to territory in which case the right to secede would not attach. If, however, the Slovaks perceive themselves as Slovaks in both the political and cultural sense, the historical claim to the territory and independent governance of that territory would prevail and permit them to secede from the state. In this regard, a modern plebiscite, might have been held to determine the degree to which the Slovaks desire autonomy from the Czechs and whether that desire amounted to a popular demand for an independent state.³⁰⁴

D. Capacity

To be recognized by the international community as an independent state, a political entity must be capable of engaging in formal relations with other states.³⁰⁵ The Restatement of United States Foreign Relations explains: "[a]n entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so."³⁰⁶ This requirement is especially problematic in the context of secession, since rarely will a unified, or even federal state, be governed by a constitution which permits a subpart to engage in formal international relations with other states.³⁰⁷ However, the Restatement

³⁰³ See *supra* note 281 and accompanying text.

³⁰⁴ See *supra* note 280 and accompanying text.

³⁰⁵ RESTATEMENT, *supra* note 146, § 201.

³⁰⁶ *Id.* cmt. e.

³⁰⁷ Lawrence M. Frankel, *International Law of Secession: New Rules for a New Era*, 14 HOUS. J. INT'L L. 521, 529 (1992).

In some states (especially federal ones), a local region may have considerable autonomy, and the local legislature may have substantial control over local affairs. However, as long as the central government retains control over some important matters (such as foreign affairs or the right to nullify repugnant local legislation), the autonomous region is not truly independent.

Id. (citing JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1979)). Cass Sunstein points out that article 72 of the Soviet Constitution guaranteed the right of each Union Republic to secede. Cass R. Sunstein, *Constitutionalism and Secession*, 56 U. CHI. L.R. 633, 633, n.1 (1991). The United States Constitution, however, does not support such a right whether explicit or implicit. *Id.* See also RESTATEMENT, *supra* note 146, § 201, cmt. g.

A State of the United States is not a state under international law since under the Constitution of the United States foreign relations are the exclusive responsibility of the Federal Government. A state may not make treaties (Article I, section 10) or otherwise engage in or intrude upon foreign relations to any substantial extent.

Id.

goes on to say that "[s]tates do not cease to be states because they have agreed not to engage in certain international activities or have delegated authority to do so to a 'supranational' entity."³⁰⁸ Here again, the element of consent is critical. The Restatement notes that statehood is not denied by explicit consent to the delegation of authority normally within the competence of the state alone.³⁰⁹ However, a related argument can be made that statehood cannot be denied due to the lack of consent to enter into a constitutional arrangement which denies the existence of a political entity as an independent state.³¹⁰ As discussed above, in connection with the subjective political desire of the Slovak people to become and remain a part of the Czecho-Slovak state, an argument can be made that the Slovak nation had not validly consented to be subsumed within that state.

A legitimate claim to secede must demonstrate that the group's existence within the unified state denies them the degree of autonomy to which they are entitled. Commentators have argued that in order for a group to assert a valid claim to secede, a requisite amount of oppression by the dominant³¹¹ group must be shown. Oppression, however, in the context of a proto-state's right must be distinguished from a human rights definition of oppression.³¹² Because secession is an extreme remedial measure to vindicate the "nations" right to self-governance,³¹³ the requisite element of oppression must be directed toward the nation collectively in an attempt to suppress or deny it the degree of autonomy to which they are entitled within confines of the unified state.

In addition to the unified state's historic refusal to recognize the separatist claims for autonomy, the principle of *pacta sunt servanda* which emphasizes the social contract theory of political integration,³¹⁴ suggests that the proto-state must show that it has neither consented to the jurisdiction of the unified state nor implicitly acquiesced to its jurisdiction.³¹⁵ Levin writes,

³⁰⁸ *Id.*

³⁰⁹ RESTATEMENT, *supra* note 146, § 201 cmt. e.

³¹⁰ *Valid* acceptance of a federal constitution would, of course, constitute a waiver of the right to secede from the state. *See Texas v. White*, 74 U.S. 700, 726 (1869) (denying the right of Texas to secede from the United States).

