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# Self-Determination: A Reassessment in the Post-Communist Era

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## I. INTRODUCTION

Self-determination is commonly defined as the right allowing a people to "freely determine their political status and freely pursue their economic, social and cultural development."[1] The general view during the post-World War II (WWII) period, and particularly since the 1960s, has been that self-determination has emerged as an operative legal right in international law[2] and has arguably acquired the status of *jus cogens*.[3] The character of self-determination recognized as a legal norm, however, is usually narrowly confined to the cases of people under colonial rule. Indeed, among international lawyers there is a controversy as to whether self-determination is a recognized legal norm outside the colonial context.[4]

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1. This is a standard United Nations (U.N.) definition adopted in most U.N. literature on the subject. *See, e.g.*, G.A. Res. 545, U.N. GAOR, 6th Sess., Supp. No. 20, at 36, U.N. Doc. A/2119 (1952); G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4884 (1960); G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

2. Western Sahara, 1975 I.C.J. 12, 120-21 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 597-98 (4th ed. 1990).

3. Barcelona Traction, Light & Power Co. (Belg. v. Spain) 1970 I.C.J. 3, 304 (Feb. 5) (separate opinion of Judge Ammoun); Hector G. Espiell, *Self-Determination and Jus Cogens*, *in* U.N. LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 167 (Antonio Cassese ed., 1979); Georg Ress, *The Legal Status of Hong Kong After 1997*, 46 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG JOURNAL OF INTERNATIONAL LAW] [hereinafter ZAÖRV] 647, 651 (1986).

4. One school argues that as a mechanism for decolonization, self-determination is applicable only to colonial situations, and that the beneficiaries in respect of whom self-determination is recognized as a legal right are *colonial peoples*. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 49 (1990). The proponents of this view argue further that nationalities, tribes, or minorities that are not recognized as subject to colonial rule do not have a legitimate claim to self-determination. The logical extension of this view is that while the territorial entity as a whole may exercise its right of self-determination to become established as a state, the constituent parts of the state do not individually possess the right. Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971).

Another school of thought argues that self-determination is a right for *all*

There is substantial literature in international law to support the thesis that self-determination applies in the post-colonial context.[5] Nevertheless, the debate on the subject persists. The problems with post-colonial self-determination are best demonstrated in the case of Africa. In the colonial period, Africa, which had the largest collection of colonies, naturally became the center of intense nationalist activity. For the colonies of Africa, independence came within the framework of international law under the banner of self-determination. The reality of the African situation, however, was that almost every colony was in fact made up of different ethnic groups that had been brought together by the colonial administrators. The result was that the colonial boundaries did not coincide with ethnicity. They certainly provided no evidence of the willingness of the ethnic groups to cohabit under the same administration.

In the process of decolonization, African nationalists sought, and were granted, self-determination on the basis of these colonial units. It is therefore the case that the independent states that emerged after colonialism in Africa were political entities with boundaries coinciding with those of the colonies they used to be, with all the arbitrary demarcations imposed by colonial rule. The result, as noted by one au-

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*peoples* as such and not restricted to only colonial peoples. Accordingly, it is argued, the beneficiaries of the right could be any distinct group that can be classified as a people, irrespective of whether they live under a colonial situation or they are a part of a sovereign state. This school sees self-determination as an aspect of human rights and a necessary condition for the proper exercise of democratic rights. *See generally*, Robert Rosentock, *The Declaration of Principles of International Law Concerning Friendly Relations*, 65 AM. J. INT'L. L. 713 (1971); ARISTIDIS S. CALOGEROPOULOS-STRATIS, LE DROIT LES PEUPLES À DISPOSER D'EUX-MEMES 342-48 (1973); UMOZURIKE O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 199 (1972); MICHAEL B. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 53 (4th ed. 1982); Sam K.N. Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, *in* 10 AUSTL. Y.B. INT'L L. 67 (1983).

5. *See generally* M.G. Kaladharan Nayar, *Self-Determination: The Bangladesh Experience*, 7 REVUE DES DROITS DE L'HOMMES [HUMAN RIGHTS JOURNAL] 231, 258 (1974); M.G. Kaladharan Nayar, *Self Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L L.J. 321 (1975); Olga Sukovic, *The Principle of Equal Rights and Self-Determination of Peoples*, *in* PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION 323 (Milan Sahovic ed., 1972); Ved P. Nanda, *Self-Determination in International Law: A Tragic Tale of Two Cities*, 66 AM. J. INT'L. L 321 (1972); Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 275 (1981). *Compare* Robert A. Friedlander, *Self-Determination: A Legal-Political Inquiry*, *in* SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS 307, 313 (Yonah Alexander & Robert A. Friedlander eds., 1980); *and* Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L. L. 790 (1976); *with* Lung Chu Chen, *Self-Determination as a Human Right*, *in* TOWARDS WORLD ORDER AND HUMAN DIGNITY 198 (W. Michael Reisman & Burns H. Weston eds., 1976); *and* S. Prakash Sinha, *Is Self-Determination Passe?*, 12 COLUM. J. TRANSAT'L. L. 260 (1973) (discussing various viewpoints on the applicability of self-determination in the post-colonial context).

thor, is that in the post-1945 era, the Latin American notion of *uti possidetis* and the general notion of self-determination were synthesized into the doctrine of decolonization.[6]

After decolonization, the scene was set in Africa for a second generation of self-determination demands. After the successful application of self-determination to decolonize the continent, many of the ethnic groups within the newly emerged states sought the right to establish themselves as independent states. Within the post-colonial context in Africa, the right of self-determination was therefore to become synonymous with the right of secession. In spite of persistent demands leading to endemic wars in several parts of the continent, African states have generally resisted the application of the right in the post-colonial context. The basis for their rejection of the right has been principally political. But on the other hand, they have been helped considerably by the uncertainty of international law on the subject. If decolonization demonstrated the success of international law in assisting the peaceful transition from colonial rule to statehood in places like Africa, then the law has been a monumental failure with respect to post-colonial self-determination.

However, just as the international community appears to have settled with the ambivalence and the failure of the law towards post-colonial self-determination, political events in Eastern Europe have brought up the issue of self-determination in a context that, though not identical to that of post-colonial Africa, is nonetheless very similar to the African scenario. Since the end of communism in Eastern Europe, not only has the former East Germany been absorbed into the Federal Republic of Germany (FRG), but the world has witnessed the emergence of several new states that used to be constituent parts of the Soviet Union (USSR); Czechoslovakia has divided into two states; and Yugoslavia is still going through the painful traumas of secessionist wars that have now turned into wars for territorial acquisition. The events in Eastern Europe bear some resemblance to post-colonial self-determination in Africa. In their substance, however, they have sufficient differences to justify including them in a separate category. These may be categorized as "cases of self-determination in the post-communist context" rather than the post-colonial context.

A significant feature of the cases of self-determination in the post-communist context is that they have all attracted responses different from those in the post-colonial context. All the cases, including Yugoslavia, have attracted favorable responses leading to the recognition of the new states and their subsequent membership in the U.N. The question of the validity or applicability of self-determination to these

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6. Thomas M. Franck, *Post Modern Tribalism and the Right to Secession, in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3, 5 (Catherine Brölmann et al. eds., 1993)

cases has never been at issue, let alone been disputed.

In this article, the principal objective is to examine the differences between the post-colonial cases and the post-communist cases of self-determination and the responses they have tended to attract. The focus of the article will be on post-communist self-determination and the interplay between international law and politics in determining the acceptance or rejection of the right in either case.

## II. THE POSITION OF INTERNATIONAL LAW ON POST-COLONIAL SELF-DETERMINATION

The phrase "post-colonial self-determination" can be used in one of two senses. In a broad sense, it describes the application of, or demand for, self-determination in any context that is not colonial. In this regard, it specifically relates to the operation of the right after the wave of decolonization in the post-1945 period. The phrase can also be used in a narrower sense. In this second sense, it means demands for, and application of, self-determination in the states that were colonies in the post WWII period. In this sense, the operation of self-determination is a genuine "second generation" phenomenon. For the purposes of this paper the second and narrower meaning of post-colonial self-determination is preferred because it reflects more accurately the phenomenon of the self-determination operation under consideration here.

The term "post-colonial" in its broader sense can be misleading. The range of beneficiaries for self-determination is very wide. For instance, sovereign states are unquestionably subjects of self-determination, but the operation of the right in respect of such beneficiaries is anything but post-colonial. One cannot, therefore, safely use the term "post-colonial" to refer to all cases of self-determination occurring after the wave of decolonization. The use of the term in a broader sense also implies a temporal element. "Post-colonial" interpreted to mean the *period after decolonization*, generally without reference to a specific place and context, presupposes a definite cut-off date for decolonization. But decolonization occurred at different places at different times. It is also debatable whether decolonization has in fact ended, given cases such as New Caledonia and the other French colonies. On the other hand, "post-colonial" used in the narrower sense refers to the specific context involving a claim against a state in the period after the state itself has exercised self-determination and emerged from colonial rule.

### A. *The Normativity of International Law and the Issue of Post-Colonial Self-Determination.*

In their assessment of the law's position on specific issues, international lawyers state the law as *lex lata*. In so doing, the usual practice is for the lawyers to assess specific factual and related issues

against a background of the accepted sources and evidence of international law and draw appropriate conclusions. Thus, in the specific case of post-colonial self-determination, the validity of the right is tested against the sources of law: general or particular conventions, international custom as evidence of state practice, general principles of law accepted by civilized nations, decisions of tribunals and the writings of publicists. These sources do not generally support the existence of the right. International lawyers using this methodology were therefore bound to draw negative conclusions after a systematic analysis. The problem with this methodology is that it seeks to address a normative issue using non-normative criteria. The point here is that the standard methodology of testing an issue against a background of the sources of law to help determine its validity is only useful when we are considering the issue as *lex lata*.

In the context of the U.N. Charter and, in particular, regarding decolonization, the sources clearly establish the legal status of self-determination as *lex lata*. However, once the inquiry is expanded to include post-colonial self-determination as such, within the established criteria for (colonial) self-determination generally, the result is bound to be negative because the established criteria make no room for this variation of self-determination. For instance, a survey of relevant international conventions does not indicate any positive recognition for a right of post-colonial self-determination in international law. In more specific terms, the U.N. Charter and the Human Rights Covenants only provide for self-determination in the colonial context. While the Helsinki Accords (Accords) seem to support post-colonial self-determination, a careful evaluation of the Accords and the history of their negotiations reveals at best tepid support for the right.

The formulation of self-determination in the text of the Accords was the result of intense negotiations between the Western State participants and the Eastern Bloc countries, particularly the former Soviet Union.[7] In pursuing the inclusion of self-determination in the Accords, the Western States were motivated primarily by the desire to restrain the Soviet Union from any future Czechoslovakia-style invasion under the Brezhnev Doctrine and to provide a recognized basis for the claims of self-determination by the Baltic Nations under Soviet rule.[8] In specific reference to the Baltic Nations, it was suggested that self-determination as incorporated in the Accords is a recognition of the "universal nature of [the principle] for all peoples who have lost their political independence through force or who have been separated against their

7. Antonio Cassese, *The Helsinki Declaration and Self-Determination*, *in* HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORDS 83 (Thomas Buergenthal ed., 1977).

