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SECEDING IN THE TWENTY-FIRST CENTURY: A PARADIGM FOR THE AGES

*Robert Trisotto**

“Any people anywhere, being inclined and having the power, have the right to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable—a most sacred right—a right, which we hope and believe, is to liberate the world.”¹

INTRODUCTION

On August 30, 1999, the people of East Timor prepared for a referendum on the country’s constitutional status in a fight for self-determination against a background of genocide, injustice, and betrayal.² “[N]o place on earth was [as] defiled and abused by murderous forces, in collaboration with the ‘international community,’ as East Timor,” wrote one commentator.³ “We are dying as a people,” wrote the head of the Catholic Church in East Timor in a letter to the United Nations’ Secretary-General.⁴ At least one-third of East Timor’s population have died under the Indonesian occupation.⁵ Yet, in what has been described as “a showing of courage and determination, the people of East Timor turned

* New York Law School J.D. 2009, *Magna Cum Laude*. This article has been awarded the Otto L. Walter Distinguished Writing Award from New York Law School, 2009. I would like to thank Professor Tai-Heng Cheng for his comments and advice.

1. President Abraham Lincoln, Address before the United States House of Representatives on the War with Mexico (Jan. 12, 1848), in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 431, 438 (Roy P. Basler ed., 1953) (Abraham Lincoln commenting on the war with Mexico in 1848).

2. José Ramos-Horta, *Preface to THE EAST TIMOR QUESTION: THE STRUGGLE FOR INDEPENDENCE FROM INDONESIA* xiii, xiii (Paul Hainsworth & Stephen McCloskey eds., 2000); see also Seth Mydans, *With More Broken Promises of Peace, East Timor Votes*, N.Y. TIMES, Aug. 30, 1999, at A3 (stating that the vote by the people of East Timor on August 30, 1999, would determine whether the territory would become a sovereign state).

3. John Pilger, *Foreword to THE EAST TIMOR QUESTION: THE STRUGGLE FOR INDEPENDENCE FROM INDONESIA* ix, ix (Paul Hainsworth & Stephen McCloskey eds., 2000) (stating the situation in East Timor “is one of the great and, until recently, unrecognized crimes of the twentieth century.”).

4. *Id.* (quoting a 1989 letter to the United Nations’ Secretary-General by Bishop Carlos Felipe Ximenes Belo, the head of the Catholic Church in East Timor). *But see* Daniel Pascoe, *The Role of the Catholic Church in Support or Opposition to the Indonesian Occupation of East Timor (1975-1999)*, 2006 CROSS SECTIONS 119 (2006) (discussing the view of the Catholic Church towards Indonesian occupation).

5. Stephen McCloskey, *Introduction: East Timor – From European to Third World Colonialism*, in THE EAST TIMOR QUESTION: THE STRUGGLE FOR INDEPENDENCE FROM INDONESIA 1, 4 (Paul Hainsworth & Stephen McCloskey eds., 2000).

out in massive numbers to vote” on the future of the territory.⁶ With such threats to a people’s fundamental rights, the question of when international law should deem a people’s declaration of independence a lawful act is critically important.

This Article will argue for a new method through which scholars, advocates, and other decision-makers can analyze the legitimacy of a population’s declaration of independence. The current approach to such an analysis—making self-determination the main focus of claims to secession—fails to consider the circumstances surrounding secession and, thereby, fails to properly balance the importance of state sovereignty with that of self-determination.⁷ As an alternative, this Article develops an alternative method of analysis using a sliding scale inquiry with a novel concept: the “Political Liberty Triangle” paradigm. This new method seeks to improve the ability to assess the merits of secessionists’ claims and determine whether a group’s declaration of independence should be deemed lawful.

The Political Liberty Triangle represents a stable, independent state. It is formed by, and is focused on, the relative importance of the concepts of sovereignty, self-determination, and secession. They constitute the three points of inquiry in this analysis and are considered in light of the context and particular circumstances surrounding a group’s claim to independence. This method considers the validity of the claim for independence in light of factors such as the likelihood of a territory to become economically self-sufficient, the free will of a territory’s people, and the state’s behavior toward its people.

This alternative analysis uses a sliding scale inquiry in conjunction with the Political Liberty Triangle. The sliding scale measures the legitimacy of a territory’s independence relative to the extent of that territory’s continued dependence. Some relevant factors that can shift a territory toward either dependence or independence on the scale include: human rights violations, attempts at peaceful negotiations, will of the supermajority for independence, economic self-sufficiency, and international harmony.⁸ The weight given to each of these non-exhaustive fac-

6. IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT, AND INTERNATIONAL INTERVENTION 11 (2001) (quoting a statement by Secretary-General Kofi Annan to the United Nations Security Council on the result of the East Timor Popular Consultation on September 3, 1999).

7. See generally Int’l Peace Academy, Vail, Colo., July 13, 2001, *Competing Claims: Self-Determination and Security in the United Nations* (prepared by Simon Chesterman, Tom Farer & Timothy D. Sisk), available at www.ipacademy.org/media/pdf/publications/competing_claims.pdf.

8. See discussion *infra* Part II.B.1–5.

tors will change depending on the circumstances surrounding each claim for secession. This method applies a totality of the circumstances approach to claims of secession. Furthermore, because the considerations comprised in the Political Liberty Triangle also hinge on context-specific factors, the international community should look to the Political Liberty Triangle in light of the “totality of the circumstances” surrounding a claim to secession. Ultimately, this approach is designed to remedy the under-inclusiveness of past methodologies. By focusing on the circumstances surrounding a group’s claim to secession, the international community may answer the question that has been side-stepped for decades: When is secession legitimate?

To conceptualize the relationship between the Political Liberty Triangle and the sliding scale of independence, the latter can be seen as a tool for gauging the stability of the former. When sovereignty and self-determination are balanced in equilibrium, secession is not a legitimate act. As the scale slides farther toward independence, the triangle is implicitly buckling under disequilibrium. When the equilibrium is thrown off, the triangle crumbles and secession becomes necessary to restore the state’s political liberty triangle, although the final result is *two* political liberty triangles—one resurrected for the original state and one new triangle for the new state created from the seceded territory.

Part I of this Article provides some background on the traditional concepts of sovereignty and self-determination in order to explain their competing relation at opposite points of the political liberty triangle. Part II explains in greater detail the nature of the new prospective approach proposed in this Article and elaborates on the factors that should be considered in determining whether secession is legitimate. Finally, part III applies this new approach to East Timor’s and Kosovo’s past secession disputes as case studies, illustrating that while Kosovo’s 2008 declaration of independence was likely appropriate, a consideration of the totality of the circumstances renders it questionable whether East Timor should have been granted independence in 2002.⁹ Finally, this Article sets out a number of recommendations for transitioning away from the old paradigm’s focus on self-determination. These recommendations hinge on the notion that, while considerations of self-determination explain *why* secession might be justified, such considerations cannot alone indicate *whether* secession is actually justified in a particular instance. The Politi-

9. East Timor was granted independence on May 20, 2001. Firdaus Abdullah, *Dr. Mahathir Assures East Timor Counterpart of Continued Assistance*, NEW STRAITS TIMES (MALAY.), Aug. 13, 2002, at 1; Piers Akerman, *Ragged Chorus Flies Timor’s Tattered Flag*, DAILY TELEGRAPH (AUSTL.), May 30, 2006, at 20; Fabio Scarpello, *Energy Deals Light the Way for Nation’s Future*, SOUTH CHINA MORNING POST, Apr. 7, 2007, at 14.

cal Liberty Triangle paradigm brings necessary analytical rigor to the latter inquiry.

I. THE FRAMEWORK OF THE POLITICAL LIBERTY TRIANGLE

The Political Liberty Triangle represents a stable, independent state and is conceptually formed by the notions of sovereignty, self-determination, and secession. International law norms equate self-determination and sovereignty as parallel interests.¹⁰ For example, the Charter of the United Nations states that one purpose of the U.N. is to respect the self-determination of peoples,¹¹ and that the U.N. is based on the principle of sovereign equality of its members.¹² Traditionally, claims of secession are based on violations of the right to self-determination within a sovereign state.¹³

The following sections examine the relationship between sovereignty and self-determination in order to provide a more explicit understanding of the framework proposed herein. This framework is a building block of a methodology that supersedes the traditional approach to claims of secession.

A. Sovereignty and Territorial Integrity

State sovereignty relates to a state's claim to, and exercise of, authority.¹⁴ In terms of its continuous development, it is not an "immutable principle decreed in fixed form once and for all time," but rather a con-

10. See, e.g., U.N. Charter art. 1, para. 2; U.N. Charter art. 2, para. 1; Final Act of the Conference on Security and Co-operation in Europe 1(a)(I), 1(a)(VIII), 14 I.L.M. 1292 (1975) (declaring both the respect for sovereign equality and the self-determination of peoples as principles guiding relations between states).

11. U.N. Charter art. 1, para. 2 (providing that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace").

12. U.N. Charter art. 2, para. 1 (providing "the principle of the sovereign equality of all its Members" as one of the organizing principles of the United Nations and its members).

13. See, e.g., PATRICIA CARLEY, U.S. INST. OF PEACE, SELF-DETERMINATION: SOVEREIGNTY, TERRITORIAL INTEGRITY, AND THE RIGHT TO SECESSION, vi (1996) [hereinafter SELF-DETERMINATION REPORT] (stating that self-determination movements typically are the target of human rights violations); Viola Trebicka, Recent Development, *Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination*, 32 YALE J. INT'L L. 255, 260 (2007) ("[T]he exercise of self-determination would certainly lead to secession.").