³¹¹ The word "dominant" is used to stress the fact that the separatist group may not constitute a numerical minority. Rather the relevant issue is the degree of control over and oppression of the claimant group by the dominant group which is not always conditioned upon the numerical superiority of the dominant group. BUCHHEIT, *supra* note 60, at 82.

³¹² Oppression in the human rights context is directed primarily toward the individual and international law may provide an individual remedy for these abuses in the form of human rights conventions or the convention on genocide.

³¹³ *See supra* notes 139-41 and accompanying text.

³¹⁴ BUCHHEIT, *supra* note 60, at 21.

³¹⁵ *Id.* It should be noted, however, that this would not apply to the decolonization process

When a nation exercises its right to self-determination, forming an independent state, voluntarily remains in a multinational state or joins another multinational state, its right to the free determination of its further internal political, economic, social and cultural status passes to the sphere of state law of the state to which the nation now belongs.³¹⁶

The impact of this principle on self-determination is that when groups come together to form a social construct, they consent to be governed by the unified entity in exchange for the benefits obtained through a larger association.³¹⁷ Moreover,

[u]p to a certain point, this seems an unexceptionable proposition. No one would seriously suggest that self-determination demands that a group be whimsically free to disown a political act like joining an association or electing a government, within hours or days of its undertaking. To suggest however that a group has only one chance to exercise a self-determining right, and that once having done so it is forever wedded to its choice, is equally unrealistic.³¹⁸

Thus a conclusory statement that a "nation" which is subsumed within a sovereign state has consented to forever maintain that relationship is not dispositive.

In determining whether a valid claim exists, a claimant group may show that consent was illegally or coercively obtained, or that the circumstance attending the original consent have materially changed.³¹⁹ The separatist "nation" must show that the internal autonomy which the separatist group obtains by remaining a part of the unified state has not been validly consented to, or that the arrangement to which the group originally acceded has not been fulfilled.

In order to demonstrate a valid right to secede, the Slovak nation must show that their consent to be incorporated with the Czechs nation in a unified political state has been invalidly obtained. Politically, the creation of the Czechoslovak state differed considerably from the experience of Western European states which grew to nationhood as a result of 19th century nationalism.³²⁰ Prior to World War I, both Czechs and Slovaks, Slavic neighbors isolated from one another, were firmly under

where no consent is granted to colonial domination.

³¹⁶ D.B. Levin, *The Principle of Self-Determination of Nations in International Law*, 1962 SOVIET Y.B. INT'L L. 45, 46 (1962).

³¹⁷ *Id.*

³¹⁸ BUCHHEIT, *supra* note 60, at 21.

³¹⁹ *Id.* at 22.

³²⁰ LEFF, *supra* note 29, at 11.

the control of the non-Slavic Austro-Hungarian Empire.³²¹ The Czech lands, consisting of Bohemia and Moravia, fell under the aegis of the Austrian half of the dual monarchy.³²² Slovakia, by contrast, was ceded from territory within the control of the Hungarian crown.³²³ As a result, both nations, upon unification, had attained different levels of economic and political development, the Czechs having been linked to Vienna while the Slovaks were linked to Budapest.³²⁴

In the pre-War socio-political sphere, the Czech experience, fashioned by ties to Austria, can be characterized as one of co-optation and cooperation.³²⁵ The Czech lands were home to almost seventy-five percent of Austrian industry.³²⁶ Czechs were typically highly educated and politically involved in the Austrian Parliament, Czech males enjoying universal suffrage.³²⁷

The experience of the Slovaks by contrast was one of Magyarization.³²⁸ Their Hungarian rulers emphasized a policy of forced assimilation, infiltration by classes of non-Slav professionals and administrators, and a concerted lack of political access.³²⁹

The participation of the Czech coalition within the Austrian parliamentary system prior to World War I gave the Czechs a significant advantage in the creation and administration of the First Republic in the new Czechoslovak state carved out of the Austrian Empire at the end of

³²¹ *Id.*

³²² *Id.* The Dual Monarchy of Austria-Hungary was established by the Compromise of 1867 whereby the Kingdom of Hungary and the Austrian Empire resolved to be united by a common ruler with shared foreign policy and, to a more limited extent, finances. CZECHOSLOVAKIA: A COUNTRY STUDY 25 (Ihor Gawdiak ed., 1987).