8. Harold S. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?*, 70 AM. J. INT'L L. 242, 253-56 (1976).

will."[9] It is not at all clear that the parties meant to recognize post-colonial self-determination as such by incorporating the principle in the Accords. In any case it is instructive to note that before the demise of the Soviet Union, neither the Baltic States nor post-colonial claimants were able to make any successful claims based on the Accords because the provisions of the Accords are not legally binding.[10] In pressing for the inclusion of self-determination, the West had therefore been aware that its practical effects could well be marginal for the intended beneficiaries.[11]

On the other hand, the Charter of the Organization of African Unity (OAU) implicitly rejects post-colonial self-determination through a commitment to the maintenance of territorial integrity.[12] The African position, as reflected in the OAU Charter, is reinforced by a persistent opposition to separatist claims by African states based on an agreement by the states to respect their pre-existing colonial boundaries and on other political considerations. In the African context, however, whereas the general opposition to post-colonial claims, on first impression, gives the appearance of an emerged *opinio juris* providing the basis for a regional customary international law rule against post-colonial claims, a closer examination reveals a different situation. States that oppose a claim in one instance may quite easily support a similar post-colonial claim in another instance. Thus, Tanzania recognized Biafra but made no attempt to support the Eritreans. In the case of the Western Sahara, the OAU members were, and are still, divided on the admissibility of the claims of the Polisario against Morocco.[13] In more recent times, the Banjul Charter has been adopted incorporating provisions that implicitly support post-colonial self-determination that undermines the OAU Charter position.[14] Thus, contrary to common opinion, one can hardly argue that there exists a regional rule that precludes post-colonial self-determination in Africa.

General international practice as reflected through the U.N. has also been far from uniform. The U.N. was silent on the claims of Biafra, but it tacitly admitted the claims of Bangladesh when the territory effectively separated itself from the parent state. On the other hand, the U.N. actively assisted the suppression of the Katanga claims[15] and has condemned the purported secession of Cyprus in

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9. Boris Meissner, *The Right of Self Determination after the Helsinki Accords for the Baltic Nations*, 13 CASE W. RES. J. INT'L. L. 375, 378 (1981).

10. *See* Russell, *supra* note 8, at 246-49; Oscar Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

11. Russell, *supra* note 8, at 256.

12. ORGANIZATION OF AFRICAN UNITY CHARTER, art. II.

13. *See* Sam Blay, *Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights*, 29 J. AFR. L. 147, 155-56 (1985).

14. *Id.* at 157-59.

15. S.C. Res. 5002, U.N. SCOR, 16th Sess., Supp. for Oct.-Dec. 1961, at 148,

recent times.[16] Apart from the inconsistent treatment of the cases, the response of the U.N. in each was not based on any existing international law rule against post-colonial self-determination. In all, the practice of the organization neither supports nor rejects the existence of the right as a matter of law.

No general principle of law recognized by the legal system of independent States permits post-colonial self-determination. On the other hand, no principle prohibits such claims. Regarding judicial decisions, the most relevant and direct one is the Aaland Islands Case,[17] which seemed to support the right but only as a last resort or in very exceptional circumstances where a section of a state's population is deprived of the state's protection. As a rule, however, the decision unequivocally rejected the existence of the right of self-determination for peoples in a non-colonial context.[18] With the exception of the African case and the decision in the Aaland Islands dispute, the various law determining agencies we have examined do not indicate any recognition or rejection of a right of post-colonial self-determination in international law. The African practice only relates to a regional situation and is consequently restricted. The Aaland Islands decision stands isolated without any collaboration from international practice, conventions, the general principles of law or even other judicial decisions. As a result, the current international law position on the status of the right of self-determination in the post-colonial context seems more or less "neutral." There are no definite international law rules that forbid or permit a claim to the right. Past cases would suggest that, in general, the law would accept a claim if it is successful.[19] On the other hand, where the claim is unsuccessful, the law would recognize the authority of the parent state as legitimate irrespective of the internal conditions that may have necessitated the claim in the first place.

In describing international law as neutral, there is the risk of an implicit suggestion that the law is an abstract machinery that evolves by itself to assume a positive or negative, or indeed a neutral position

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U.N. Doc. S/5002 (1961). *See also*, U.N. SCOR, 16th Sess., Supp. for Oct.-Dec. 1961, at 132, U.N. Doc. S/4985/Rev.1 (1961) (Draft of resolution submitted by Ceylon, Liberia, and the United Arab Republic); 1961 U.N.Y.B. 57, 65-71, U.N. Sales No. 62.I.1 (discussing the debates).

16. S.C. Res. 541, U.N. SCOR, 38th Sess., 2500th mtg., Supp. for Oct.-Dec. 1983, U.N. Doc. S/541 (1983).

17. LEAGUE OF NATIONS O.J., Spec. Supp. 3, at 5 (1920); *The Aaland Islands Question: Report to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B.F. 21/68/106 (1921). *See also* Charles N. Gregory, *The Neutralization of the Aaland Islands*, 17 AM. J. INT'L L. 63 (1923) (commenting on the decisions on the Aaland Islands question).

18. LEAGUE OF NATIONS O.J., *supra* note 17; JAMES BARROS, THE AALAND ISLANDS QUESTION: ITS SETTLEMENT BY THE LEAGUE OF NATIONS (1968) (providing a detailed documentary account of the dispute).

19. Bangladesh is the best example in this regard.

on a particular subject matter. International law is not a self-evolving institution. The development of the law is the product of state activity. To this extent, the position of the law on a subject matter is in many respects a reflection of the consensus, or absence thereof, in the community. This is particularly so in the case of post-colonial self-determination. A claim of self-determination in the post-colonial context is a claim on the integrity of the centralized state system. In the countries where the claims have been made, it is therefore hardly surprising that the claims have generally met with disapproval. In all the cases, the rest of the international community has tended to support the claimants or the parent states depending on political expediency rather than any set legal standards. The element of political expediency is perhaps the single most important factor that accounts for the absence of any coherent rules of international law on post-colonial self-determination.

In the absence of specific international law rules that deal with post-colonial self-determination, any inquiry on the subject must necessarily be normative rather than putative. International law is both normative and dynamic. To this extent, it provides the standard for measuring state behavior. But in its normativity it can also be molded to accommodate prescriptions for particular conduct or the development of new rules. It is within this context that the issue of post-colonial self-determination needs to be considered.

Before decolonization, self-determination was applied extensively in Europe. During its evolutionary stages, the beneficiaries of the principle had been distinct minorities or peoples who were non-self-governing or subject to rule by other nationalities. With the emergence of colonialism and the subsequent need for decolonization, colonial peoples came to be identified as a new category of beneficiaries. As a result of the focus of self-determination on decolonization since 1945, international lawyers have tended to dwell on the relevance of the principle only to colonial peoples. They have thus glossed over the essential similarity between the significance of the principle (as applied to minorities and nationalities) in the pre-1945 era on the one hand, and the post-1945 era on the other hand. More importantly, they have ignored the teleological basis of self-determination over the years as a right that has applied *mutatis mutandis* to nationalities, minorities, occupied territories, and colonial units to remedy situations of subordination.

The application of self-determination to diverse groups is evidence of its flexibility. It also lends weight to the view that the right of self-determination is dynamic and applicable to different beneficiaries in different circumstances. Just as the right was used to "rectify" cases of political subordination in previous stages of its evolution and as a mode of expression of popular will and sentiment for specific forms of political association, so can it be applied in modern times to similar

situations irrespective of whether they are colonial or not.

The case for self-determination, as discussed in this context, relates to the principle as *lege ferende* rather than as *lex lata*. Given the normativity and dynamism of international law, it should be possible for the law to accommodate this variant of self-determination as it did with respect to the principle through the period of decolonization. But to the contrary, not only has the law failed to regulate post-colonial self-determination, it has tended to be passive when the principle has been in dispute, even in cases involving major conflicts that threaten international peace such as the cases in Biafra, Eritrea, and the Sudan. Where the law has responded, it has tended to be indeterminate and inconsistent. In the recent case of self-determination claims in Europe following the demise of communism, the response of the international community has been markedly different. The former constituents republics that chose independence have all been admitted to the U.N. Even in the case of Yugoslavia, the community has shown a willingness to accept the dismantling of the former Yugoslavian state and to admit the right of self-determination of Croatia and the other former regions of Yugoslavia. Does the international community's position on these post-communist cases indicate a double standard, or is it in fact an indication of the probable normative development in international law of self-determination generally and post-colonial cases for that matter? Finally, if the responses indicate no double standards, or if there is not a normative development, then is there a justifiable basis that adequately explains the difference in attitudes towards these cases?

## III. POST-COMMUNIST SELF-DETERMINATION: THE BACKGROUND

To understand self-determination in the post-communist context, one must first understand it in the communist context. In WWII, the Soviet Union was a major power and played a significant role in the victory of the Allies. During the immediate post-war period, the Soviet Union emerged as a superpower, consolidated its communist regime, and established itself as a post-modern empire. In relative terms, the Soviet empire lasted for only a short period. However, within its brief fifty year existence, it wielded great influence and power as one of two international power blocks. Within its sphere of influence were trapped sovereign states compelled to take up the communist ideology and to subscribe to the ideals of socialist internationalism. Ethnic, tribal, and national groups were trapped within the Soviet Union itself and, in some instances, they were compelled to be part of the union. Even though the union was made up of independent republics, the constituent republics were anything but independent entities that could separate from the union at will. Communist-style authoritarianism kept such separatist ambitions under control, usually by the threat of force. The right of peoples in the Soviet empire to self-determination was no

more than a Leninist chimera.

A. *Self-Determination in the Communist Context*

The Russian Empire was primarily a conglomerate of many nationalities ruled over by the Romanovs. What the Bolsheviks inherited after the 1917 revolution was, therefore, a mosaic of an Empire with the risk of disintegration into component nationalities. The task for the Bolsheviks was the reconstitution of what was once the Tsarist domain and its subsequent harnessing as the basis of the socialist empire that was to emerge later.[20]

The multinational composition of the Soviet Union was unique because the territory inherited by the Bolsheviks comprised peoples of European, Asian, and other racial backgrounds. Uniting the different nationalities under a post-revolutionary authority was a Herculean task.[21] If the nationalities were to be fused together as a basis for the grand union of the Soviet State, they needed to be brought together in the first place. From the beginning, there was evidence of strong resistance from nationalities such as the Ukrainians, the Central Asian Peoples, and the Transcaucasians, who had been known to demonstrate strong separatist tendencies. To meet the demands of such groups, and indeed to appease them, Lenin opted for a strategy of assurance that, among other things, nationalities would not be subject to Russian domination, they would have autonomy, and they would have the right to secede should they so desire. This provided the motivation

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20. After the Civil War and once they were in power, the Bolsheviks made no secret of their territorial ambitions and their intention to take over the Tsarist territorium. They perceived themselves as the legitimate heirs of the Tsarist Empire and looked on themselves as the true successors to the Romanov regime. By the mid-1920s, Soviet historiography was using this perception as a crucial part of its claims to rule over the non-Russian population. Quite apart from the justifications based on Marxist-Leninist rhetoric, early Soviet leaders promoted the idea of replacement as the basis for their right to rule *in loco* of the Tsarist government because of the indivisibility of the Tsarist Empire. This is a significant point and was later to be used by Stalin as a justification for the seizure and subsequent annexation (in his words, the seizure was a reintegration) of eastern Poland, the Baltic countries, and northern Romania. *See* Henry R. Huttenbach, *Towards a Unitary Soviet State: Managing a Multinational Society, 1917-1985*, *in* SOVIET NATIONALITY POLICIES: RULING ETHNIC GROUPS IN THE USSR 1, 4 (Henry R. Huttenbach ed., 1990) [hereinafter SOVIET NATIONALITY POLICIES].