14. See DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 20 (1st ed. 2000) ("[T]he idea of state sovereignty is a claim relating to proper exercise of public authority.").

cept “whose meaning and scope are subject to re-evaluation” by the international community.¹⁵ As such, although sovereignty is traditionally associated with the idea of supreme authority, today, sovereignty must instead be evaluated in terms of sovereign equality, or equality among the states.¹⁶

While during the Middle Ages, sovereignty was used to signify superiority, the term did not exist as it does today.¹⁷ Although people in the Middle Ages had “a very strong sense of that concrete thing, hierarchy; they lacked the idea of that abstract thing, sovereignty.”¹⁸ Sovereignty in today’s sense emerged as a consequence of the formation of the modern state. First, the royalty acquired *plenitudo potestatis*, or “the supreme power,” which meant that no authority was able to challenge them.¹⁹ That power was further strengthened when the royalty began asserting territorial autonomy of their kingdom.²⁰ Second, the royalty began to use law as an instrument to further their power, contributing to the establishment of the concept of sovereignty.²¹ Relying on the Roman law maxims such as *quod principi placuit legis habet vigorem* (“what pleases the prince has the force of law”), and *si veut le roi, si veut la loi; car tel est notre plaisir* (“what the king wills, the law wills”) the law was utilized as an instrument of command.²²

15. *Id.* (“[A] claim to [sovereignty is] to be evaluated by the rest of the international community. Thus state sovereignty is not some immutable principle decreed in fixed form once and for all time, but rather an argument about state authority whose meaning and scope are constantly subject to re-evaluation.”). For a collection of articles discussing sovereignty as a social construct that developed over time, see STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., 1996); see also STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3 (1999) (pointing out that “[s]ome analysts have argued that sovereignty is being eroded by one aspect of the contemporary international system, globalization”).

16. See J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT’L ORG. 107, 110–12 (1994).

17. For an interesting discussion of the notion of sovereignty as developed in the Middle Ages, see, for example, Walter Ullman, *The Development of the Medieval Idea of Sovereignty*, 64 ENG. HIST. REV. 1 (1949) and J. W. McKenna, *The Myth of Parliamentary Sovereignty in Late-Medieval England*, 94 ENG. HIST. REV. 481 (1979).

18. BERTRAND DE JOUVENEL, SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD 171 (1957).

19. Martin Loughlin, *Ten Tenets of Sovereignty*, in SOVEREIGNTY IN TRANSITION 55, 58 (Neil Walker ed., 2003).

20. *Id.*

21. *Id.*

22. *Id.* at 59.

Accordingly, sovereignty has traditionally been associated with supreme authority²³ and has essentially been thought of as the concept of a state's right to exercise certain powers with respect to its territory and citizens.²⁴ Sovereignty can be characterized by three concepts: internal coherence, external independence, and supremacy of law.²⁵ A sovereign state is characterized by internal coherence and supremacy of law since it has the power to make law that is "supreme and ultimate."²⁶ Additionally, a sovereign state is externally independent because a sovereign power obeys no external authority outside its own territory.²⁷ Accordingly, states are only bound by those rules of law to which they have agreed to be bound, such as international treaties or customary international law.²⁸

Another relevant legal principle in our discussion of sovereignty is equality of states. This principle is based on the analogy of the status of men in natural law.²⁹ In the words of Emer de Vattel, a representative of the natural law school of thought, "A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom."³⁰

The Charter of the United Nations combines these two concepts of sovereignty and equality of states.³¹ The principle of sovereign equality

23. 1 OPPENHEIM'S INTERNATIONAL LAW 122 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("Sovereignty is supreme authority . . .").

24. JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 57 (2006) (Although "[t]he old 'Westphalian' concept in the context of a nation-state's 'right' to monopolize certain exercises of power with respect to its territory and citizens is in many ways discredited," the "main characteristics are still prized and harbored by those who maintain certain views, perhaps fairly characterized 'realist,' or who otherwise wish to avoid (sometimes with justification) interference in a national government's decisions and activities by foreign or international powers and authorities.").

25. Loughlin, *supra* note 19, at 59.

26. *Id.*

27. *Id.*

28. See generally Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

29. See VA. BILL OF RIGHTS OF 1776, ¶ 1 ("All men are by nature equally free and independent and have certain inherent rights. . . ."); THOMAS HOBBES, LEVIATHAN 104 (The Liberal Arts Press, Inc., 1958) (1651) ("Nature has made men so equal in the faculties of body, and mind.").

30. EMER DE VATTEL, 1 LE DROIT DES GENS, OU PRINCIPES DE LOI NATURELLE, APPLIQUÉS A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET SOUVERAINS 11 (1758), translated in THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW, APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS 7 (Charles G. Fenwick trans., The Carnegie Institution of Washington, 1916).

31. See U.N. Charter art. 2, para. 1. For a discussion on sovereign equality and the United Nations, see Bardo Fassbender & Albert Blechman, *Article 2(1)*, in 1 THE

espoused in Article 2(1) of the U.N. Charter represents a profound change and a shift in the conceptual direction of the meaning of sovereignty.³² A report by the U.N. drafting subcommittee states:

The Subcommittee voted to keep the terminology, “sovereign equality,” on the assumption and understanding that it conveys the following: (1) [t]hat states are juridically equal; (2) [t]hat they enjoy the rights inherent in their full sovereignty; (3) [t]hat the personality of the state is respected, as well as its territorial integrity and political independence; (4) [t]hat the state should, under international order, comply faithfully with its international duties and obligations.³³

Sovereign equality was purposefully adopted as a new term to take precedence over the term “sovereignty.”³⁴ Sovereignty was given the position of an attributive adjective modifying the noun equality.³⁵ This was intended to highlight the new concept of sovereignty as establishing a better community discipline between individual states and mankind.³⁶

B. Self-determination

Self-determination is the ability of an individual or group to make choices free from the force of the institutional framework within which they live.³⁷ The concept of self-determination is disputative in international law because it challenges core principles of the international legal system.³⁸ In particular, it challenges the sovereignty and territorial integr-

CHARTER OF THE UNITED NATIONS: A COMMENTARY 77, 87 (Bruno Simma et al. eds., 2d ed. 2002).

32. See U.N. Charter art. 2, para. 1; see also Fassbender & Blechman, *supra* note 31, at 87–88.

33. *Report of Rapporteur of Subcommittee I/1/A to Committee I/1, Conference on International Organization*, Doc. 723, June 1, 1945, in THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SELECTED DOCUMENTS 483 (1946).

34. Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in SOVEREIGNTY IN TRANSITION 115, 128 (Neil Walker ed., 2003).

35. *Id.*

36. Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 195, 292 (1993) (The two elements of sovereignty and equality provide for a “development towards greater community discipline” which is “driven by a global change in the perception of how the right balance between individual State interests and interests of mankind as a whole should be established.”).

37. ROBERT MCCORQUODALE, SELF-DETERMINATION IN INTERNATIONAL LAW xi (2000) (“Self-determination is primarily about the ability of an individual or a group to make choices free from the bounds of the institutional framework within which they live.”).

38. *Id.* (“One reason why self-determination is contentious in international law is that the concept challenges some of the core principles of the international legal system.”).

ity of states and interferes with matters that fall within the domestic jurisdiction of states.³⁹

Self-determination developed within the international legal system in the wake of the First World War.⁴⁰ In 1918, U.S. President Woodrow Wilson, a key advocate of the right of the people to choose their own form of government,⁴¹ stated, “[P]eoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.”⁴² President Wilson’s views of self-determination helped the concept become an accepted term of use in international relations.⁴³

The establishment of the United Nations advanced the development of the concept of self-determination; the U.N. Charter mentions the “principle” of self-determination twice⁴⁴—although, both references are made in the limited contexts of developing “peaceful and friendly relations among nations” and protecting the principle of “equal rights . . . of peoples.”⁴⁵ However, it has been noted that the reference to “peoples” presumes a group beyond states and encompasses territories “whose peoples have not yet attained a full measure of self-government.”⁴⁶

After its inclusion in the U.N. Charter, self-determination quickly evolved from a principle to a right.⁴⁷ The most significant document in

39. *Id.* (“It [(self-determination)] challenges the sovereignty of states and their territorial integrity, it interferes in matters within the domestic jurisdiction of states . . .”).

40. *Id.* at xiii. (stating that self-determination developed in an international context during the immediate wake of the First World War).

41. SELF-DETERMINATION REPORT, *supra* note 13, at 3 (“Wilson distinguished between ‘internal’ and ‘external’ interpretations of self-determination; the former, referring to a people’s right to choose its own form of government without outside pressure, was of far greater concern to him.”).

42. President Woodrow Wilson, Address to the Joint Session of Congress: Analyzing German and Austrian Peace Utterances (Feb. 11, 1918).

43. MCCORQUODALE, *supra* note 37, at xiv (“The long-term effect of Wilson’s views was that self-determination, despite its vague content and dubious conceptual basis, became an accepted term of use in international relations.”).

44. U.N. Charter art. 1, para. 2; U.N. Charter art. 55.

45. See U.N. Charter art. 1, para. 2; U.N. Charter art. 55.

46. Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1, 11 (1993) (quoting Article 73 of the U.N. Charter).

47. See SELF-DETERMINATION REPORT, *supra* note 13, at 3 (“once [self-determination] was written into the Charter, it very quickly evolved from a principle to a right.”); Hannum, *supra* note 46, at 31.

[S]elf-determination has undoubtedly attained the status of a “right” in international law. Formal statements by governments, the adoption by consensus of numerous United Nations resolutions, and the fact that more than half of the

the promotion of the right to self-determination is the 1960 U.N. Declaration on the Granting of Independence to Colonial People (the “1960 U.N. Declaration”),⁴⁸ which makes it clear that all colonial territories have the right to independence.⁴⁹ The “push for decolonization in the 1960s . . . elevated self-determination to a right and brought to full light the need to contend with [the] humanistic components” of self-determination.⁵⁰

However, given the trend in recent decades toward redefining self-determination to apply beyond decolonization—i.e., so as to include *every* group as having a right to independence—the 1960 U.N. Declaration may no longer offer sufficient guidance.⁵¹ For example, Kosovo and East Timor achieved independence after long and bloody struggles for self-determination.⁵² Currently, Chechnya is seeking its independence

world’s states have accepted the right of self-determination through their adherence to one or both of the United Nations covenants on human rights would seem to confirm the existence of self-determination as a norm of international law.

Hannum, supra note 46, at 31.

48. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, at 66, 67, U.N. GAOR, 15th Sess., 947th plen. mtg., U.N. Doc. A/L.323 & Add.1-6 (Dec. 14, 1960) (“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

49. Hannum, *supra* note 46, at 12 (With respect to the U.N. General Assembly’s 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, “[t]he thrust of the declaration is clear: all colonial territories have the right of independence.”).

50. Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace”*, 6 ILSA J. INT’L & COMP. L. 455, 455 (2000).

51. See, e.g., East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30); *In re* Secession of Quebec, [1998] 2 S.C.R. 217 (expanding the right to self-determination to apply to people who are deprived of self-determination by oppressive foreign occupying powers).

52. See Dan Bilefsky, *In a Showdown, Kosovo Declares its Independence*, N.Y. TIMES, Feb. 18, 2008, at A1 (“The province of Kosovo declared independence from Serbia . . . , sending tens of thousands of ethnic Albanians streaming through the streets to celebrate what they hoped was the end of a long and bloody struggle for national self-determination.”); Barbara Crossette, *Annan Warns Indonesians That Inaction May Lead to Criminal Charges*, N.Y. TIMES, Sept. 11, 1999, at A6 (quoting former U.N. Secretary General Kofi Annan saying: “the people of East Timor are being terrorized and massacred because they exercised their right of self-determination.”).

from Russia,⁵³ and Western Sahara is in a struggle for independence against Morocco.⁵⁴

The 1960 U.N. Declaration was a product of its time, promulgated amidst a trend toward freedom and independence in a large number of colonial territories.⁵⁵ It did not, however, allow for secession because the territorial integrity of existing states was assumed.⁵⁶ Consequently, it does not address current problems that the international community faces with respect to secession. Today, in light of a trend toward independence for any group, it is necessary to have a conceptual framework for balancing the territorial integrity of existing states with the right to self-determination.

This shift is further evidenced in international declarations and covenants created after the 1960 U.N. Declaration. For instance, the 1970 Declaration on Principles of International Law Concerning Friendly Relations (the "1970 Declaration") states, "[T]he subjection of peoples to alien subjugation, domination[,] and exploitation constitutes a major obstacle to the promotion of international peace and security."⁵⁷ Furthermore, suggesting that a state erodes its claim to sovereignty when engaging in subjugation, domination, and exploitation, the 1970 Declaration imposes limits on a state's sovereignty when the state fails to "represent the whole people belonging to the territory without distinction as to race, creed, or colour."⁵⁸ The International Covenant on Economic, Social and

53. See Zbigniew Brzezinski, Op-Ed, *Russia Would Gain by Losing Chechnya*, N.Y. TIMES, Nov. 19, 1999, at A35 ("The only fair and workable solution, good both for the Chechens and for the Russians, is self-determination for Chechnya.").

54. See HUMAN RIGHTS WATCH, HUMAN RIGHTS IN WESTERN SAHARA AND IN THE TINDOUF OF REFUGEE CAMPS (2008), available at <http://www.hrw.org/sites/default/reports/wsahara1208webcover.pdf> (reporting that Morocco punishes Sahrawis who advocate in favor of self-determination for Western Sahara).

55. Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 48, at 67 ("Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trend towards freedom in such territories which have not yet attained independence.").

56. See *id.* at 68; SELF-DETERMINATION REPORT, *supra* note 13, at 4.

57. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 121, U.N. GAOR, 25th Sess., 1883rd plen. mtg., Supp. 28, U.N. Doc A/8028 (Oct. 24, 1970).

58. *Id.* at 124.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-

Cultural Rights (“ICESCR”) and the International Covenant on Civil and Political Rights (“ICCPR”) also state that “all peoples have the right of self-determination.”⁵⁹ This includes the right to “freely determine their political status,” and to “freely pursue their economic, social, and cultural development.”⁶⁰

While scholars have written extensively on the right to self-determination—what it encompasses, and to whom it applies—no international agreement currently exists to precisely define the scope of the right and identify who may exercise the right. Furthermore, states have been slow to acknowledge the right beyond the colonial context.⁶¹ The reluctance of states to expand the scope of self-determination and the lack of international consensus make answering questions relating to and depending on self-determination especially difficult. Until the issue of scope and entitlement can be ascertained through international agreements or international norms, the legitimacy of secessions cannot be answered solely with self-determination.

C. Secession

Secession is “[t]he process or act of withdrawing,” such as when a people withdraw from their central government.⁶² Secession is largely the result of a state’s failure to balance its right to territorial integrity with its people’s right to self-determination.

The concept of secession is inseparable from the concepts of self-determination and sovereignty, the latter concepts being parallels in international norms.⁶³ The relationship between the corners of the Political Liberty Triangle becomes clear upon consideration of the following idea: when secession is intended, acceptance of one group’s claim to self-

determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory and without distinction as to race, creed, or colour.

Id.

59. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

60. International Covenant on Civil and Political Rights, *supra* note 59; International Covenant on Economic, Social and Cultural Rights, *supra* note 59.

61. See G.A. Res. 39/40, at 142–43, U.N. Doc. A/RES/39/40 (Dec. 5, 1984); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES (1995); Hannum, *supra* note 46.

62. BLACK’S LAW DICTIONARY 1470 (8th ed. 2004).

63. See, e.g., U.N. Charter art. 1, para. 2; U.N. Charter art. 2, para. 1.

determination results in the denial of another group's competing claim to territorial integrity.⁶⁴

A balance is necessary between the right of the people to self-determination and the right of a state to maintain a territorial integrity in order to alleviate conflicting policy goals. If the international community favors a state's territorial integrity over its people's right to self-determination, the international community may potentially be complicit in limiting the freedom and liberty of that state's people.⁶⁵ Moreover, territorial integrity was not intended to preclude the right to self-determination.⁶⁶ Alternatively, too broad a reading of the right to self-determination will compromise the territorial integrity of the state.⁶⁷

It has been argued that secession is permissible under a number of circumstances. Namely, secession has been thought to be justified in extreme situations where "definite and substantial grievances" are present and "all other [means of resolving these grievances] have been exhausted or repudiated."⁶⁸ Among the prime considerations in evaluating a secessionist claim are the history, nature, and severity of the existing griev-

64. Hannum, *supra* note 46, at 41 ("Where independence is the goal, acceptance of one group's claim to self-determination necessarily implies denial of another group's competing claim of territorial integrity.").

65. Brock Lyle, *Blood for Oil: Secession, Self-Determination, and Superpower Silence in Cabinda*, 4 WASH. U. GLOBAL STUD. L. REV. 701, 707 (2005) (pointing out that "too strict a reading of territorial integrity creates an internationally sanctioned form of fascism, a nation where the people have no freedom to disagree.").

66. Pius L. Okoronkwo, *Self-Determination and the Legality of Biafra's Secession Under International Law*, 25 LOY. L.A. INT'L & COMP. L. REV. 63, 80 (2002) ("The principle of territorial integrity, however, was not intended to preclude people within a sovereign state from exercising their right to self-determination through secession.").

67. Lyle, *supra* note 65, at 707 (pointing out that "too broad a definition of self-determination makes it impossible to keep countries together.").

68. Hannum, *supra* note 46, at 44-45 (citing Onyeonoro Kamanu, *Secession and the Right to Self-Determination: An OAU Dilemma*, 12 J. MOD. AFR. STUD. 355, 359, 361 (1974)). Hurst Hannum discusses the four principal arguments in favor of the right to secede. The first argument, the liberal democratic theory, "holds that, since the legitimacy of any government must rest upon the consent of the governed, the governed have the inalienable right to withdraw that consent whenever they wish." *Id.* at 43-44. The second argument emphasizes humanitarian or human rights concerns. *Id.* at 44-47. The third argument identifies a list of criteria that might be used in specific cases to evaluate secessionist claims, and seeks to balance "the internal merits of the claimants' case [for secession] against the justifiable concerns of the international community expressed in its calculation of the disruptive consequences of the situation." *Id.* at 47-48. Lastly, the fourth approach, a territorially based test, considers the following criteria: the immediacy and nature of the historical grievance of the secessionist group, the extent to which the group has kept its self-determination claim alive, and the extent to which the disputed territory has been settled by members of the dominant group. *See id.* at 48-49.

ances.⁶⁹ For example, scholars have argued that secession may be legally justified when gross violations of human rights, such as genocide, occur within a given state or territory.⁷⁰

Additionally, scholars weigh the expected impact on international harmony in ascertaining the legitimacy of a claim to secession.⁷¹ While states may freely recognize the independence of a given population, acceptance of a group's declaration of independence by the greater international community increases the legitimacy of the right to secession.⁷² Moreover, the promotion of international harmony requires a balancing of the right to secession and the adverse effects on the given state. Accordingly, it has been noted that "the basic question is whether separation or unification would best promote security and facilitate effective shaping and sharing of power and of all the other values for most people."⁷³

While a right to secession does not yet exist, it is an open question whether a right legitimizing secession under certain circumstances should be recognized. Because the legitimacy of any government rests "upon the consent of the governed, the governed should have the inalienable right to withdraw that consent whenever they wish."⁷⁴ This power to

69. *Id.* at 48 (citing Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT'L L.* 177, 199–201 (1991)) (discussing the territorially based test for determining a right to secede).

70. *Id.* at 46 (discussing the humanitarian or human rights approach to determining a right to secede).

71. *Id.* at 47 (discussing the third approach to judging the right to secede); *see supra* note 68.

72. Clifton van der Linden, *Secession: Final Frontier for International Law or Site of Realpolitik Revival?*, *J. INT'L L. & INT'L REL.*, Summer 2009, at 1, 6.

Although recognition of the newly created state by the international community as a requisite component in the legality of secession remains in dispute . . . in political terms its necessity is almost universally accepted. As membership in the UN General Assembly is the preeminent signifier of international recognition of statehood, the UN can leverage substantial power insofar as it confers legitimacy on newly created states.

Id.

73. Lung-Chu Chen, *Self-Determination as a Human Right*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL* 198, 210 (W. Michael Reisman & Burns H. Weston eds., 1976); *see also* LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 238 (1978) (arguing that the "final decision regarding the legitimacy of a particular secessionist claim must result from the balancing of the internal merits of the claimants' case for secession against the justifiable concerns of the international community expressed in its calculation of the disruptive consequences of the situation.").