³²³ LEFF, *supra* note 29, at 11.

³²⁴ *Id.* The developmental separation between opposite poles of the Empire further serves to explain the inability of 19th century nationalism to penetrate the Czech and Slovak lands. Both the Czechs and Slovaks were Slavic brethren surrounded by German and Magyar non-Slavic peoples. By isolating them from one another, the Empire quite possibly saved itself the trouble of serious Czech and Slovak demands for autonomy. *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 12.

³²⁷ *Id.* at 25.

³²⁸ "Magyar" denotes the non-Slav ethnic group that governed Hungary, a territorial term without ethnic connotation, despite the continued use of the term "Hungary" after the Trianon Treaty of 1918 reduced historical Hungary to the ethnic Magyar state. Prior to 1918, "Hungary" included, besides Magyars, the Slovaks, Carpathian Ruthenians, Serbs, Croats, Roumanians, and Germans. MIKUS, *supra* note 158, at xxxi n. 10.

³²⁹ "Magyarization operated as a centrifugal force generating 'national deconcentration,' the creation of a 'mass of individuals, differentiated by class, without group consciousness of a feeling of national belonging.'" *Id.* at 19 (quoting from Jan Sveton, *Od Mad'arizacii Bratislavy, SLOVENSKA BRATISLAVA* 1, 275 (1948)).

hostilities.³³⁰

In addition to the capacity to enter into formal relations with other states, a further requirement must be respect for the human rights of minorities which may be trapped in the territory of the seceding state.³³¹ In applying this element with reference to the arguments against secession,³³² this requirement would insure that trapped minorities within a seceding state would be protected by the new state's adherence to international law regarding human rights.

While the international community is morally obliged to monitor member states' conduct with respect to human rights in general, an extra degree of vigilance should be exercised in reference to seceding states. As a matter of simple mathematics, a minority within a state prior to the secession of any subpart will constitute a relatively smaller percentage of the total population and represent less of a threat to the unified state. After secession of a subpart, a minority concentrated within the seceding state will be larger relative to the population and may be perceived as a political or cultural threat to the majority and thus may be subject to some degree of oppression.³³³ The Hungarian minority concentrated in Slovakia is just such an example. Within the CSFR, they constituted a relatively small minority, while in the independent Slovakia their numbers are proportionately much larger.³³⁴ The situation is particularly sensitive due to Hungary's historical exercise of oppression over the Slovak people.

The Slovak constitution guarantees the right of all persons to "freely decide which national group he or she is a member of"³³⁵ and prohibits "[a]ll manner of influence or coercion that may affect or lead to a denial of a person's original nationality."³³⁶ Specifically, the rights of national minorities and ethnic groups are protected in chapter four of the Constitution³³⁷ which guarantees "their full development, particularly the rights to promote their cultural heritage . . . receive and dissemi-

³³⁰ *Id.* at 25.

³³¹ "The willingness of the secessionist leaders and population to comply with international obligations, human rights law, and the principles of the U.N. Charter should also be considered." Frankel, *supra* note 307, at 551. For purposes of U.N. membership, this amounts to requiring that the seceding state accept the obligations of the U.N. Charter. Van der Vyer, *supra* note 138, at 26.

³³² See, e.g., Francine Keifer, *Hungarian Minority Wary in Independent Slovakia*, CHRISTIAN SCI. MONITOR, Dec. 31, 1992, at 6 [hereinafter *Hungarian Minority Wary*].

³³³ *Id.*

³³⁴ Ethnic Hungarians in Slovakia number about 600,000 or eleven percent of the population. *Id.*

³³⁵ CONSTITUTION OF THE SLOVAK REPUBLIC, art. 12(3) (1992).