21. As Huttenbach notes,

> [t]he re-emergence anywhere after WWI of a viable multinational political entity of great geographic expanse seemed improbable and, certainly, unrealistic given the trends embodied in the dramatic contemporary events. The disintegration of the Hapsburg and Ottoman Empires and the continued rise of ethnically driven nationalism strongly dictated against the wisdom of pursuing a more imperial — some would have argued, indeed Utopian — dream of believing in the possibility of ruling over diverse and mutually antagonistic peoples within the same borders.

*Id.* at 1-2.

for the leadership to make provision for national self-determination.[22] In the Declaration of the Rights of the Peoples of Russia, assurances were given to induce the nationalities to join in the grand union of the Soviet State. The assurances included a range of options that embraced self-determination.

As a result, a federal structure of government was established under which "independent" national statehood was granted to some of the most numerous nationalities. To the smaller ethnic groupings, a system of national autonomy was granted. The system resulted in the establishment of 15 union republics, 20 autonomous republics, 8 autonomous *oblasts*, and 10 national *oblasts*. Even though the union republics were assured of the right of secessionist self-determination by the Soviet Constitution, Lenin made it clear that this did not mean that the leadership supported secession as such. This is well illustrated by his often quoted statement that the "right of divorce is not an invitation to all wives to leave their husbands."[23]

Self-determination in the Soviet Constitution was perceived principally as the right to secede. It served the politically important purpose of reassuring nationalities with separatist ambitions. Paradoxically, it was meant to bring the nationalities into the union and not to provide the vehicle for secession.[24] For all practical purposes, the right of self-determination as such did not exist under the Soviet Con-

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22. The nationality question, however, posed a special problem for the Bolsheviks. Communist ideology did not allow for different nationalities or for commitments to ethnicity. Marxist ideology saw nationalism as a bourgeois condition and product of class society. In the words of Lenin, "workers know no fatherland." As far as the architects of the Soviet Union were concerned, nationalism was doomed to oblivion in the Soviet system once communism was achieved. This objective was to be achieved by fusing (*sliianie*) all of the nationalities into the Soviet system. However, the logic of this strategy was that the stage of separate republics in the union was to be only a transition towards the eventual *sblizhenie* or merger of all the groups into one citizenry. To Lenin, then, self-determination was politically expedient rather than an inherently functional political theory that had to be put into practice. On the eve of the Bolshevik seizure of power and during the meeting of the second All-Russian Congress of Soviets of Workers' and Soldiers' Deputies, the official position authorized by Lenin was to guarantee autonomy (self-determination) to all the non-Russian nationalities that found themselves under Soviet rule. *Id.*

23. *The Other Political Issues Raised and Distorted by P. Kievsky*, *in* 23 V.I. LENIN, SOCHINENIIA [LENIN: COLLECTED WORKS] 68, 72 (4th ed., Institute of Markism-Leninism, Central Committee of the CPSU ed., 1960).

24. Lenin and his co-architects believed that while a guarantee of secessionist self-determination was necessary to encourage the participation of separatist minded nationalities in the union, with time such nationalities, and in particular the non-Russian nationalities, would come to realize the benefits of belonging to the union and would therefore not want to secede. Within Marxist-Leninist ideology, in any case, nationalist sentiments underlying secessionist demands would wither away with the development of communism in the Soviet state. To achieve this objective, it was also part of the strategy to Sovietize the peoples of the various nationalities into a homogenous group of citizenry with no ethnic oriented allegiances as such.

stitution or its legal system. Despite the attempts at Sovietization of the nationalities, parochial nationalist sentiments remained, particularly among the non-Russian nationalities.[25]

The strict dictatorial system under the Soviet leadership prevented the non-Russian nationalities from airing their deep resentment and discontentment. The nationalities were kept in the union through a system of inducements and whenever necessary by force. Nevertheless, they managed to maintain their ethnic identities.[26]

Despite the multi-ethnic character of Soviet society, it was unquestionably governed from Moscow, which in fact took it for granted that a diverse population was evolving into a single citizenry under the great socialist reforms. Indeed, the Bolsheviks and the subsequent leadership avoided recognition of the highly visible fact of the multinational character of the Soviet Union. In post-revolution propaganda, emphasis was always placed on the unity of Soviet citizenry rather than the plurality of the society.

By the 1960s, Soviet leadership was content to suggest that the nationality issue had been successfully resolved within the socialist framework, as envisaged in Marxist-Leninist writings. At the 22nd Party Congress in 1961, for instance, Khrushchev optimistically noted that "the Party has solved one of the most complex of problems which has plagued mankind for ages and remains acute in the world of capitalism to this day — the problem of relations between nations."[27] In

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25. To bring the nationalities together, the leadership needed an administrative machinery that could provide the umbrella for an effective integration program. The Communist Party was to be used as the instrumentality for this purpose. The immediate goal for the party and indeed for the leadership was to neutralize the mutual antagonisms of the various groups and to bring them together into a common friendship of nations (*druzhba narodov*). As a supra-republic institution, the party was to be ethnically neutral and be managed by cadres drawn from the component ethnic groups of the union. In many respects, this was in fact the case under a program called *korenizatsiia* within the party until the late 1930s when Stalin changed course and embarked upon a program of Russification as the basis for denationalization. The approach of Stalin was different from that advocated by Lenin.

Stalin's Russification strategy undermined the smooth pre-*sliianie* program of equal development and comradeship among the nationalities as envisaged by Lenin. Many of the nationalities suffered glaring disparities. The non-Russian nationalities were to develop a deep sense of alienation towards Moscow that would last for the life of the Soviet Empire. The resentment was exacerbated by mass deportations of some of the nationalities across the Soviet Union in their leadership's effort to create that single bond of Soviet citizenry envisaged in Marxist-Leninist ideology.

26. Huttenbach notes that "[n]either carrots nor sticks proffered by tsars or commissars, neither generous economic inducements nor violent assaults, ranging from mass deportation to mass starvation, fundamentally altered the multinational, multicultural demographic reality of the Soviet Union." Huttenbach, *supra* note 20, at 7.

27. Gregory Gleason, *Leninist Nationality Policy: Its Source and Style*, *in* SOVIET NATIONALITY POLICIES, *supra* note 20, at 9, 15 (quoting *Pravda*, October 18, 1961).

the same vein, the new Party Program adopted by the 22nd Party Congress went on to suggest that the "borders between the union republics within the USSR are increasingly losing their former significance" and that this was the result of the fact that the republics are "all united into one family by common vital interests and are advancing together toward a single goal — Communism."[28] In later years, Brezhnev put it differently, asserting that a new historical community, the Soviet people, had emerged.[29] As recently as 1986, the Communist Party of the Soviet Union (CPSU) Party Program adopted a resolution stating that "the nationality question, as it has been inherited from the past, has been successfully solved."[30] However, Gorbachev expressed it in more realistic terms at the 27th CPSU Congress, observing that "[o]ur achievements should not create the impression that there are no complications in nationality processes. The contradictions characteristic of all development are unavoidable in this sphere as well."[31]

B. *Self-Determination and the Disintegration of the USSR.*

The candid admission by Gorbachev that nationality problems still existed in the Soviet Union must be understood against a background of his political reforms introduced through *glasnost* and *perestroika*. Not only did glasnost allow a great measure of freedom of speech, it also provided the nationalities with the avenue to express their resentment and the associated desire to separate from the union. Dozens of nationalities began to openly voice demands for self-determination, sometimes interpreted principally in terms of secession. Pent-up nationalist sentiments, most predating the Bolshevik revolution, surfaced and forced the Soviet leadership to reassess the national question.

The first nationalist challenge to Gorbachev came with the Kazakh riots of mid-December 1986 in Alma Ata.[32] From the Kazakh riots onwards, it appeared the lid had been taken off the Soviet nationality problems. In what appeared to be a chain reaction, the hitherto ethnically harmonious Soviet Empire seemed to explode into ethnic unrest. Throughout 1987, there were demonstrations by the Crimean

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28. *Programma Kommunisticheskoi Partii Sovetskogo Soiuza* [Program of the Soviet Communist Party], KOMMUNIST, No. 16, 1961, at 84.

29. Gleason, *supra* note 27, at 16.

30. *Programma Kommunisticheskoi Partii Sovetskogo Soiuza* [Program of the Soviet Communist Party], KOMMUNIST, No. 4, 1986, at 127.

31. Gleason, *supra* note 27, at 10

32. The riots had erupted after the Kazakh First Party Secretary had been replaced with a Russian. This was a break with tradition; in the past, the practice had been to replace party officials in the periphery with natives from the nationality in question. To the Kazakhs, the replacement of a local with a Russian amounted to a blatant act of Russification and an obvious indication of Moscow's insensitivity to the ethnic realities of the region.

Tatars, the Baltic peoples, and the Ukrainians. In 1988, the problems moved to the Transcaucasians. Nagorno-Karabakh, an Armenian enclave administered as part of Azerbaijan, adopted a resolution asking for the transfer of the territory to Armenia. The resulting demonstrations and riots led to bloodshed, prompting Gorbachev to admit that the nationality question was far from resolved in the Soviet Union. In 1989, there were further problems in Georgia between Georgians and Abkhazians that resulted in the use of force by the central government to bring the situation under control.

The atmosphere of freedom ushered in by glasnost and the general situation of ethnic unrest provided an excellent basis for increased nationalist demands. In December 1989, the Lithuanian Communist Party unilaterally declared its decision to separate from the CPSU. On March 11, 1990, the Lithuanian Parliament, in an action that seemed rather courageous at the time, declared independence from the Soviet Union. In an effort to bring the situation under control, the central government took a series of actions aimed at compelling Lithuania to rescind its unilateral declaration of independence. But the central government took further steps to deal with the increasingly nationalist demands in the other republics, such as Estonia, Latvia, Georgia, and Azerbaijan. In April 1990, the Supreme Soviet passed a law providing for a waiting period of five years to secede from the Federation. From this point onwards, the dismantling of the Soviet Union became only a question of time.

The general situation of ethnic unrest was exacerbated by economic decline. These factors, coupled with Gorbachev's rapprochement with the West and his willingness to negotiate to scale down the military arsenal of the Soviet Union, were considered by the conservatives as contributing to the decline of the Kremlin's political control, as well as the power and influence of the USSR internationally. Disenchanted members of the Politburo and the military conspired to stage a coup in August 1991 while Gorbachev was away on holiday. The coup collapsed within a few days. The conservative forces engineered the coup to stop the ethnic unrest and the disintegration of the Soviet Union, but their failure further weakened the power of Gorbachev, who had courted their support, and provided a catalyst for the dismemberment of the union.