74. Hannum, *supra* note 46, at 43 (discussing the liberal democratic theory approach to determining right to secede); *see supra* note 68.

withdraw should arguably extend “not only to rejection of [a] particular government, but also to rejection of [an entire] state.”⁷⁵

II. A PARADIGM FOR THE AGES

After juxtaposing the Political Liberty Triangle approach with the traditional paradigm, the following sections explain the methodology—and, ultimately, the desirability—of the former, in order to support this Article’s call for a paradigm shift.

A. Rejection of the Traditional Paradigm of Self-Determination

While self-determination explains why a group may be entitled to secede, it does not guide the international community in determining whether an act of secession is lawful. Similar to a student of mathematics who is unable to use calculus without first understanding the fundamentals of algebra, the international community is unable to evaluate the legitimacy of a claim without the proper tools.⁷⁶ While a student may recognize that a given problem can be solved using a particular calculus theorem, he or she will not be able to utilize the theorem without the requisite tools. Similarly, scholars may recognize that self-determination is a justification for secession, but they are unable to analyze the legitimacy of specific claims for secession because a sufficient framework does not yet exist.

If scholars—and, ultimately, members of the international legal community—possessed a more expansive analytical framework for looking at the legitimacy of secessionists’ claims, they could offer better collective judgments as to how to react. Some of the types of information most important to the decision-making process include: the occurrence of human rights violations; the occurrence of attempts at peaceful negotiation; clear expressions of the will of a supermajority to secede; indications that other rights violations are being perpetrated; and indications of whether the aggrieved population could be economically viable if secession were recognized as legitimate.

Because such information is essential to fully evaluate the question of legitimacy, the international community should no longer focus on self-determination to determine when an act of secession is lawful. Self-

75. Hannum, *supra* note 46, at 43.

76. *Cf.* STEPHEN R. COVEY, *THE 8TH HABIT: FROM EFFECTIVENESS TO GREATNESS* 117 (2004) (pointing out the calculus portion of the analogy—“you can’t do calculus until you understand algebra, and you can’t do algebra until you understand basic math”).

determination alone is not enough because it simply distinguishes legitimate claims from illegitimate claims.⁷⁷

B. The Political Liberty Triangle Paradigm

The international community must begin viewing secession in light of the totality of the circumstances. The extent of a people's dependency on a given state body hinges on *all* factors relevant to the competing desires for self-determination or territorial integrity. Furthermore, determinations of the legitimacy of acts of secession should be made on a case-by-case basis because the circumstances arising in each case will be unique. This is why it is important to point out that the list of potentially relevant considerations (provided above and discussed in greater detail below) is not exhaustive. The weight to be given to any one factor or circumstance is not fixed; the gravity of any type of consideration will always depend on the context and the interplay of all other relevant factors and circumstances. For example, the economic viability of a territory may be given more weight than the exhaustion of peaceable negotiations where a territory is small and its population uneducated.

To further conceptualize this approach, it is best to think of these case-specific factors as lying at the heart of the Political Liberty Triangle. Remember that as the sliding scale shifts from dependence to independence on the basis of these case-specific factors, the triangle begins to crumble.

Many scholars have already written about many of the factors that will be examined in this Article, but the forthcoming discussion aims to build and improve upon the existing scholarship. For example, it has been argued that serious human rights violations alone are sufficient to justify secession.⁷⁸ However, this Article argues that this is not a facially obvious conclusion—rather, evidence of such violations is but one of many factors that should be considered, in light, of course, of the surrounding circumstances of the territory.

Unsurprisingly, most academic work dealing with secession has focused on self-determination.⁷⁹ If nothing else, this Article will hopefully encourage a shift in academic discourse away from the self-determination paradigm and toward a more meaningful, in depth analysis

77. W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 162 (1977).

78. See ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 335 (2004); Okoronkwo, *supra* note 66, at 106 (stating secession is permissible when serious human rights violations are present).

79. See, e.g., Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137 (2010).

of the kind advocated here. Unfortunately, “paradigms, like traditions, die hard,”⁸⁰ and a flawed paradigm can live on for centuries even after a better one is advanced.⁸¹

1. Gross, Substantial, and Extensive Human Rights Violations

Human rights are those fundamental moral rights necessary for individuals to live with liberty and dignity; moreover, they are a means to a greater social end.⁸² The legal system identifies and codifies rights that are considered fundamental,⁸³ and States ensure autonomy and equality for individuals by recognizing, applying, and protecting the fundamental legal rights of individuals.⁸⁴

With the advent of international law, human rights have been internationalized and are no longer solely a matter of domestic jurisdiction.⁸⁵ Today, states are held accountable to the international community for their human rights violations.⁸⁶ When a state fails to recognize and apply fundamental rights appropriately, victimized groups may seek assistance from the international community,⁸⁷ and recognition of the legitimacy of secession is always a potential remedy international actors can offer. In

80. COVEY, *supra* note 76, at 20.

81. *Id.*

82. FORSYTHE, *supra* note 14, at 3.

83. *Id.* (“[I]t is the legal system that tells us at any given point in time which rights are considered most fundamental in society. Even if human rights are thought to be inalienable . . . rights still have to be identified—that is, constructed—by human beings and codified into the legal system.”); see also Jack Donnelly, *The Social Construction of International Human Rights*, in HUMAN RIGHTS IN GLOBAL POLITICS 71–102 (Tim Dunne & Nicholas J. Wheeler eds., 1999).

84. FORSYTHE, *supra* note 14, at 3 (“[i]n the classical liberal view, the good society is based on respect for the equality and autonomy of individuals, which is assured through the recognition and application of the fundamental legal rights of the person.”). For a novel and creative approach to human rights violations, see Tai-Heng Cheng, *The Central Case Approach to Human Rights: Its Universal Application and the Singapore Example*, 13 PAC. RIM L. & POL’Y J. 257, 259–62 (2004) (arguing for a more meaningful measure of human rights by focusing on different deviations from a central case of human rights).

85. FORSYTHE, *supra* note 14, at 4–5 (“Other developments also indicated the central point that human rights was no longer a matter necessarily or always within state domestic jurisdiction. . . . Human rights had been internationalized . . .”).

86. *Id.* at 4 (“In principle, states were to answer to the international community for their treatment of individuals.”).

87. See BENYAMIN NEUBERGER, NATIONAL SELF-DETERMINATION IN POSTCOLONIAL AFRICA 71 (1986) (stating a group may defend themselves by seceding from an oppressive state); Onyeonoro S. Kamanu, *Secession and the Right to Self-Determination: An OAU Dilemma*, 12 J. MOD. AFR. STUD. 355, 362 (1974) (arguing that a group may defend themselves when they are subjected to human rights violations).

such circumstances, the possibility of secession is a source of protection.⁸⁸

Human rights violations may provide a compelling justification for secession.⁸⁹ However, there is no general consensus as to what type or extent of violations are necessary to justify secession. For example, would it be sufficient to justify succession if there is a credible threat to the physical existence of an aggrieved population? What about extreme discrimination against a particular group such that it results in significant oppression?⁹⁰ What about genocide? Surely genocide should be sufficient, right?

While genocide is illegal under customary international law,⁹¹ one single act of genocide against a population is probably insufficient to justify secession.⁹² In such a situation, secession may not be the proper remedy. For instance, the Preamble of the Universal Declaration of Human Rights states that “if man is not to be compelled to have recourse, *as a last resort*, to rebellion against tyranny and oppression, . . . human rights should be protected by the rule of law.”⁹³ Additionally, long established

88. See Hannum, *supra* note 46, at 45 (stating secession is a form of self-defense while discussing the humanitarian or human rights approach to determining the appropriateness of the right to secede); see *supra* note 68.

89. See BUCHANAN, *supra* note 78, at 335; KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 262–63 (2002); Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, FOREIGN AFFAIRS, Mar.–Apr. 1998, at 13, 16 (“There are two instances in which secession should be supported by the international community. The first occurs when massive, discriminatory human rights violations, approaching the scale of genocide, are being perpetrated. If there is no likelihood of a change in the attitude of the central government, or if the majority population supports the repression, secession may be the only effective remedy for the besieged group.”); Okoronkwo, *supra* note 66, at 106.

90. See Hannum, *supra* note 46, at 45 (reviewing the second approach to determining the right to secede which emphasizes humanitarian and human rights concerns).

91. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (“A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . genocide.”).

92. See Hannum, *supra* note 89, at 16 (conditioning the right to secession on the basis of “massive, discriminatory human rights violations, approaching the scale of genocide” upon “there [being] no likelihood of a change in the attitude of the central government” or “majority population support[] [of] the repression.”).

93. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plan. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (emphasis added). For a good discussion of the authority of the Universal Declaration of Human Rights since its enactment, see Tai-Heng Cheng, *The Universal Declaration Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT’L L.J. 251 (2008).

principles of sovereignty and territorial integrity signal that secession may not be the preferable remedy.⁹⁴

When human rights violations are gross, substantial, and extensive, however, secession may become a legitimate goal for an aggrieved population. As mentioned above, international agreements, such as the 1970 Declaration,⁹⁵ the ICESCR,⁹⁶ and the ICCPR,⁹⁷ suggest that respect for state sovereignty ought not to prevent the international community from taking action in opposition to state actors who commit serious human rights violations on behalf of their states.⁹⁸

2. Attempted Peaceful Negotiated Settlements

There is a historical notion that violence rarely, if ever, produces viable and just outcomes.⁹⁹ In order for a state's Political Liberty Triangle to remain intact, a state should repudiate all forms of violence and pursue peaceful negotiated settlements. When a state uses violence and force on an aggrieved population as a method of settling problems, that state corrodes its right to sovereignty.¹⁰⁰ Likewise, the aggrieved population should also not resort to violence as a means of achieving its goal of secession from the oppressive state.

The establishment of the United Nations in 1945 signaled a movement away from violence and toward institutions that would promote peaceful settlement of disputes.¹⁰¹ Article 33 of the U.N. Charter states that "[t]he parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other

94. See, e.g., Rob Dickinson, *Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet*, 26 ARIZ. J. INT'L & COMP. L. 547, 557 (2009).

95. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, *supra* note 57, at 121.