³³⁶ *Id.*

³³⁷ *Id.* arts. 33 & 34.

nate information in their mother tongues, form associations, and create and maintain educational and cultural institutions."³³⁸ While the Slovak language is the official language of the Republic,³³⁹ minorities are guaranteed the right to be educated in their own language,³⁴⁰ the right to use a minority language in official communications,³⁴¹ and the right to participate in decision-making in matters affecting them.³⁴² However, a vague provision insists that "[t]he exercise of rights by citizens of a national minority guaranteed by this Constitution may not threaten the sovereignty and territorial integrity of the Slovak Republic or discriminate against other citizens."³⁴³ Thus, while minority rights are literally protected, it remains to be seen exactly how the provisions of the Constitution will be interpreted and executed by the Constitutional Court.³⁴⁴ And despite these protections, ethnic Hungarians do feel some insecurity in the new Slovak Republic.³⁴⁵

IV. CONCLUSION

Self-determination in international law has become a complex and internally inconsistent principle. Currently, it has been applied as a recognized right only in the context of decolonization and amounts merely to the guarantee that the people within a pre-existing territorial state should have the right of self-governance without alien interference or domination. This is an unsatisfactory resolution so long as nationalism and demands for secession remain powerful forces in the world,³⁴⁶ and the bare assertion that secession is not recognized by the international community will do little to curb either reasoned or irrational nationalist demands.

³³⁸ *Id.* art. 34.

³³⁹ *Id.* art. 6(1).

³⁴⁰ *Id.* art. 34(2)(a).

³⁴¹ *Id.* art. 34(2)(b).

³⁴² *Id.* art. 34(2)(c).

³⁴³ *Id.* art. 34(3).

³⁴⁴ Constitutional provisions for the Constitutional Court are set forth in *id.* arts. 124-40.

³⁴⁵ See *Hungarian Minority Wary*, *supra* note 332; Linnet Myers, *Ethnic Hungarians Growing Leery of Slovakian Nationalism*, CHI. TRIB., Oct. 4, 1992, at C16. Slovaks in turn are defensive about Hungarian claims of human rights infractions. See *Ambassadors From EC Countries Interested in Ethnic Minorities*, CTK NEWS WIRE, Sept. 2, 1992, available in LEXIS, Nexis Library, CTK File (Slovak Parliament Chairman, Ivan Gasparovic, stating that the EC ambassadors had express doubt about the democratic character of the Slovak Constitution due to the Hungarian lobby in EC bodies "which creates an unfavorable image of Slovakia in the world as far as [its] approach to ethnic minorities is concerned").

³⁴⁶ "The desire for independent self-government may seemingly thrive in the face of irrefutable evidence that the political, economic, and military well-being of the group would be better served by a continuing association with a larger political entity." BUCHHEIT, *supra* note 60, at 8.

Instead, by bringing the principle of national self-determination within the jurisdiction of the international legal community, it is hoped, on the one hand, that the potential for recognition of secessionist demands will encourage multi-cultural states to pre-emptively rectify any abuses of the ethnic minorities, whether they amount to a nation or not. On the other hand, potential recognition of their right to secede may encourage separatist groups to go to the international legal community before resorting to armed conflict with the unified government. It must also be noted that the willingness of minorities, not legally entitled under this framework to assert the right to secede, to voluntarily remain within the existing state depends in large part on the effectiveness of the international enforcement of human rights.

Under the framework developed, the Slovaks absent federal consent, might have demonstrated a legitimate claim for secession by showing that the federative structure in place prior to their successful divorce from the CSFR could not rectify the historic denial of their claims for autonomy. This would have been unlikely since Slovak demands for autonomy have historically been based on the federative model. The Slovaks could, however, convincingly have argued that an accurate reflection of the political will of the Slovak people has been impossible during Czechoslovakia's forty years of Communist domination. In which case, a plebiscite should have been conducted prior to the 1992 elections asking Slovaks specifically what form of political association they desired with the Czechs, if any. Had the desire for full independence been evidenced at that time, all efforts could have been made to accommodate that right in a State Treaty between the Czech and Slovak Republics recognizing a perpetual right to secede yet maintaining a union of the two nations. Although in some cases this might prove a poor solution in terms of predictable security, in the Slovak case it would seem that had their historical demands for federation been achieved, absent Communist domination, apprehensions concerning Czech domination would likely have dissipated in the wake of the political and economic advantages of continued union.

*Holly A. Osterland**

*J.D. Candidate, Case Western Reserve University School of Law (1993).