After the collapse of the August coup, it seemed that Moscow lacked the political clout, or the appropriate justification, to stop the secession of the three Baltic states — Lithuania, Latvia, and Estonia. On September 17, 1991, the three states were admitted as members of the United Nations.[33] Their right to self-determination and the issue

33. *See* G.A. Res. 46/4, U.N. GAOR, 46th Sess., Supp. No. 49, U.N. Doc. A/46/4 (1991) (admitting Estonia); G.A. Res. 46/5, U.N. GAOR, 46th Sess., Supp. No. 49, U.N. Doc. A/46/5 (1991) (admitting Latvia); G.A. Res. 46/6, U.N. GAOR, 46th Sess.,

of their admissibility was never disputed. For all practical purposes, the three republics ceased to be part of the Soviet Union. Their effective secession left the union with only twelve republics: the Russian Federation, Ukraine, Belarus, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Uzbekistan, and Georgia.

In an effort to forestall any possible domino effect flowing from the secession of the three republics, Gorbachev negotiated a new all-union treaty for what was left of the USSR. The treaty aimed at granting more autonomy to the republics to meet their separatist demands. But the treaty soon fell into disrepute when, on December 1, 1991, Ukrainians voted in a referendum for independence by a massive majority.[34] A week later, the leaders of Russia, the Ukraine, and Belarus met in Minsk (Belarus) and proclaimed the establishment of the Commonwealth of Independent States (CIS).[35] The CIS at this stage comprised only the three "independent" states. The Soviet Union still appeared intact with Gorbachev describing the Minsk Declaration as an "illegal and dangerous" constitutional coup.[36] This did not deter the remaining republics from leaving the union. On December 21, 1991, the remaining republics, except Georgia, joined the CIS through a Protocol to the Minsk Agreement, concluded in Alma Ata.[37] At this point in time, the dismemberment of the USSR was complete;[38] the union existed in name only. It had no members, and President Gorbachev became the leader of a union devoid of membership. On December 25, 1991, Gorbachev resigned after the Soviet Parliament voted to dissolve itself. The Soviet Union legally ceased to exist.

Since the break up of the USSR, all the former republics have become full-fledged independent states and have been subsequently admitted into the U.N. The validity of their right to self-determination and their admissibility to the U.N. has never been disputed.

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Supp. No. 49, U.N. Doc. A/46/6 (1991) (admitting Lithuania).

34. *End of Soviet Union — Formation of CIS — Resignation of Gorbachev*, 37 KEESING'S RECORD OF WORLD EVENTS 38,654 (1991).

35. Minsk Declaration and Agreement Establishing the Commonwealth of Independent States, Dec. 8, 1991, 31 I.L.M. 138, 142 (1992).

36. KEESING'S RECORD OF WORLD EVENTS, *supra* note 34.

37. It is thus worth noting that the CIS comprises the whole territory of the former USSR, with the exception of the three Baltic Republics and Georgia. *See generally* Ryszard W. Piotrowicz, *The CIS: Acronym as Anachronism*, 29 COEXISTENCE 377 (1992) (discussing the complex international legal status of the CIS and the relationship between the CIS and the former USSR).

38. It is of interest to note that as far as the members of the CIS are concerned the demise of the USSR occurred before this period. The Minsk Agreement expressly mentioned the *former* Soviet Union.

### C. *Self-determination and Disintegration in Other States in the Eastern Block*

Of the Soviet satellite states, Yugoslavia and Czechoslovakia were two of the most ethnically conscious states, being composed of older nationalities with separatist ambitions that predate World War I (WWI). These two states also had the most potential for ethnic strife, given the history of the sometimes antagonistic relations between their component groups. The former East Germany, on the other hand, was the most homogeneous, being composed primarily of people who were ethnically Germans. When these states were incorporated into the Soviet Block, they became subject to Marxist-Leninist tenets that regulated their nationality questions and, indeed, their political restructuring.

The Soviet theory of international relations divided the world into three categories of states: capitalist, socialist, and developing states. The relationship with the capitalist states was based on peaceful coexistence. Peaceful coexistence postulated that there was an antagonistic class struggle between the capitalist camp and the socialist camp. However, this struggle was to be characterized, and for that matter mitigated, by two critical factors: the absence of the use of force on the one hand, and cooperation where appropriate on the other. The class struggle was thus described as peaceful. Since peaceful coexistence presupposed the existence of a class struggle, it did not apply to the relationship between the USSR and the other socialist states because there was not supposed to be a class struggle between such states. The relationship between Moscow and the socialist states was based on "socialist internationalism." Under the doctrine of socialist internationalism, the states in the socialist camp were subject to a number of duties. In their domestic sphere, they were obliged to build up socialism on the Soviet model. In the international sphere, they had the duty to subordinate their specific national interests to the interest of the group, the socialist camp. They were also not to terminate their membership in the Warsaw Pact Organization or the Council for Mutual Economic Assistance.[39] Within the communist context then, any act of secessionist self-determination in any of the multinational states was simply not permissible. In the case of East Germany, any attempt at political restructuring or act of self-determination purporting to integrate the state with West Germany would have been equally impermissible, even if the communist leadership had contemplated such an act before 1989. Socialist international lawyers tended to describe the authoritarian relationship between Moscow and the satellite states in terms of "socialist international law."[40]

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39. Theodor Schweisfurth, *The New Approach to the Law of Peaceful Coexistence*, *in* THE CHANGING POLITICAL STRUCTURE OF EUROPE: ASPECTS OF INTERNATIONAL LAW 29, 30 (Rene Lefeber et al. eds., 1991).

40. In the view of socialist international lawyers, this law was supposed to be

After the rise to power of Gorbachev and the subsequent introduction of perestroika, the changes in Soviet domestic policies were also reflected in its policy on international relations and in particular, its relationship with the other states in the Eastern Block. In 1986, the Party Program of the CPSU revised and redefined peaceful coexistence in light of the new thinking that increasingly characterized Soviet international relations. Under the revised program, coexistence included principles very similar to those contained in the U.N. Declaration of Friendly Relations of 1970. They included the rejection of war and the use of force, or threat thereof, in international relations, non-intervention in the internal affairs of states, the right of peoples to determine their own political destiny independently (the right of self-determination), strict respect for the principle of sovereignty and territorial integrity, and international cooperation on the basis of equality and mutual advantage.

The revision and redefinition of the concept of peaceful coexistence was significant because the new principles were of general application and not just restricted to classical conceptions of class struggle between capitalist and socialist states. More significantly, it meant that peaceful coexistence, with its attendant principles of non-intervention and equality of states, respect for sovereignty, and for self-determination of peoples, was applicable to the relations between Moscow and the other states in the socialist camp. The full implication of these changes were emphasized by Gorbachev in his address during the 70th anniversary of the October Revolution. He noted that relations with the socialist states should be based on the "strict observance of the principles of peaceful coexistence by all, [and] on that rests the practice of socialist internationalism." More importantly, he noted that "we have convinced ourselves that socialism has not and cannot have a 'model' which all have to follow." He completed this point with the observation that all communist parties in the socialist camp are "completely and irrecoverably independent."[41]

These pronouncements meant a shift from the Brezhnev Doctrine, which had hitherto characterized the relationship of the Soviets to their satellite states, and opened the way for the free development of policies in these states without Soviet intervention. The exercise of self-determination was first to lead to the disintegration of East Germany, which voted to be absorbed into West Germany. The disintegration of Yugoslavia followed with the declaration of independence by Croatia, Slovenia, and then Bosnia-Herzegovina. The ethnic tensions that developed engulfed the state in a war that continues today. In

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the international law of the future once the majority of states became socialist. *See generally* THEODOR SCHWEISFURTH, SOZIALISTISHES VÖLKERRECHT? (1979).

41. *Id.* at 36-37.

Czechoslovakia, the Czechs and the Slovaks amicably agreed to break up their federation and to form separate independent states.

## IV. THE RESPONSE OF INTERNATIONAL LAW TO THE POST-COMMUNIST CHANGES

From a political stand point, the failure of communism appeared to be a vindication of the policies of western capitalist democracy. The changes, which were accompanied by popular and democratic elections in all cases, were therefore welcome. In all cases, the U.N., and the entire international community for that matter, accepted the creation of the new states without question. At the U.N., the admission of the new states was undertaken without debate or dissenting votes. The admission of each new state constituted the legal recognition of that entity as a state and its concomitant right to self-determination. Even the African and Asian States that have generally opposed demands for self-determination in instances outside the classical colonial cases supported the admission of the new states.

So, what is the fundamental difference between these post-communist cases and the post-colonial demands for self-determination that warrant different treatment? Even though the post-colonial cases fall within the framework of the same historical events, the dynamics in each country leading to disintegration varied. In dealing with this question, therefore, it is best to consider the cases separately.

### A. *The States of the Former Soviet Union*

#### 1. The Baltic States

The Baltic States comprise Estonia, Latvia, and Lithuania. For the period of their integration into the USSR, their nationalists persistently argued that the incorporation of the states into the Soviet Union was illegal because it was not based on their free consent.[42]

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42. During the expansionist rivalry between Russia and Prussia in the sixteenth and seventeenth centuries, Russia annexed Estonia, Latvia, Lithuania, and Finland. In WWI, it ceded all four territories to Germany under the Brest-Litovsk Treaty. However, with the Allied victory in 1918, the Treaty was canceled and all four states emerged as sovereign nations. They remained independent until the outbreak of WWII. *See generally* BERNARD NEWMAN, THE BALTIC BACKGROUND 11, 18 (1948). *See also* COUNCIL OF EUROPE, THE BALTIC STATES AND THE SOVIET UNION (Estonian Information Center, Problems of the Baltic Series, No. 1, 1962); ALBERT N. TARULIS, SOVIET POLICY TOWARD THE BALTIC STATES, 1918-1940 33-68 (1959); U.S. CONGRESS, HOUSE SELECT COMMITTEE ON COMMUNIST 1216 AGGRESSION, THE BALTIC STATES: A STUDY OF THEIR ORIGINS AND NATIONAL DEVELOPMENT, THEIR SEIZURE AND INCORPORATION INTO THE USSR, (Int'l. Military Law and History Reprint Series No. 4, 1972); Max M. Laserson, *The Recognition of Latvia*, 37 AM. J. INT'L. L. 233 (1943).

On the eve of the War, Germany and the Soviet Union signed the Molotov-Ribbentrop Agreement. The secret protocols to the accord divided Central Eastern Europe into two spheres of influence. The Baltic States came within the Soviet

During the period of incorporation, the general claim of Baltic nationalism was summed up by Boris Meissner: "the incorporation of the Baltic States into the Soviet political alliance . . . did not constitute a voluntary union based on federal principles, but rather a forcible acquisition forbidden in modern international law."[43] On the basis of this illegality, the Baltic States demanded the right to self-determination as expressed through a return to their pre-incorporation status. Their demands were basically secessionist.