96. International Covenant on Economic, Social and Cultural Rights, *supra* note 59.

97. International Covenant on Civil and Political Rights, *supra* note 59.

98. See discussion *supra* Part I.B.

99. L. ALI KHAN, A THEORY OF INTERNATIONAL TERRORISM: UNDERSTANDING ISLAMIC MILITANCY 287 (2006).

100. Trebicka, *supra* note 13, at 260 ("In the case of Kosovo, the exercise of self-determination would certainly lead to secession, thus violating the principle of territorial integrity of the sovereign, Serbia. In this case, I argue that emerging international law should favor the right to self-determination over sovereignty claims.").

101. See U.N. Charter art. 39–51 (forbids the threat or use of force in international relations).

peaceful means of their own choice.”¹⁰² Furthermore, the U.N. Charter empowers the Security Council to resolve disputes that threaten international peace and security.¹⁰³ While the U.N. Charter is only binding on member states,¹⁰⁴ the international community as a whole should follow the trend toward peaceful solutions to promote global harmony.

Peaceful negotiated settlements should be the result of real bargaining by legitimate representatives of the parties after an examination of all issues that constitute the heart of the conflict.¹⁰⁵ No party should be coerced or pressured into accepting an agreement, and when negotiations cannot produce a solution that is genuinely acceptable to both parties, the United Nations Security Council should assist in resolving the conflicts. The risk of intervention by the Security Council should encourage parties to reach agreements and settle their disputes in a peaceful way.

3. The Will of the Supermajority

Secession is not legitimate without the will of the people.¹⁰⁶ Thus, majority support is often a very important element in weighing the legitimacy of secession. However, it is arguable that secession should be permissible whenever “reasonable demands for local self-government or minority rights have been arbitrarily rejected by a central government.”¹⁰⁷ According to much existing scholarship, the apparent sentiment is that evidence of majority support among all aggrieved individuals might very well be sufficient for legitimate secession.¹⁰⁸ To demand a

102. U.N. Charter art. 33, para. 1.

103. U.N. Charter art. 23–38.

104. U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”); see also Shigeo Kawagishi, *UN Economic Sanctions and Domestic Implementation in Japan*, 89 AM. SOC’Y INT’L L. PROC. 344, 346 (1995) (“[n]onmember countries [of the United Nations] are not legally bound by the decisions of the [United Nations Security] Council.”).

105. KHAN, *supra* note 99.

106. See, e.g., Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541, at 29, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 15, 1960) (“Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.”); *In re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶ 87 (requiring the clear expression of the people’s will in a case of secession).

107. Hannum, *supra* note 89, at 16.

108. See, e.g., Jonathan I. Charney, Commentary, *Self-Determination: Chechnya, Kosovo, and East Timor*, 34 VAND. J. TRANSNAT’L L. 455, 464 (2001); Robert W. McGee, *The Theory of Secession and Emerging Democracies: A Constitutional Solution*, 28 STAN. J. INT’L L. 451, 466–67 (1992) (citing FRANCES KENDALL & LEON LOUW, AFTER

simple majority, however, is *not* sufficient. Rather, to be deemed the “will of the people,” a claim should be a clear expression of a *supermajority* of the people.¹⁰⁹ When a supermajority of all those who have been arbitrarily rejected by the central government express a clear will for secession, the territory may become one notch closer to independence on the sliding scale.

A supermajority is necessary, in contrast to a majority, because of how difficult it may be to gauge whether a mere majority of a population within a territory actually wishes to secede. The requirement of supermajority support is likely to guarantee that secession is the direct wish of the population within a territory. Furthermore, requiring a supermajority minimizes the risk of harm to minority groups, which must be protected when a population secedes from a state. Scholars have persuasively argued that the overall situation for minorities must not be worsened by secession.¹¹⁰ Indeed, secession should leave minorities at least no worse off than they were previously; meanwhile, secession might appear increasingly legitimate, the greater the improvements to minorities’ circumstances in the new secessionist state.¹¹¹

The Supreme Court of Canada, addressing a claim of secession of the Quebec province, decided that the right to self determination must “be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”¹¹² The Court, however, noted that there are extreme circumstances where a right to secession may arise.¹¹³ Of particular importance, while recognizing that it may not be “an established international law standard,”¹¹⁴ the Court stated that “when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.”¹¹⁵

Especially relevant to this analysis, the Canadian Supreme Court also discussed the relationship between the will of the majority and secession. In order for an expression of a desire to secede to be legitimate, the Court has said it would require “a clear expression by the people . . . of their

APARTHEID: THE SOLUTION FOR SOUTH AFRICA 116 (Institute for Contemp. Studies 1987) (1986)) (associating the will of the majority of the group seeking secession with secession).

109. See *In re* Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 87.

110. See David Miller, *Secession and the Principle of Nationality*, in NATIONAL SELF-DETERMINATION AND SECESSION 62, 72 (Margaret Moore ed., 1998).

111. Hannum, *supra* note 89, at 17.

112. *In re* Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 122.

113. *Id.*

114. *Id.* at ¶ 135.

115. *Id.* at ¶ 134.

will to secede.”¹¹⁶ The court indicated that a clear majority of the population’s vote on the question, free of ambiguity, would qualify as a clear expression.¹¹⁷ Accordingly, requiring the will of a supermajority to secede would provide an even clearer expression of the majority of the population.

4. Economic Viability

Within the framework set forth in this article, the ability of a territory to be self-sustaining should be a prerequisite to secession.¹¹⁸ Given the simple fact that a state’s future and security are so closely connected to its economic viability, it is surprising how little discussion of secession has focused on the economic viability of a territory.¹¹⁹ Perhaps this factor has been ignored by scholars and academics because Article 3 of the 1960 U.N. Declaration provides that “[i]nadequacy of political, *economic*, social[,] or educational preparedness should never serve as a pretext for delaying independence.”¹²⁰ Declarations, however, are not binding.¹²¹ Additionally, in today’s world, globalization creates new economic challenges that were not known, and could not even be fathomed, at the time

116. *Id.* at ¶ 87.

117. *Id.* at ¶ 87; *see also* Jean-François Gaudreault-DesBiens, *The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy, and Identity*, 23 VT. L. REV. 793, 830 (1999).

118. *But see* Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 48, at 67 (“Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”).

119. *See, e.g.*, Michael Hechter, *The Dynamics of Secession*, 35 ACTA SOCIOLOGICA 267, 267–77 (1992); Daniel Fierstein, Note, *Kosovo’s Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, 26 B.U. INT’L L.J. 417, 430–31 (2008) (citing JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 391–415 (2006)) (“For a secession claim to be considered legal, State practice tends to emphasize consent of the parties involved as a necessary condition”); Ronald Thomas, Note, *The Distinct Cases of Kosovo and South Ossetia: Deciding the Questions of Independence on the Merits and International Law*, 32 FORDHAM INT’L L.J. 1990, 1993–96 (2009) (discussing views on secession in UN declarations and resolutions).

120. Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 48 (emphasis added).

121. *See* Noëlle Lenoir, *Universal Declaration on the Human Genome and Human Rights: The First Legal and Ethical Framework at the Global Level*, 30 COLUM. HUM. RTS. L. REV. 537, 550 (1999) (“[T]he achievement of consensus on a declaration is a short-lived victory, because declarations are not binding and there is nothing to prevent states from later revoking the commitment they made when the text was adopted.”); John J. Maresca, *Remarks, Human Rights: The Helsinki Process*, 84 AM. SOC’Y INT’L L. PROC. 122, 122 (1990) (stating, in reference to the Helsinki Final Act declaration adopted by the Conference of security and co-operation in Europe (“CSCE”), that it “entails political and moral commitments, rather than legally binding treaty obligations.”).

of the Declaration's enactment in 1960. If a territory cannot survive as an economically viable state, then it should not legitimately secede, as it would likely fail as a state and become a burden on the international community.

An independent state must be able to build a strong, healthy, and self-sustaining economy to survive. Until its final status is resolved, however, a territory's prospects for future economic development will be uncertain. Businesses will be reluctant to invest in a territory where independence has gone unrecognized, and international financial institutions will be unable to offer monetary assistance.¹²²

Still, one may be able to determine a territory's economic viability to an extent by looking at its size and assets. For instance, rich natural resources should indicate future self-sustainability. Additionally, a young population with a robust drive to succeed is more likely to contribute to a territory's economic success. The amount of potential investment by the community, outsiders, and financial institutions will also lead to predictions about economic viability.

A great emphasis should be placed on the economic state of a territory in determining whether secession is appropriate. A territory that wishes to secede from an economically stable state should be self-sustainable and free from direction and assistance.

5. Promotion of International Harmony

A legitimate act of secession requires recognition from the international community.¹²³ The formation of a state occurs, initially, as a matter of fact, and later, as a matter of international law.¹²⁴ In other words, the formation of a state truly occurs upon recognition by the international community as a whole.¹²⁵ While states are free to recognize any territory or population as an independent state, secession should not be considered

122. See *The Balkans After the Independence of Kosovo and on the Eve of NATO Enlargement: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 1 (2008) [hereinafter *Kosovo Hearing*] (statement of Rep. Howard L. Berman, Chairman, H. Comm. on Foreign Affairs) (noting, in regards to Kosovo, that "[a]s long as Kosovo's final status remained unresolved, businesses were reluctant to invest there, and international financial institutions were unable to offer the needed monetary assistance).

123. K. William Watson, Comment, *When in the Course of Human Events: Kosovo's Independence and the Law of Secession*, 17 TUL. J. INT'L & COMP. L. 267, 268 (2008) (stating that "[t]he viability of a state depends, in practical terms, on the acceptance of its existence by other international actors.").

124. L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 544 (H. Lauterpacht ed., 8th ed. 1955).

125. See Watson, *supra* note 123.

a legal act without recognition by the larger international community,¹²⁶ as this promotes international harmony.¹²⁷ Among other factors and policy considerations, a state will ultimately weigh the legitimacy of secession as a basis for determining whether to grant recognition.¹²⁸ When a majority of the international community recognizes a state's independence, it is a statement of legality and legitimacy for the secessionist state.

This argument, of course, ignores the dissenting states' wishes. At first blush, one may grapple with the idea of promoting international well-being when a portion of the international community will almost certainly object to the legality of the secessionist movement. However, each state will take into account the adverse significant affects on the state being seceded from in deciding whether to recognize the secessionist state's independence. Accordingly, recognition from the greater of the two halves is likely to promote international harmony.