Under international law, there is no doubt that the Baltic States were not states as such during the period of their incorporation in the USSR. Despite their persistent demands for self-determination throughout the period, Soviet military, political, and economic control ensured that they could hardly be described as rebel republics. Notwithstanding the totality of their incorporation, Western states generally supported their right to self-determination[44] and declined to rec-

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sphere. *See* Meissner, *supra* note 9, at 379; STEPHEN P. DUNN, CULTURAL PROCESSES IN THE BALTIC AREA UNDER SOVIET RULE 17 (Univ. of California, Berkeley, Inst. of Int'l. Studies Research Series No. 11, 1966). In pursuance of the secret agreements, the Soviets concluded Pacts of Mutual Agreement with the States of Latvia, Estonia, and Lithuania in early 1940. The new accords gave the Soviet Union substantial military concessions in each state. In return, the Soviets undertook not to interfere in the internal affairs of the Baltic States. Soviet Minister Molotov emphasized this: "The Pacts . . . in no way imply the intrusion of the Soviet Union in the internal affairs of Estonia, Latvia and Lithuania . . . [the] foolish prattle of Sovietization of the Baltics is of use merely to our common enemies." NEWMAN, *supra* at 160-161.

Stalin also promised that Soviet troops would be withdrawn from the three states after the war. In the summer of 1940, with the Germans advancing into Western Europe the Soviet Union changed its position on the Baltics. In a dispatch to the three states, it declared that "[i]n view of the anti-Soviet policy of the governments of the Baltic States, the USSR [is] compelled to demand from all three States the formation of such governments as would be capable and willing to ensure that the Pacts of Mutual Assistance would be loyally carried out." *Id.* at 162.

In response, all the political parties in the three states were dissolved and new ones formed under communist control. In Lithuania, the "Labour Alliance" was formed; Estonia formed the "Alliance of Working Peoples;" and Latvia inaugurated the "Labouring People of Latvia." *Id.* at 162-64. In the general elections that followed, the voting was open for all adults, but the voters had no choice of candidates. Thus, in the three states, communist-controlled parties assumed power by July 1940. In Lithuania, the party was returned by 99.90% "yes" votes; Estonia returned the Working Peoples Party by 93% "yes" votes; and Latvia returned its party by 97% "yes" votes. A week after the elections it was reported that "the representative assemblies elected by universal suffrage, established Soviet governments in the three Baltic States, met and decided on the entry of these States into the Union of Soviet Socialist Republics." The incorporation of the Baltic States into the USSR was achieved quite easily under a facade of legitimacy.

When Germany overran the Baltics in WWII, Russian forces were pushed out of the area. Before the German occupation of the region, the Lithuanians proclaimed a Provisional Government of the Independent Republic of Lithuania. In 1944, however, Russia halted the German advance and drove them out of the Baltics. The Baltic States were thus "liberated" and brought back under Soviet control.

43. Meissner, *supra* note 9, at 381.

44. This was well demonstrated with the inclusion of the right of self-determina-

ognize the Soviet annexation or occupation of the Baltic States. They thus rejected the legality of the Soviet occupation. While this was evidently consistent with the Stimson Doctrine of *ex injuria non oritur jus,* it is important to note that there were no acts of recognition, *de facto* or *de jure*, of any of the Baltic States.

There is no duty under international law to recognize entities as states.[45] Even where an entity meets all the criteria for statehood, there is no duty on other states to recognize that entity. On the other hand, there *is* a duty *not* to recognize illegal entities. In general, this duty arises where the entity to be recognized is an illegal creation or lacks the accepted attributes of statehood. There would also seem to be a duty of non-recognition in relation to rebel territories in the process of seceding from their parent states.[46] In the case of such territories, recognition is only permissible in law where the parent state has indicated or demonstrated that it is unwilling or incapable of exerting control over or reclaiming the territory. In the absence of such conditions, the recognition of the rebel territory may not only be premature but also constitute an intervention in the affairs of the parent state.[47]

In the specific case of the Baltic Republics before 1990, they could not be, and were not recognized as states, despite the general support for their right to self-determination. The reason for this was that they were not states. Even if they had been rebel territories, which they were not before 1990, recognition for them would still not have been possible or prudent given the control exercised over them by the USSR and the potential for what would most certainly have been classified as intervention in the affairs of the USSR.

Before 1990, the non-recognition of the Baltic Republics placed many Western nations, and in particular the United States, in an awkward legal position. The Baltic Republics existed as independent states before their annexation by the Soviet Union. The *raison d'etre* for the refusal to recognize the Soviet annexation was that it was illegal. The non-recognition of the illegal state of affairs would imply that Western States subscribed to the *status quo ante*. This would further imply that they in fact had the legal justification to recognize the republics if they chose to. More significantly, their recognition of the republics would not necessarily have been an infringement of the duty not to recognize. Indeed, for the states that recognized the republics

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tion in the Helsinki Accords.

45. *See* TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION (L.C. Green ed., 2nd ed. 1951); Phillip M. Brown, *The Legal Effects of Recognition*, 44 AM J. INT'L L. 617 (1950).

46. 1 LASSA OPPENHEIM, INTERNATIONAL LAW 127-28 (Hersch Lauterpacht ed., 8th ed. 1955).

47. *Id.*

before their illegal annexation, there may well have been no need for a second statement on recognition. At the most, they may only have had to reaffirm their recognition. This not withstanding, they declined recognition of the republics. The situation underscores the fact that even though recognition has juridical implications, it is essentially political in character. Whatever the illegal basis of the annexation of the republics may have been, the political realities before 1990 militated against their recognition. Under the control of the Soviet Union, the republics were for all practical purposes part of the Union. They lacked independence, both economically and politically. In the cold war environment, any attempts to recognize the republics may possibly have produced a backlash to their disadvantage.

If the cold war environment did not encourage the recognition of the republics, then the emergence of glasnost came to pave the way for it. In a referendum on February 9, 1991, seventy six percent of Lithuanians voted in support of the independence of the republic. Even though Moscow declared the referendum illegal, Iceland formally recognized Lithuania's independence a mere three days later. Denmark followed with its recognition on February 28.

It is arguable that at this stage, the actions of Denmark and Iceland were in breach of the duty of non-recognition since the situation in the Soviet Union, and indeed in Lithuania itself, was far from settled. In any case the Soviet Union, beset by ethnic demands, was taking steps to resist the unilateral declaration of independence by Lithuania. Nonetheless, the recognition by Iceland and Denmark was a significant morale booster. On May 8, 1991, President Bush met with the leaders of the three Republics in the White House. While this was not an act of recognition in itself and had little legal significance, it was indicative of the sympathies held by the U.S. administration, and it was an important political step. After the failure of the August coup, more states came to accept the secession of the Baltic states. Norway and Argentina recognized Lithuania on August 25, and Sweden and Finland followed the next day. Sweden subsequently opened embassies in all the three republics on August 29. On August 27, all the 12 Members of the European Community (EC), at a special meeting of EC foreign ministers, formally recognized the three republics and unanimously decided to establish diplomatic relations with them. Australia recognized the republics on the same day. The United States recognized the Baltic States on September 2. The secession of the three republics became a *fait accompli* when the State Council of the USSR (what was left of it) formally recognized the republics. The admission of the republics to the U.N. followed these acts of recognition.

It is important to note that apart from the isolated cases of Iceland and Denmark, all the acts of recognition for the Baltic states came after the failure of the August coup. Before this period, the Soviet Union was actively engaged in dissuading the republics from seces-

sion through constitutional means, negotiations, and the use of economic sanctions. There was also the potential to use military force, given the presence of Soviet troops in the three republics. For states that admitted the reality of Soviet control over the republic, there existed a duty of non-recognition pending the resolution of the crisis by the USSR.

If there came a spate of recognitions after the failure of the coup, it was because the coup's failure changed the political realities in the USSR with definite legal implications. For instance, the Lithuanian Communist Party, which had allegiance to Moscow, was banned and its property confiscated by the Supreme Council of Lithuania. The new government assumed more control of the territory and established a greater degree of independence with the departure of the Soviet Interior Ministry special (OMON) troops and the issuing of visas to foreign visitors. These factors provided legal conditions that distinguished the case of the three republics from the post-colonial cases and justified the international responses to them. In specific terms, the legal conditions may be summarized as follows.

(a) *The Incapacity or Unwillingness of the USSR to Exercise Control Over the Territory*

As indicated earlier, there is a duty of non-recognition in relation to seceding territories in transition where evidence indicates that the parent state is making efforts to exercise or regain control of the territory. The converse of this condition is that where there is indication that the parent state is either unable or unwilling to assume such control, recognition is permissible. Events in the USSR after the failure of the August coup indicated ample evidence of the incapacity or unwillingness of the central administration to exert control over the republics. After the failure of the coup, the hardliners who opposed reforms in the USSR and the secessionist demands of the republics were either arrested or neutralized. Within days after the coup's failure, the Russian Federation, which was still a member of the USSR, formally recognized Lithuania as an independent state. All these factors, coupled with the withdrawal of OMON troops from Lithuania, were indications of the softening of Moscow's stance and, at the very least, evidence of its unwillingness, if not incapacity, to exert control.

(b) *Absence of Contest from the USSR and the Multiplier Effect of Recognitions*

The apparent unwillingness or incapacity to exert control was reinforced by the absence of protest from the USSR to the initial acts of recognition by Iceland and Denmark. Since the USSR had initially declared the Lithuanian independence to be illegal and had followed with an economic blockade, it would have been logical and appropriate to indicate unequivocally to the international community that recogni-

tions would be considered intervention in the internal affairs of the USSR. But the central administration failed to offer any meaningful protest or deterrent to prospective recognitions.

The absence of protest, coupled with the failure of the August coup encouraged further recognitions, which in turn spurred a multiplier effect for future recognitions. In other words, the unchallenged initial acts of recognition encouraged other recognitions, which were then used by more states as "justification" for their own recognition of the Baltic Republics. The recognitions in this context tended to have a constitutive effect to the extent that they gave the appearance of a *fait accompli* to the secessionist efforts of the Republics. Indeed, the recognition of the Republics by the State Council of the USSR, after the recognition by the members of the EC and the United States, seemed to indicate the acceptance of this *fait accompli*.

(c) *The Attainment of the Attributes of Statehood*

Recognition of an entity is conditional on the entity's possession or attainment of the attributes of statehood. In the case of the three Baltic Republics, there is of course no doubt that each possessed the basic attributes of land, population, and government. The capacity of each to enter into international relations was also not disputed. Their independence may have been an issue before the failure of the August coup, since Moscow controlled their territories militarily, economically, and to some extent politically. After the failure of the coup, however, the republics gained greater control over their territories. The establishment of national guards, the issuing of visas to visitors, the enactments of their parliaments dealing with issues ranging from defense policy, foreign policy, and property previously controlled by the central administration, helped to confirm their new independent status.

(d) *The Differences Between the Post-Communist Cases of the Three Baltic Republic and Post-Colonial Cases*

The Baltic cases have three fundamental features: The parent state was either unable or unwilling to exercise or regain control over the seceding territories, a significant degree of independence and the attainment of the other attributes of statehood, and the absence of protest against recognition by states. These three important features are persistently absent in the post-colonial cases. With the exception of Bangladesh, there has been no case where the parent state has demonstrated an incapacity or unwillingness to exert or regain control over a part of its territory engaged in secessionist conflict. In the case of Bangladesh, once it became apparent that Pakistan was unable to regain control, the condition was created for its recognition and subsequent admission into the U.N. To this extent, the post-colonial case of Bangladesh is no different from the Baltic cases.

The critical difference between the three post-communist cases and the post-colonial cases is the absence of control by the parent state. Once the parent state loses control over the seceding territory, and if the other indicia of statehood are present, the territory becomes an independent state *in nacsendi*. All that is required to complete its "creation" as a state is its recognition by other states. The Baltic cases belong in this category. On the other hand, when the parent state continues its efforts to exert control, the territory remains an integral part of it. The principles of non-intervention and respect for territorial integrity impose a duty on states to desist from recognizing the seceding territory in such circumstances. The post-colonial cases belong in this category.

A logical extension of the critical difference between these two categories of cases is that the Baltic cases appeal to, and are accommodated within, the existing putative rules of international law on recognition and the creation of states. On the other hand, the post-colonial cases involve a demand for acceptance or recognition even where the parent states still exert control, or are making efforts to do so. In this regard, they appeal to the normativity of international law and not to its putative rules. This is because current international law does not allow the recognition of an independent territory that is still effectively part of another territory. The issue whether the international system can and should evolve rules to admit cases of secession, even where the parent state is capable of exerting or is willing to exert control, is the principal difficulty confronting post-colonial cases. The Baltic Republics had no such difficulties.

2. The Other Soviet Republics

The emergence of the twelve remaining republics was the result of the Minsk Agreement and the Alma Ata Protocol.[48] Central to the Agreement and the Protocol was the mutual agreement of the constituent republics to dismantle the union. The republics did not secede as such from the union, they dissolved it. It is arguable, however, that Russia, Ukraine, and Belarus concluded the Minsk Agreement to form the CIS without the remaining nine republics of the union. Thus, in spite of references in the Alma Ata Agreement to the "former Soviet Union," the USSR in fact existed after the Minsk Agreement, consisting of the nine remaining Republics. To this extent, the conclusion of the Minsk Agreement amounted to a *secession* from the union. If this is indeed the case, the secession itself is of relative significance in assessing the legal aspects of the international responses to the CIS. This is because international recognition for the CIS members and their subsequent admission into the U.N. came after the constitutional dissolution of the USSR and the resignation of Gorbachev. Following

48. *See supra* notes 34-38 and accompanying text.

the dissolution of the USSR, the constituent republics emerged as independent entities, and each possessed the basic attributes of statehood. International recognition completed the process of their establishment as independent states.

(a) *The Differences Between the CIS States and Post-Colonial Cases*

There are several differences between the cases of the former Soviet Republics and the post-colonial cases. The emergence of the states was the result of a mutually agreed dissolution of their parent state. No rule of international law prohibits the mutual dissolution of a state by its component units and the subsequent creation of states out of those units. The dissolution of a state leaves the component units free to exercise their self-determination through complete independence, association with an existing state, or integration into another state. The dissolution by itself also means there is no parent state to resist the break away or to attempt to exert control over the new entities, thereby undermining the legality of any act of recognition. Such cases differ significantly from the post-colonial cases where the seceding territories continue to be part of an existing parent state and thus subject to conditions that bar their recognition.

B. *The Unification of Germany*

Before 1989, the general view was that the division of Germany was permanent[49] and that, in any case, the "German question" will remain unresolved so long as the Brandenburg gate remained closed.[50] On November 10, 1989, however, the Berlin Wall opened. Less than a year later, the two "Germanies" united. The unification of Germany is without a doubt one of the most significant events in the modern history of Europe. Coming in the wake of *glasnost* and *perestroika* in the Soviet Union and the general situation of liberalization in Eastern Europe, the unification was the culmination of a catalogue of political events in Europe. In many respects, the word "unification" used to describe the event is a misnomer. This is because the "unification" occurred after the disintegration of the former East Germany, the German Democratic Republic (GDR). It was not, therefore, the coming together of two states as such. For the purposes of our present discussion, the label that may be appropriately used to describe the event is immaterial. What is material is that the two related

49. Ryszard W. Piotrowicz, *The Status of Germany in International Law: Deutschland über Deutschland?*, 38 INT'L & COMP. L. Q. 609, 634 (1989).

50. *See, e.g.*, President von Weizsäcker, Address Before the 21st Convention of the Evangelical Church, (June 8, 1985), *in* U.S. DEP'T OF STATE, THE AXIS IN DECLINE: DOCUMENTS ON GERMANY, 1944-1985, at 1415 (1985) [hereinafter U.S. DEP'T OF STATE].

phenomena of the disintegration of the GDR and the subsequent unification were made possible by the breakdown of communism and were pursued within the context of self-determination. They therefore constitute a legitimate subject for discussion under post-communist self-determination.[51]

### 1. Background to the Disintegration and Unification

The unification of Germany has its roots in the division of the country after WWII and the subsequent disintegration of the GDR. Following the defeat and unconditional surrender of Germany in WWII, the country was divided into different zones of occupation,[52] but this was only for the purposes of the occupation by the Allied Powers. The division of the country into separate political units as such was not made part of the agenda of the Allied Powers.[53] However,

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51. In an address to the Bundestag on the State of the Nation in Divided Germany, Chancellor Kohl declared that "[a]ny one who today, in an attitude of resignation and fatalism, draws a final line under the German question is rejecting the right of self-determination and the realization of human rights . . . ." Chancellor Kohl, Address to the Bundestag on the State of the Nation in Divided Germany, (Feb. 27, 1985), *in* U.S. DEP'T OF STATE, *supra* note 50, at 1387, 1396. Chancellor Kohl concluded his address by quoting a declaration by the Bundestag adopted a year earlier:

> Our country is divided, but the German nation lives on . . . . It remains our task to work for a state of peace in Europe in which the German nation will regain its unity through free self-determination. The German Bundestag reaffirms the right of the German people to exercise peacefully its right of self-determination.

*Id.*

52. At the end of the War, the United Kingdom, the United States, and the USSR concluded agreements providing for the division of Germany and Berlin into separate zones of occupation. Each of these States was to occupy about one third of Germany. Berlin, although situated in the Soviet zone, was to be administered separately by the three Powers, each having its own sector in the city. While each of these States had full authority to run its own zone and sector, decisions with regard to Berlin and Germany as a whole were to be taken jointly. At a later stage, France was invited, and it agreed, to participate in the administration of Germany and Berlin. It took over responsibility for its own occupation zone in Germany, taken from the American and British zones, and its own sector in Berlin, also from the sectors controlled by these States. *See generally* Protocol on Zones of Occupation and Administration of the "Greater Berlin Area," Sept. 12, 1944, 5 U.S.T. 2078, 227 U.N.T.S. 279.

53. From the outset there was no apparent intention that Germany should be divided. Indeed, it was clear that, while suggestions had been made that the country be split up (the Morgenthau Plan, for instance), the Four Powers actually intended to treat Germany as one country. Following the unconditional surrender of Germany, they issued a declaration that was of crucial significance for Germany in two ways. First, the declaration provided that the Four Powers would "assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal or local government authority. The assumption . . . of the said authority and powers does not effect the annexation of Germany." Declaration Regarding the Defeat of Germany and the

disagreements between the three Western Powers and the Soviet Union made the joint administration of the defeated state as a single unit impossible. The economic and political division between the zones administered by the Western Powers and that of the Soviet Union, exacerbated by the Berlin blockade, led to the establishment of West Germany, the Federal Republic of Germany (FRG), in September 1949.[54] In October 1949, the Soviet Union responded to these developments with the establishment of the GDR.[55] Even though both states pos-

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Assumption of Supreme Authority with Respect to Germany by the Allied Powers, June 5, 1945, 60 Stat. 1649, 1650, 68 U.N.T.S. 189, 190. This meant that the Four Powers were assuming total authority, almost akin to sovereignty, over Germany, but they nevertheless explicitly refused to annex it. This statement manifested a clear intention to maintain the existence of Germany as one State; it was not to be divided. The second major provision in the declaration was the express assumption by the Four Powers of the right and obligation to "hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory." *Id.* 60 Stat. at 1650-51, 68 U.N.T.S. at 190-92. That Germany was to be maintained as a single unit is evident also from the Potsdam Agreement, which provided that a Council of Foreign Ministers was to be set up, *inter alia*, to prepare "a peace settlement for Germany to be accepted by the Government of Germany when a Government adequate for the purpose is established." Protocol of Proceedings Approved at Berlin (Potsdam), Aug. 2, 1945, 3 Bevans 1207, 1208. However, in that same agreement it was clear that, while Germany would continue to exist, there would be limits to its freedom of action. Thus it was agreed in principle that the northern part of East Prussia, including Königsberg, should become part of the Soviet Union subject only to final determination at the peace settlement. Similarly, large areas of "former German territory" (including southern East Prussia, Pomerania, parts of Mazuria and Lower Silesia) were placed under Polish administration subject to final delimitation at a peace settlement. *Id.* at 1218.

54. At this stage, the FRG was not a fully independent State. The process of moving towards independence lasted for six years, and the western powers clearly retained a substantial amount of control. The country remained under occupation until 1955, when the Paris Protocol came into effect. *See* Convention on Relations Between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 U.S.T. 4251, 331 U.N.T.S. 327; Paris Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany [hereinafter Paris Protocol], Oct. 23, 1954, 6 U.S.T. 4117, 331 U.N.T.S. 253. Moreover, the FRG constitution, the *Grundgesetz*, was subject to the veto of the three western Powers, a veto which was employed significantly when they refused to allow Berlin to be treated as part of the Federal Republic — a measure that had been proposed by the framers of the *Grundgesetz*. By exercising authority with regard to Berlin, the western Powers asserted rights over Germany as a whole, the same rights that may impede the Germans' right to self-determination.

Following the establishment of the FRG, the Soviet Union, on October 1, 1949 sent a note to the United Kingdom, the United States, and France protesting this development as a "completion of the policy of splitting Germany . . . in violation of the Potsdam Agreement under which these States, jointly with the Soviet Union assumed the obligation of treating Germany as one single whole . . . ." Note from the Soviet Union to the United States Protesting the Formation of a Separate Government for the Western Zones of Germany (Oct. 1, 1949), *in* U.S. DEP'T OF STATE, *supra*, note 50, at 274.