III. APPRAISING THE POLITICAL LIBERTY TRIANGLE PARADIGM

In 2002, East Timor achieved independence from Indonesia, and in 2008, Kosovo achieved its independence from Serbia.¹²⁹ What follows is an appraisal of the methodology advocated in this Article as applied to East Timor's and Kosovo's previous secession claims. Using East Timor and Kosovo as case studies, the following sections will use the Political Liberty Triangle and the sliding scale of independence as tools for determining whether the conditions in East Timor and Kosovo reached the threshold of legitimate independence, and whether Indonesia's and Ser-

126. *In re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶ 155 ("The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition."); see also BUCHHEIT, *supra* note 73, at 238; Chen, *supra* note 73, at 210 (advocating that "[t]he recommended test in granting or rejecting a demand for self-determination is not whether a given situation is 'colonial' or 'noncolonial,' but whether granting or rejecting the demands of a group would move the situation closer to goal values of human dignity, considering in particular the aggregate value consequences on the group directly concerned and the larger communities affected.").

127. Watson, *supra* note 123; see also Eisuke Suzuki, *Self-Determination in International Law*, 89 YALE L.J. 1247, 1258 (1980) (reviewing LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (1978)) (discussing the community interest achieved in recognizing secessionist states after weighing the potential disruption in world harmony resulting from separation).

128. *In re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶ 155; see also Watson, *supra* note 123, at 268 (stating states will likely base their decision to support the independence of Kosovo on realist political tactics).

129. See Bilefsky, *supra* note 52; *supra* note 9.

bia's Political Liberty Triangles faltered to the point of rendering secession sufficiently legitimate.

The history behind East Timor¹³⁰ and Kosovo¹³¹ is extensive and complicated. Because a complete discussion of the history of each state is beyond the scope of this Article, the analysis will focus only on the relevant factors and circumstances at the heart of the Political Liberty Triangle.

A. East Timor

On May 20, 2002, East Timor achieved its independence from Indonesia¹³² and became the first new sovereign state of the twenty-first century.¹³³ Starting in the sixteenth century and continuing well into the twentieth century, East Timor was a Portuguese colony. It was not until 1975¹³⁴ that the Indonesian government took control of the territory when the Portuguese government departed.¹³⁵ At that time, the United Nations denounced the Indonesian means of exerting control over East Timor and continued to recognize East Timor as a "non-self-governing territory" under Portuguese administration.¹³⁶

130. For a discussion on the history of East Timor, see TAI-HENG CHENG, *STATE SUCCESSION AND COMMERCIAL OBLIGATIONS* 171–208 (2006); GEOFFREY C. GUNN, *EAST TIMOR AND THE UNITED NATIONS: THE CASE FOR INTERVENTION* (1997); MARTIN, *supra* note 6.

131. For a discussion on the history of Kosovo, see KOSOVO: THE POLITICS OF DELUSION (Michael Waller, Kyril Drezov & Bülent Gökay eds., 2001); MIRANDA VICKERS, *BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO* (1998); U.S. Dep't of State, *Kosovo Chronology* (May 21, 1999), http://www.state.gov/www/regions/eur/fs_kosovo_timeline.html [hereinafter *Kosovo Chronology*] (providing a chronology of the history of Kosovo).

132. Abdullah, *supra* note 9; Akerman, *supra* note 9; Scarpello, *supra* note 9.

133. Sterio, *supra* note 79, at 159 (2010) ("East Timor became the first new sovereign state of the 21st century by obtaining independence on May 20, 2002 when United Nations Secretary-General Kofi Annan handed over authority of the country to the new government.").

134. MARTIN, *supra* note 6, at 16 ("On 7 December 1975, Indonesia launched a naval, air, and land invasion of East Timor.").

135. East Timor (Port. v. Austl.), 1995 I.C.J. 90, 96 (June 30).

136. Julie M. Sforza, Note, *The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonization*, 22 SUFFOLK TRANSNAT'L L. REV. 481, 483 (1999); see also G.A. Res. 37/30, U.N. Doc. A/RES/37/30 (Nov. 23, 1982); G.A. Res. 36/50, U.N. Res. A/RES/36/50 (Nov. 24, 1981); G.A. Res. 35/27, U.N. Res. A/RES/35/27 (Nov. 11, 1980); G.A. 34/40, U.N. Doc. A/RES/34/30 (Nov. 21, 1979); G.A. Res. 33/29, U.N. Doc. A/RES/33/39 (Dec. 13, 1978); G.A. Res. 32/34, U.N. Doc. A/RES/32/34 (Nov. 28, 1977); G.A. Res. 31/53, U.N. Doc. A/RES/31/53 (Dec. 1, 1976); G.A. Res. 3485 (XXX), U.N. Doc. A/RES/3485 (Dec. 12, 1975); S.C. Res. 389, U.N. Doc. S/RES/389 (Apr. 22, 1976); S.C. Res. 384, U.N. Doc. S/RES/384 (Dec. 22, 1975).

Extreme brutality and violence marked Indonesian rule over East Timor. The Commission for Reception, Truth and Reconciliation in East Timor reported a minimum of 102,800 conflict-related deaths between 1974 and 1999.¹³⁷ This estimate is further supported by a comprehensive study commissioned by the Australian Parliament, which reported at least 200,000 East Timorese died under Indonesian occupation.¹³⁸

On May 5, 1999, the negotiations over the final status of East Timor resulted in Indonesia and Portugal signing the Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor. The agreement allowed the United Nations to organize a popular consultation of the East Timorese through a “direct, secret, and universal ballot.”¹³⁹ Under the agreement, if the East Timorese people rejected the autonomous framework, Indonesia would transfer its authority to the United Nations, and this would eventually lead to East Timor’s independence.¹⁴⁰

While the status of East Timor was never clear until the popular consultation,¹⁴¹ nearly 79% voted to reject autonomous status in Indonesia on August 30, 1999.¹⁴² The consultation resulted in mass violence, including “murders, massacres, disappearances, forced expulsion, rape, sexual harassment of women, and destruction of property” perpetrated by pro-Indonesia militias.¹⁴³ Peace was not restored in East Timor until the U.N. Security Council authorized the creation of the International Force for East Timor (“INTERFET”) to quell the violence brought on by the

137. COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN TIMOR-LESTE, CHEGA!: FINAL REPORT OF THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN TIMOR-LESTE pt. 6.1.1 (2006), available at <http://www.cavr-timorleste.org/chegaFiles/finalReportEng/06-Profile-of-Violations.pdf>. The margin of error for the report’s estimate of conflict-related deaths is plus or minus 12,000 deaths.

138. Pilger, *supra* note 3, at ix (“According to a comprehensive study commissioned by the Australian Parliament, ‘at least’ 200,000 East Timorese, a third of the population, have died under the Indonesian occupation.”); see also MARTIN, *supra* note 6, at 17 (“Estimates of the number who died as a result of the conflict, including the famine and disease that accompanied the displacement of large parts of the population, range from tens of thousands, acknowledged by Indonesia itself, to as many as 200,000.”).

139. The Secretary-General, *Report of the Secretary-General on the Question of East Timor*, Annex I, art. 1, delivered to the Security Council and the General Assembly, U.N. Doc. S/1999/513, A/53/951 (May 5, 1999).

140. *Id.* at art. 6.

141. Amardeep Singh, *The Right of Self Determination: Is East Timor a Viable Option for Kashmir?*, HUM. RTS. BRIEF (Ctr. for Human Rights & Humanitarian Law, Washington D.C.), Spring 2001, at 9, 10.

142. *Timor Chooses Independence*, BBC NEWS, Sept. 4, 1999, available at <http://news.bbc.co.uk/2/hi/asia-pacific/438145.stm>.

143. Singh, *supra* note 141, at 10.

consultation,¹⁴⁴ but not long after that, East Timor finally won its hard-fought battle for self-government.¹⁴⁵

Did the international community achieve the proper result by granting East Timor its independence? At first blush, this sounds plausible. The people of East Timor suffered decades of violence, brutality, and extensive human rights violations. Then, while the popular consultation evinced East Timor's willingness to engage in peaceful negotiations, the resulting violence indicated that secession represented the will of the supermajority. Meanwhile, East Timor's independence likely promoted international harmony. When Indonesia took control of East Timor, the United Nations' Security Council and General Assembly adopted resolutions recognizing the legitimacy of East Timor's struggle for independence.¹⁴⁶ Since member states of the United Nations are bound by U.N. resolutions and the United Nations represents a considerable majority of independent states in the world, the U.N.'s resolute disapproval of Indonesia's occupation of East Timor arguably represented the view of the broader international community.¹⁴⁷ At the time of Indonesia's invasion in 1975, there were 144 member states of the United Nations.¹⁴⁸ According to the U.S. Department of State, there are 194 independent states in the world.¹⁴⁹

Using the sliding scale approach, however, the lawfulness of East Timor's secession is not as clear cut. Significantly, East Timor's economic viability was in question at the time of secession.¹⁵⁰ Commentators have pointed out, "[i]t was a belief that an independent East Timor was not economically viable that provided one of its justifications for incorporation into Indonesia."¹⁵¹ East Timor is small, with few natural resources,

144. *Id.*

145. Abdullah, *supra* note 9; Akerman, *supra* note 9; Scarpello, *supra* note 9.

146. *See, e.g.*, G.A. Res. 33/39, ¶ 1, Doc. A/RES/33/39 (Dec. 13, 1978) (recognizing East Timor's struggle for independence).

147. For representative functions of the United Nations and its members, see, for example, U.N. Charter art. 25.

148. United Nations, Growth in United Nations Membership, 1945–present, <http://www.un.org/members/growth.shtml> (last visited Apr. 21, 2010).

149. U.S. Dep't of State, Independent States in the World (July 29, 2009), available at <http://www.state.gov/s/inr/rls/4250.htm>.