55. In a statement regarding the establishment of a provisional Government for

sessed most of the attributes of statehood, they were subject to many restrictions, including the issue of unification.[56]

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the GDR, the Chief of the Soviet Military Administration in Germany made it clear that, like the FRG, the independence of the new State would be limited by the existence of certain rights and obligations of the Four Powers with regard to Germany as a whole. "In the place of the Soviet Military Administration in Germany, a Soviet Control Commission will be established charged with exercising control over the fulfillment of the Potsdam and other joint decisions of the Four Powers in respect of Germany." Statement by the Chief of the Soviet Military Administration in Germany on the Establishment of a Provisional Government of the German Democratic Republic, (Oct. 10, 1949), *in* U.S. DEP'T OF STATE, *supra* note 50, at 306-08. The reference to fulfilling the Potsdam and other decisions acknowledged the requirement that Germany would remain under the control of the Four Powers until it had been prepared for a peace settlement, at which time final decisions were to be made regarding its status and boundaries. This acknowledgment showed that the USSR continued to recognize that the Four Powers jointly rights and responsibilities that it could not unilaterally abrogate.

56. In terminating the occupation regime in the western zones, the United Kingdom, the United States, and France made it clear, and West Germany accepted, that their rights with regard to Berlin and Germany as a whole subsisted.

> [I]n view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, *including the reunification of Germany and a peace settlement* [emphasis added].

Paris Protocol, *supra* note 54, 6 U.S.T. at 4121-22, 331 U.N.T.S. at 260 (Schedule I Amendments to the Convention on Relations Between the Three Powers and the Federal Republic of Germany, signed as part of the Paris Protocol).

In other words, the FRG expressly accepted that the reunification of Germany lies in the competence not of itself but of third States. Moreover, it is clear from the text of the treaty that these rights do not derive from the agreement itself but rather possess an independent foundation, *viz*, the assumption of supreme authority with regard to Germany by the Allies in 1945. Thus, mere denunciation of the treaty by the FRG would not remove the retained competence of the western Powers. It seems, therefore, that even after the termination of the occupation regime, the Federal Republic, though it may have become an independent State, was nevertheless subject to major restrictions to its freedom of action as far as the German question was concerned.

A similar position was adopted by the USSR vis-a-vis the GDR. In a statement issued on March 25, 1954 attributing full sovereignty to the GDR, the USSR asserted that the GDR "shall be free to decide internal and external affairs, including the question of relations with Western Germany, at its discretion." Statement by the Soviet Union Attributing Full Sovereignty to the German Democratic Republic, (Mar. 25, 1954), *in* U.S. DEP'T OF STATE, *supra* note 50, at 418. On its face, this stance seems to be contrary to that of the Western Powers. However, in that same statement, the USSR "retain[s] in the German Democratic Republic the functions connected with guaranteeing security, and resulting from the obligations incumbent on the USSR as a result of the [Potsdam] Agreement." *Id.* A similar approach was adopted the following year in the Treaty on Relations between the USSR and GDR. While article 1, paragraph 2 refers to the GDR as being "free to take decisions on all questions pertaining to its domestic and foreign policy, including its relations with the Federal Republic of Germany," this has to be read in light of the statement in the Preamble that refers to the obligations of the USSR and the GDR "under existing international agreements relating to Germany as a whole." Treaty Concern-

Because of the limitations imposed upon the FRG and the GDR when they were founded, they had no *prima facie* right to reunify, except with the consent of the Four Powers. In 1945, the Allies assumed supreme authority over Germany, including the right to decide upon its status and frontiers. When Germany was divided and the two new States set up, these rights were maintained. Indeed, the treaty giving the FRG full independence expressly retained for the Powers the right to decide upon the unification of Germany.[57] Thus, in the early 1970s, when the FRG concluded its *Ostpolitik* treaties, which served to establish that State's relations with certain socialist States on a more normal footing, it was always emphasized that the rights and duties of the Four Powers subsisted.[58] When East and West Germany applied for admission to the U.N., similar declarations were forthcoming.

The developments regarding Germany since 1945 made clear that the country lost control of its destiny to the Four Powers. While this was intended to be a temporary state of affairs, political developments made the achievement of a peace settlement impossible. The extent of the collapse in relations between the USSR and the Western Powers was such that each side preferred to establish its own German client State rather than allow Germany to remain united under the influence of the other. To safeguard their own influence over Germany, they concluded treaties in which the new states accepted the subsistence of the rights, established in 1945, to decide Germany's status and frontiers. Any serious move towards reunification was dependent upon the political will of the Four Powers to reach agreement, rather than initiatives by the German States.[59]

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ing Relations between the Union of Soviet Socialist Republics and the German Democratic Republic, Sept. 20, 1955, U.S.S.R.-G.D.R., 226 U.N.T.S. 201. Thus the GDR, like the FRG, was given full freedom to conduct its own affairs, including its international relations, subject to the rights and responsibilities of the Four Powers concerning Germany as a whole. The GDR, again like the FRG, was bound by the four Power agreements on Germany, even if it had elected to denounce the treaty with the USSR.

57. Convention on Relations Between the Three Powers and the Federal Republic of Germany, *supra* note 54.

58. Note from the United States to the Federal Republic of Germany Confirming, with Respect to a West German-Poland Treaty, the View of the Federal Republic on Quadripartite Rights (Nov. 19, 1970), *in* U.S. DEP'T OF STATE, *supra* note 50, at 1113.

59. Ryszard W. Piotrowicz, *The Arithmetic of German Unification: Three into One Does Go*, 40 INT'L & COMP. L. Q. 635, 641 (1991). The question remains whether the unification process could have gone through without the consent of the Four Powers. *See* Jochen A. Frowein, *Die Verfassungslage Deutschlands im Rahmen des Völkerrechts*, *in* DEUTSCHLANDS AKTUELLE VERFASSUNGLAGE 7, 12-14 (1990).

2. The Unification of Germany

Unification was central to German politics. From the outset, the FRG always regarded the division as a temporary state of affairs. The authorities avoided the writing of a constitution, which they believed would seal the division forever. When a constitution was finally adopted, it was condemned "as a bastard Constitution produced in nine months through pressure by the military occupation."[60] To emphasize its temporary nature, it was called the Basic Law rather than the Constitution.[61] It was only passed by Parliament and not by popular referendum. Many aspects of the Basic Law reflected very clearly the temporary nature of the division.[62] The Basic Law at any rate underscored the temporary state of affairs with the provision in Article 116 that German citizenship extended to the people of East Germany.[63]

Despite the resolve of the FRG statesmen to ensure that the division did not become permanent, it was also generally accepted that unification could not occur without the cooperation, and indeed consent, of the Four Powers. Beginning in the early 1950s, the Four Powers met occasionally to discuss issues relating to Germany, including the question of unification. There was a general agreement that unification should be the result of free election. However, the Soviet Union added the significant condition that unification could only be achieved through an agreement between the two Germanies. This condition tended to place the Western allies in an impossible position. While they favored unification, they did not recognize the GDR and were consequently unwilling to accept its consent and role in the unification arrangements. There was also the obvious possibility that a GDR blessed with the implied recognition from the West might in any case refuse to accept unification.

In spite of the failure to agree on a *modus operandi* for unification of the two Germanies, considerable advances were made towards greater cooperation in the 1970s through Willy Brandt's policy of *Ospolitik*.[64] In 1972, the two Germanies concluded a treaty of coopera-

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60. DAVID P. CONRADT, THE GERMAN POLITY 17-18 (3rd ed. 1986).

61. In this regard, it is interesting to notice the wording of Article 46, which states that the Basic Law shall cease to be in force on the day that a constitution adopted by a free decision of the German people comes into force. *Id.* at 17.

62. Judgement of Aug. 17, 1956, BVerfG [Federal Constitutional Court], 5 Entscheidungen des Bundesverewaltungsgericht [BVerfGE] 85, at 127 (F.R.G) (showing the response of the German courts to the temporary state of affairs as far as the division was concerned).

63. Gregory S. McCurdy, *German Reunification: Historical and Legal Roots of Germany's Rapid Progress Towards Unity*, 22 N.Y.U. J. INT'L L. & POL. 253, 258-61 (1990).

64. Willy Brandt stated that his policy was, first, to renew negotiations without discrimination for the purpose of achieving a treaty of cooperation, and, second, to relax relations between the two Germanies and to achieve togetherness after a peri-

tion.[65] While the treaty constituted the first formal act of recognition of the GDR, it also, ironically, paved the way for increased cooperation and eased the way to eventual unification. As a result, several commissions were established during the 1970s that enhanced intra-German relations. The close relations developed further in the 1980s with a series of meetings between political leaders from both sides and the conclusion of a range of cultural agreements in 1986. In 1987, Eric Hoenecker visited the FRG, becoming the first leader of the GDR to do so since 1949. The close relationship that had grown, beginning in the 1970s, resembled a cordial relationship between two independent states. Whatever the wishes of the FRG politicians may have been, unification as such was not considered part of the immediate agenda. It took the political changes in the Soviet Union to make unification possible on October 3, 1990.

### 3. The Differences Between the German Unification and Post-Colonial Cases

Even though German unification was commonly accepted as an act of self-determination, there are significant differences between it and the post-colonial cases. For one thing, the Federal Constitution of Germany expressly provides for unification in Article 23, which allows the accession to the German Federation by other parts of Germany. Indeed, in 1956, the Saarland joined the Federal Republic through the operation of Article 23.[66] The accession was affected after a decision favoring unification had been made democratically by the representative organs of the GDR.

For the purposes of German internal law, the unification was simply an act of accession consistent with the Constitution. From the perspective of international law, the accession was also consistent with existing norms. An existing state such as the FRG may accept the accession of any territorial entity so long as the accession is not in breach of any international agreements or the territorial integrity of another state. Logically, a state also has the right to accept the reintegration by accession of a part of its own territory that had been separated. Indeed,

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od of regulated existence side by side. *See* F.W. Hess, *German Unity: Documentation and Commentaries on the Basic Treaty, in* EAST EUROPE MONOGRAPHS 23 (1974). *See also* LAWRENCE L. WHETTEN, GERMANY'S OSTPOLITIK: RELATIONS BETWEEN THE FEDERAL REPUBLIC AND THE WARSAW PACT COUNTRIES (1971) (describing the policy of *Ostpolitik* generally).

65. The treaty was approved by the Bundestag on May 11, 1973 and subsequently by the Bundesrat on May 25, 1973. Despite the formal recognition of the GDR, the treaty did not extend such recognition to East Berlin. The validity of the treaty itself was contested before the German constitutional court. *See* Judgement of July 31, 1973 (Intra-German Treaty Case), BVerfG, 36 BVerfGE 1, 7-10 (F.R.G).

66. The Saarland is one of the Länder (states) in the German Federation. *See* Fritz Münch, *Zum Saarvertrag vom. 27 Oktober 1956*, 18 ZAÖRV 1 (1958). *See also* Jochen A. Frowein, *Germany Reunited*, 51 ZAÖRV 333, 336 (1991).

in such cases the principles of territorial integrity and self-determination warrant the encouragement and the recognition of the reintegration.