150. *See* Roger S. Clark, *The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 YALE J. WORLD PUB. ORD. 2, 12 (1980); Jeremy Wagstaff, *Independent East Timor Would Rely on Foreign Aid*, WALL ST. J., Aug. 30, 1999, at A18 ("Economically, East Timor is unprepared for independence, making it likely that if it chooses to split from Indonesia, it could be dependent on foreign aid for years.").

151. GUNN, *supra* note 130, at 23.

and sparsely populated.¹⁵² Furthermore, years of war have left most of its people uneducated.¹⁵³ In 1999, East Timor's was among the poorest economies in the world¹⁵⁴ and its infrastructure had been neglected or destroyed over the decades during Portuguese and Indonesian rule.¹⁵⁵ A territory with such deterioration in its economical abilities may not be able to accept the responsibilities of statehood in the international community.¹⁵⁶

East Timor does, however, have reasons to be optimistic. While economists have estimated that it could take 15 to 20 years before East Timor achieves levels of economic growth comparable to those of Indonesia,¹⁵⁷ there is significant growth potential because the area is rich in oil and natural gas.¹⁵⁸ Under the Timor Sea Treaty, which replaced the Timor Gap Treaty, East Timor is entitled to a share of the proceeds coming from petroleum found in the seabed area described in the agreement.¹⁵⁹ Additionally, East Timor's agricultural, coffee, marble-mining, coastal fishing, and tourism industries also provide potential sources of economic development.¹⁶⁰

Still, despite this potential, East Timor has yet to prove it can be economically viable.¹⁶¹ In 2008, East Timor's success depended on interna-

152. Paul D. Elliott, Note & Comment, *The East Timor Dispute*, 27 INT'L & COMP. L.Q. 238, 247-48 (1978). *But see* Maps of World.com, *East Timor Natural Resources*, <http://www.mapsofworld.com/timor-leste/geography/east-timor-natural-resources.html> (stating that East Timor has a variety of natural resources including gold, petroleum, natural gas, and marble).

153. Lindsay Sobel, *Rebuilding East Timor's Economy*, MOTHER JONES, Sept. 10, 1999 (on file with the *Brooklyn Journal of International Law*); Wagstaff, *supra* note 150 ("Half of [the citizens of East Timor] can't read.").

154. Sobel, *supra* note 153.

155. Wagstaff, *supra* note 150 (stating years of war have left land scarred and undeveloped).

156. *Id.* *But see* Sobel, *supra* note 153 (noting some hopeful signs with respect to East Timor's economy, including potential for developing its natural resources).

157. Wagstaff, *supra* note 150 ("economists reckon it could take 15 to 20 years for East Timor to reach the levels of Indonesia.").

158. CHENG, *supra* note 130, at 171.

159. Timor Sea Treaty Between the Government of East Timor and the Government of Australia art. IV, E. Timor-Austl., May 20, 2002, 2003 Austl. T.S. 13, *available at* <http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html>.

160. Sobel, *supra* note 153.

161. Erica Tay, *Singapore Ranked as World's Easiest Place to Do Business; New Zealand Slips to Second Spot in World Bank Report of 175 Economies*, THE STRAITS TIMES (SING.), Sept. 7, 2006 ("Among the 175 economies studied, troubled East Timor was second from the bottom. Only the Democratic Republic of Congo fared worse.").

tional assistance, without which the area's future would be bleak.¹⁶² It is debatable whether the people of East Timor are better off in a poor economy marked by starvation, high unemployment, and a high mortality rate than they would have been as a territory dependent on an economically self-sufficient state.¹⁶³ As such, the circumstances surrounding East Timor's declaration of independence may not have been enough to justify East Timor's independence when considered under the more rigorous sliding scale approach.

B. Kosovo

In 1989, the Serbian government seized control of Kosovo¹⁶⁴ and retained control for nearly twenty years until the Kosovo Assembly declared independence on February 17, 2008 in Pristina.¹⁶⁵ Throughout the 1990s, Kosovo was technically an independent part of Serbia,¹⁶⁶ but the occupation was marked by Serbia denying the people of Kosovo the right to participate in government life and committing rampant human rights abuses including beatings, arbitrary arrests, and torture.¹⁶⁷

In the late 1990s, a violent resistance emerged in Kosovo, and it was met with a vehement response by Serbian authorities.¹⁶⁸ While the U.N. Security Council issued Chapter VII resolutions demanding a cease-fire and peaceful negotiations with international supervision,¹⁶⁹ Serbia resisted efforts for peaceful settlements.¹⁷⁰ As a result, the U.N. Security

162. Anne-marie Evans, *East Timor's Shaky Foundations Need Long-Term Support*, SOUTH CHINA MORNING POST, June 10, 2006, at 16 ("If East Timor is left to its own devices, then with the current unrest, the future doesn't look rosy. However, both Mr. Miller and Mr. Jones are optimistic, provided an international taskforce can guide East Timor through a few more years.").

163. UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT INDICES: A STATISTICAL UPDATE 2008, available at http://hdr.undp.org/en/media/HDI_2008_EN_Tables.pdf. In the 2008 United Nations Human Development Indices ("HDI"), East Timor ranked 158 out of 179 (Low Human Development), while Indonesia ranked number 109 out of 179 (Medium Human Development). The HDI provides a measure of three dimensions of human development: life expectancy, literacy, and standard of living. *Id.*

164. Stefan Oeter, *Yugoslavia, Dissolution*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1563, 1566 (2000).

165. Bilefsky, *supra* note 52; Christine Spolar, *Kosovo Rejoices in Independence: Ethnic Albanians Cheer; Serbia Calls Declaration Illegal*, CHI. TRIB., Feb. 18, 2008, at 1.

166. Oeter, *supra* note 164, at 1566.

167. *Id.* at 1590.

168. *Id.* at 1591.

169. S.C. Res. 1199, ¶ 1, 3, 4, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

170. Oeter, *supra* note 164, at 1591-93 (2000).

Council adopted Resolution 1244 providing for U.N. administration of Kosovo.¹⁷¹

Resolution 1244 established the U.N. Interim Administration Mission in Kosovo to promote democratic self-government and “facilit[e] a political process designed to determine Kosovo’s future status”¹⁷² The duties of the U.N. Interim Administration Mission in Kosovo (the “UNMIK”) also included performing civilian administrative functions, promoting human rights, coordinating humanitarian relief and the reconstruction of infrastructure, maintaining civil law and order, and assuring the safe return of refugees.¹⁷³

The U.N. appointed former President of Finland Martti Ahtisaari as Special Envoy to Kosovo to assist in determining Kosovo’s future status.¹⁷⁴ In March 2007, Ahtisaari released the Comprehensive Proposal for the Kosovo Status Settlement,¹⁷⁵ which called for “[i]ndependence with international supervision.”¹⁷⁶ Serbia refused to accept the plan, and additional Russian resistance led to the plan’s demise, as the Security Council ultimately failed to adopt it.¹⁷⁷ With frustration at its peak among the people of Kosovo, the members of the Kosovo Assembly took it upon themselves to officially announce the territory’s independence.¹⁷⁸

Even though the international community recognized that Kosovo’s Albanians were subjected to gross human rights violations,¹⁷⁹ it consis-

171. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

172. *Id.*; see also Watson, *supra* note 123, at 273.

173. S.C. Res. 1244, *supra* note 171; see also Watson, *supra* note 123, at 273.

174. See Special Envoy to Kosovo, *Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, delivered to the Security Council*, U.N. Doc. S/2007/168 (Mar. 26, 2007).

175. The Secretary-General, *Comprehensive Proposal for the Kosovo Status Settlement, delivered to the Security Council*, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007) [hereinafter *Comprehensive Proposal for the Kosovo Status Settlement*].

176. *Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status*, *supra* note 174.

177. John Dugard & David Raič, *The Role of Recognition in the Law and Practice of Secession*, in SECESSION, INTERNATIONAL LAW PERSPECTIVES 94, 130 (Marcelo G. Kohen ed., 2006). See also Committee on the Civil Dimension of Security, *Kosovo and the Future of Balkan Security*, NATO Doc. 155 CDS 08 E bis (May 27, 2008) (prepared by Vitalino Canas), available at <http://www.nato-pa.int/Default.asp?SHORTCUT=1480>.

178. Spolar, *supra* note 153; see also Bilefsky, *supra* note 52; Watson, *supra* note 123, at 274.

179. See, e.g., G.A. Res. 51/111, U.N. Doc. A/RES/51/111 (Mar. 5, 1997); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, Res. 1996/2, U.N. Doc. E/CN.4/Sub.2/RES/1996/2 (Nov. 25, 1996); Press Release, Secretary-General of the United Nations, Secretary-General Addresses High-Level Meeting on Balkans, U.N. Doc. SG/SM/6992 (May 14, 1999).

tently upheld Serbia's right to territorial integrity.¹⁸⁰ It may have been this failure to balance Serbia's interest in territorial integrity with Kosovo's right to self-determination that led to Kosovo's declaration of independence.

Furthermore, other relevant factors moved the sliding scale balance in favor of independence. From the time Serbia seized control of Kosovo, there was a clear expression of the supermajority's preference. In a 1991 referendum held in Kosovo, the population overwhelmingly voted for independence from Serbia.¹⁸¹ There were also attempts at peaceful negotiations as well; Resolution 1160¹⁸² and the Ahtisaari Plan serve as examples of attempts at peaceful resolution of the crisis.¹⁸³

Currently, 62 out of 192 United Nations member states formally recognize Kosovo.¹⁸⁴ While it may at first seem that the international community has failed to recognize Kosovo's independence, this statistic is deceptive. The 62 countries that recognize Kosovo's independence make up 71.7% of the world's total nominal GDP.¹⁸⁵ Furthermore, 3 out of 5 U.N. Security Council Permanent Member States, 24 out of 28 NATO Member States, and 22 out of 27 European Union Member States recognize Kosovo.¹⁸⁶ Arguably, international harmony is promoted by Kosovo's independence because a large and influential percentage of the international community does in fact recognize Kosovo's independence.

Plagued by high unemployment, a need for major infrastructure, and limited economic growth, Kosovo currently faces immense challenges for economic development.¹⁸⁷ Kosovo must focus on building a strong, healthy, and self-sustaining economy for itself if it wishes to survive as an independent state. Fortunately, Kosovo has extensive assets, such as "rich mineral resources, a young and resilient population, and a robust

180. See, e.g., G.A. Res. 53/164, U.N. Doc. A/RES/53/164 (Feb. 25, 1999); S.C. Res. 1244, *supra* note 171; S.C. Res. 1203, U.N. Doc. S/Res/1203 (Oct. 24, 1998); S.C. Res. 1160, *supra* note 169; S.C. Res. 1199, *supra* note 169.

181. See Oeter, *supra* note 164, at 1590–91; *Kosovo Chronology*, *supra* note 131.

182. S.C. Res. 1199, *supra* note 169; S.C. Res. 1160, *supra* note 169.

183. Comprehensive Proposal for the Kosovo Status Settlement, *supra* note 175.

184. Who Recognized Kosovo as an Independent State? The Kosovar People Thank You!, <http://www.kosovothanksyou.com/statistics/> (last visited Apr. 6, 2010).

185. *Id.*

186. *Id.*

187. See *Kosovo Hearing*, *supra* note 122, at 1 (statement of Rep. Howard L. Berman, Chairman, H. Comm. on Foreign Affairs) (Rep. Berman stated upon his return from his visit to Kosovo that he "was struck by the immense need for economic development.").

drive to succeed.”¹⁸⁸ Additionally, with the announcement of Kosovo’s final status, business will likely be less reluctant to invest there and international financial institutions, including the World Bank and International Monetary Fund, will be able to offer monetary assistance.¹⁸⁹ Kosovo’s economy also improved with the arrival of the U.N. Interim Administration Mission (“UNMIK”) in Kosovo. Within a year of UNMIK’s arrival, Kosovo’s economy was described as “remarkably vibrant” by the Special Representative of the Secretary-General, Bernard Kouchner.¹⁹⁰ Kosovo’s private enterprises surpassed 1998 pre-war production and employment levels,¹⁹¹ construction was deemed “booming,” and “winter wheat planting was at 80% of the historical average.”¹⁹² Ironically, this progress was attributed to several unusually bold administrative decisions made by Special Representative Kouchner, which arguably exceeded his mandate as set forth in Resolution 1244.¹⁹³ Although much of this progress was hindered by the ongoing struggle over Kosovo’s final status, it does suggest that bold decisions by the leaders of Kosovo may lead to economic viability.

The challenges facing Kosovo will take years to overcome. For Kosovo to succeed, it must learn from other states that have gone through an economic transformation. The experience of post-Communist states in the 1990s may prove a helpful guide for Kosovo’s democratic transformation. For example, a democratic transformation requires a modernized

188. *Id.* at 2; *see also* Economic Initiative for Kosovo, Top 10 Reasons to Invest in Kosovo, available at http://www.eciks.org/english/publications/investing_in_kosovo/content/media/topten_web.pdf.

189. *See Kosovo Hearing*, *supra* note 122, at 21 (statement of the Hon. Daniel Fried, Asst. Sec’y, Bureau of European and Eurasian Affairs, U.S. Dep’t of State); Henry H. Perritt, Jr., *Economic Sustainability and Final Status for Kosovo*, 25 U. PA. J. INT’L ECON. L. 259, 261 (2004) (stating that uncertainty over Kosovo’s final status is partly responsible for Kosovo’s slow economic progress); Nick Andrews & Bob Davis, *Kosovo Wins Acceptance to IMF*, WALL ST. J., May 6, 2009, at A8 (“Joining the IMF could give Kosovo important access to additional economic aid and reassure potential investors, the Kosovar government says. The government plans three major privatizations this year—a power-station project; the airport serving Pristina, the capital; and postal and telecoms company PTK—and it hopes to attract foreign investors. A U.S. official said the IMF imprimatur would make it easier for Kosovo to find government and private financing.”).

190. The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, delivered to the Security Council*, ¶ 129, U.N. Doc. S/2000/538 (June 6, 2000).

191. *Id.*

192. *Id.*

193. *See* Christian Eric Ford & Ben A. Oppenheim, *Neotrusteeship or Mistrusteeship? The “Authority Creep” Dilemma in United Nations Transitional Administration*, 41 VAND. J. TRANSNAT’L L. 55, 87 (2008).

banking system including credit, financial regulators, and an insurance system.¹⁹⁴ Furthermore, as the experience of post-communist countries shows, a flat tax reduces corruption,¹⁹⁵ which in turn will increase the flow of money and investment into Kosovo.¹⁹⁶ With bold decision-making and adherence to proven models, Kosovo may become a self-sustaining economy in the long term.

All in all, while the legitimacy of Kosovo's declaration of independence was not clear-cut, it was certainly not an open-and-shut case if analyzed in light of the totality of the circumstances. While it is true that its people suffered grave human rights abuses under the Serbian regime, Kosovo resorted to violent resistance rather than peaceful settlement of its disputes. However, Kosovo's expression of supermajority will for independence was present as early as 1992 during the referendum for independence. While bleak, the economic viability of Kosovo as an independent state is not out of the question. The transition period to full independent statehood will be difficult, but the circumstances surrounding its secession suggest that it has the potential and ability to become self-sufficient. Finally, while only 62 out of 192 U.N. Member States formally recognize Kosovo's independence, those Members do represent 70.94% of the world's total nominal GDP.

These circumstances surrounding Kosovo's declaration may have indeed shifted the sliding scale of independence far enough that Serbia's then-existing Political Liberty Triangle could no longer sustain itself and collapsed. As a result, Kosovo formed its own Political Liberty Triangle and Serbia's Political Liberty Triangle repairs itself without Kosovo.

C. Reconciling East Timor with Kosovo

How does one reconcile independence for Kosovo under the Political Liberty Triangle paradigm, but not for East Timor? Both territories suffered from subjugation, exploitation, and domination. Gross, systematic, and extensive human rights violations marked both territories. There was also evidence of attempts at peaceful negotiations, violent resistance, and expressions by both supermajorities of their wills to secede. The economic instability present in East Timor at the time it seceded can also be seen in Kosovo at the time it seceded, and international harmony was promoted in both cases.

194. *Kosovo Hearing*, *supra* note 122, at 26 (statement of the Hon. Daniel Fried, Asst. Sec'y, Bureau of European and Eurasian Affairs, U.S. Dep't of State).

195. *Id.*

196. *Id.*

However, under the Political Liberty Triangle paradigm, Kosovo shifted on the sliding scale of independence to a much greater extent than East Timor largely because Kosovo was a “unique situation.”¹⁹⁷ U.N. Security Council Resolution 1244 established the U.N. Interim Administration Mission in 1999 in Kosovo to promote democratic self-government and “facilit[e] a political process designed to determine Kosovo’s future status.”¹⁹⁸ The situation in Kosovo involved an unprecedented level of participation by the United Nations and NATO not present in East Timor’s circumstances.¹⁹⁹ Additionally, since the breakup of the former Yugoslavia, Kosovo has had independent status even while under the control of Serbia—meanwhile, East Timor never possessed independent status. As such, Kosovo’s independence was the natural progression of Yugoslavia’s breakup, as all people in the former Yugoslavia were given their right to self-determination.²⁰⁰

The circumstances surrounding secession in Kosovo and East Timor were important considerations that factored into an examination of the heart of the Political Liberty Triangle and may have justified secession for Kosovo, but not East Timor. Ultimately, all circumstances surrounding a state’s claim to secession are appropriate to analyze under the Political Liberty Triangle paradigm.

Returning for a moment to East Timor—one might question what alternative solutions to independence were available. While East Timor’s independence in 2002 is illegitimate under the Political Liberty Triangle, independence may in fact have shifted toward legitimacy within years had East Timor sought further peaceful negotiations and more U.N. involvement and continued to develop its economy. The purpose of the Political Liberty Triangle paradigm is to allow for secession only in unique situations, and the overarching aim of this new approach is to maintain a balance between sovereignty and self-determination. If lacking insistence on the necessity of that balance, any paradigm would be flawed.

197. *Id.* at 27.

198. Watson, *supra* note 123, at 273 (quoting S.C. Res. 1244, *supra* note 171).

199. U.S. GENERAL ACCOUNTING OFFICE, KOSOVO AIR OPERATION: NEED TO MAINTAIN ALLIANCE COHESION RESULTED IN DOCTRINAL DEPARTURES 3 (2001), available at <http://www.gao.gov/new.items/d01784.pdf> (characterizing NATO’s military campaign in the Federal Republic of Yugoslavia, which aimed to “compel President Milosevic to cease the violence in Kosovo and allow all refugees to return to their homes [and] restore peace throughout the Balkan region,” as “the largest combat operation in NATO’s 50-year history.”).

200. See, e.g., *Timeline: Break-up of Yugoslavia*, BBC NEWS, May 26, 2006, <http://news.bbc.co.uk/2/hi/europe/4997380.stm>.

CONCLUSION

The power of an accurate paradigm is that it explains, and then it guides.²⁰¹ Presently, the international community's paradigm focuses on self-determination to determine the lawfulness of a claim to secession. This outdated approach explains *why* secession might be justified, but it does not explain *how* that conclusion is ultimately to be reached. The failure of this approach (with respect to its lack of guidance) may be attributed to the lack of any international norm that defines self-determination.

Alternatively, as this article has demonstrated through case studies of East Timor and Kosovo, the Political Liberty Triangle and the sliding scale of independence provide analytical guidance. This approach can be used to explain why a group will seek secession in the name of self-determination. More importantly, however, it has the potential of guiding scholars, advocates, and other decision-makers to a proper conclusion whenever the legitimacy of a claim to secession is in dispute.

Unfortunately, like old habits, paradigms die hard.²⁰² Without an accurate paradigm, the confusion and complex issues that have evolved in regard to the doctrine of secession will not fade. It helps to think of a paradigm as a map.²⁰³ If a scholar's "map" is inaccurate, the scholar will remain lost regardless of how long and hard the scholar searches for his or her destination. However, with an accurate map, scholars can reach their desired destinations with sufficiently rigorous and proper reasoning and analysis. The Political Liberty Triangle is the best heuristic "map" for answering the question: When is secession lawful?

201. COVEY, *supra* note 76, at 20.

202. *Id.*

203. *Id.* at 19.