The unification can also be considered in terms of the actions of two independent states. Despite the anomalies relating to the creation of the GDR and the unique position of the Allied Powers over the two parts of Germany, for all practical purposes the two entities were independent states. International law permits the unification of any two or more states so long as the union is based on the free consent of the states concerned and the union is not in breach of any international agreements. The unification was partly the result of the Treaty of Unification concluded between the two German states on August 31, 1990. The Treaty, which regulated the details of the unification, came into effect on September 23, 1990 after approval by the houses of parliament — the Bundestag in the FRG and the Volkskammer in the GDR. An interesting aspect of the unification of the two states is that the Unification Treaty provided quite specifically that "with the coming into effect of the accession of the German Democratic Republic to the Federal Republic of Germany . . . the Länder Bradenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt, and Thüringen [all states in the GDR] become Länder of the Federal Republic of Germany." The GDR ceased to exist after the unification, while the FRG continued, albeit with an expanded territory. It has been argued, therefore, that there was no unification between two states as such, but that there was instead an absorption.[67] The label one employs to describe the union between the two states is of no great relevance to this work. For our purposes, it is sufficient to note that the unification, however described, was made possible partly because of the agreement of the two German states and it was consistent with international law norms. Another important aspect of the unification was that it was not the simple result of an agreement between the uniting parts of Germany but of a complex agreement between the Four Powers and the two German states. Three of the powers — France, Great Britain, and the United States — as occupation powers had undertaken treaty obligations to cooperate to achieve the common aim of unification of Germany pending a peace settlement.[68] The treaty was concluded with the FRG as the recognized successor of the state of Germany that had surrendered unconditionally after the war. Even though the treaty was not concluded with the GDR and the Soviet Union, there was no doubt about its propriety and the desire of the three Powers to fulfil their obligations in 1990. As a result, the unification and the recognition of its validity comprised an important aspect of the final peace settlement between Germany and the Allied Powers.

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67. Piotrowicz, *supra* note 59, at 635.

68. Convention on Relations Between the Three Powers and the Federal Republic of Germany, *supra* note 54, art. 7, 6 U.S.T. at 4258, 331 U.N.T.S. at 334.

Like the preceding cases, the unification of Germany and its subsequent acceptance, while presented on the basis of self-determination, fits into existing international law norms. Unlike the post-colonial cases, the unification does not require the application of new rules of self-determination as *lege ferenda*.

C. *The Division of Czechoslovakia*

On November 25, 1992, the Federal Assembly of the Czech and Slovak Federal Republic voted to dissolve the Czechoslovakian Federation as of December 31, 1992. On January 1, 1993, the former Republic of Czechoslovakia ceased to exist. In its place emerged two new states, the Czech Republic and the Slovak Republic. On January 19, 1993, both states were admitted to the U.N. The issue of the disintegration of the former state of Czechoslovakia and the validity of the creation of the two new states were never brought into question. The logical presumption is that the creation of the states was consistent with self-determination.

1. The Division of Czechoslovakia Distinguished from Post-Colonial Cases.

International law does not prohibit the voluntary disintegration of a state. Neither does it prohibit the creation of new states out of the disintegrating state. Allowing an existing state to determine its political destiny through unification or integration with other states is consistent with the principle of self-determination. But it is equally consistent with the principle for a state to choose to dissolve itself and enable the creation of one or more new states out of its territory. The voluntary disintegration of Czechoslovakia and the formation of the two new states are thus consistent with existing norms for the creation of states and with self-determination. The significant difference between the Czechoslovakia disintegration and the post-colonial cases that threaten disintegration is that in the latter cases, the disintegration is never voluntary. In all the cases, the demands for self-determination are resisted, and secessionist conflicts arise precisely because of the prospects of disintegration of the parent state. Where the parent state itself opts for disintegration, the potential for conflict is obviously removed subject to the amicable and equitable distribution of the assets of the state. Where the parent state ceases to exist because of a dissolution, recognition of the newly formed states poses no legal problems if the new entities fulfill all the remaining conditions for statehood. On the other hand, as noted earlier, if the disintegration and the demand for self-determination are opposed by the central authority or the parent state, the rules on non-recognition apply to make the new entities inadmissible. Unlike Czechoslovakia, the post-colonial cases fall in this latter category.

D. *The Disintegration of Yugoslavia*

Of the post-communist cases of self-determination, the disintegration of the former Yugoslavia and the subsequent bloody crisis that has continued until this day is easily the most tragic. The former republic of Yugoslavia was a federation comprising Croatia, Slovenia, Bosnia-Herzogovina, Montenegro, Macedonia, and Serbia. It also included the two autonomous regions of Kosovo and Vojvodina. The dominant nationalities are the Serbs, Slovens, and Croatians. Since the post-WWI era, separatist agitations have been a significant aspect of Yugoslavian politics, with Croatians in the forefront of the separatist demands. In the post-WWI political organization of the State, the Serbs dominated. This arrangement provided acute ethnic antagonism with the Croatians demanding autonomy. By 1928, the political system had degenerated and polarized around two main forces: the Centralists, comprising the Serbs, and Federalists, headed by the Croatian political parties. In the series of political disturbances that followed, three significant changes occurred: all ethnic based organizations were banned; all federalists' agitations were outlawed; and the State's name was changed to Yugoslavia.

These attempts to create a unified state system and forge new bonds for nationhood met with considerable Croatian opposition manifested in a new wave of autonomist protests. The tensions in the State continued until 1939. To harmonize divergent interests in order to ensure a concerted national effort for the impending war, the central government made considerable concessions for Croatian autonomy under what came to be called the Cvetkovic-Macek Agreement.[69] Encouraged by this development, Croatian nationalism took on a new zeal with the emergence of the radical *Ustashi* group, which demanded complete independence.

Croatian separatism was generally opposed by the Serbs, who considered it anti-Yugoslavian. Thus, in 1941, when the government was dismissed in a military coup[70] for its pro-Axis policies, the Cvetkovic-Macek Agreement was annulled. The Croatians subsequently became allied with Germany, which promised to establish a sovereign state of Croatia with the defeat of Yugoslavia. In April 1941, on the eve of the German invasion, the Croatians proclaimed the independent State of Croatia. As part of their war effort, they organized the quisling forces and fought on the side of the Axis against the partisan forces of the Serbs and the forces of the Communist Party of Yugoslavia. This helped to accentuate Croatian-Serb antagonism. With the defeat of the Axis, the State of Croatia fell, and it was once again in-

69. JOZO TOMASEVICH ET AL., CONTEMPORARY YUGOSLAVIA 29-32, 60-61 (Wayne S. Vucinich ed., 1969).

70. This is usually described as the (military) *Putsch* of March 1941. *Id.* at 67.

corporated into the State of Yugoslavia.

After WWII, President Tito began unifying Yugoslavia. He created six federated republics along the old historic and basically ethnic lines. These efforts, and later constitutional reforms, did not resolve the separatist agitations, but the centralist role of the communist party helped to keep the nationalist sentiments in check. The end of communist rule provided the opportunity for the resurgence of the separatist demands.

The current crisis began with the demands by Croatia and Slovenia for sovereignty within a loose Yugoslav confederation. When these demands were rejected, they sought complete independence from the Yugoslav Republic. Similar demands were later made by Bosnia-Herzogovina and Macedonia. To date, the crisis has gone through two significant phases. The first phase comprised the initial Croatian and Slovenian demands for independence and the responses from the central authority to the demands. The second phase comprised the stage of disintegration of Yugoslavia and the subsequent strife by the opposing factions to gain territory. For the purposes of this work, we are concerned with the first phase and the responses of the international community to it.

1. An Analysis of the Push for Independence.

Hostilities in Yugoslavia began on June 27, 1991 when the federal troops moved against secessionists in Slovenia. At this stage, there was no doubt that the parent state in Yugoslavia was opposed to the secessionist attempts, let alone the dissolution of the state of Yugoslavia.

Phase one of the Yugoslavian crisis thus did not fit into the classical framework of the post-communist cases we have already considered. The demand for independence and the subsequent refusal by a central administration that was capable of exerting control were typical of a classical post-colonial self-determination conflict. Nevertheless, the responses by members of the international community, and by the EC in particular, were not typical of those normally observed in post-colonial cases. The initial responses expressed support for the territorial integrity of Yugoslavia.[71] This resulted from the desire to maintain the unity of the Federation and to an implicit rejection of the secessionist claims. This policy was consistent with the practice in relation to other post-colonial cases sharing similar characteristics. However, this policy was not maintained.

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71. In statements made at the Security Council, many of the Members made references to the territorial integrity and unity of the state. *See, e.g.*, SECURITY COUNCIL, PROVISIONAL VERBATIM RECORD OF THE 3009TH MEETING, at 27-28, 36-37, U.N. Doc. S/PV.3009 (Prov. ed. 1991) (mimeographed document, statements by Ecuador, Zimbabwe, Yemen, and Cuba).

It has already been noted that hostilities broke out in June 1991 with the assault by Federal troops against secessionists in Slovenia. The use of force to suppress secessionists in a post-colonial type conflict is not only common, but it is also not prohibited by international law and is arguably a domestic issue subject to human rights requirements. The past cases of Eritrea, Southern Sudan, Biafra, and Bangladesh easily prove this point. In the case of Yugoslavia however, the use of force by the central authority met with a different response. As early as September 1, 1990, the EC called on the Croatian militia to demobilize and on the Federal army to "return to barracks."[72] There were further calls from the Commission on Security and Cooperation in Europe (CSCE) for the suspension of hostilities, the withdrawal of combatants and a moratorium on independence declarations. In July 1991, the EC banned the export of arms to Yugoslavia and to the regional factions engaged in the conflict. In September 1991, the Security Council took a much more serious view of the situation and passed a unanimous resolution expressing concern that the "continuation of [the] situation constitutes a threat to international peace and security."[73] The Council's resolution was very significant since such a determination in pursuance of Article 39 of the UN Charter opened the way for further action under chapter VII. The Security Council subsequently decided that "all States shall for the purposes of establishing peace and security in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary General and the Government of Yugoslavia."[74] In October 1991, the EC went further and prepared its own stringent set of sanctions against Yugoslavia.[75] In November, the Security Council authorized the deployment of 15,000 peace keeping troops to Yugoslavia after securing agreement for a cease fire.[76] A unique aspect of the conflict thus far was that despite its similarity to previous cases in the post-colonial context, and notwithstanding the depth of practice among members of the EC and the U.N., the issue was dealt with as if it were an international conflict. The parent state resisting disintegration was subject to sanctions and admonitions. The situation left the impression that the international system was willing to look on the secessionists favorably, in spite of the resistance of the parent state. Later developments confirmed this impression.

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72. Franck, *supra* note 6, at 21.

73. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., Supp. for Jul.-Sept. 1991, U.N. Doc. S/713 (1991).

74. *Id. See also* S.C. Res 724, U.N. SCOR, 46th Sess., 3023rd mtg., Supp. for Oct.-Dec. 1991, U.N. Doc. S/724 (1991) (establishing a committee to monitor compliance with the sanctions).

75. Franck, *supra* note 6, at 23.

76. S.C. Res 721, U.N. SCOR, 46th Sess., 3018 mtg., Supp. for Oct.-Dec. 1991, U.N. Doc. S/721 (1991).

Throughout the initial stages of the conflict, Germany indicated a willingness to recognize Croatia and Slovenia. Germany delayed recognition because of pressure from the EC for a coordinated, common approach to the crisis. However, it became obvious that the slow development of a common EC policy could precipitate unilateral actions by its members and, in particular, Germany. Thus, on October 4, 1991, the EC produced a formula for the recognition of Croatia, Bosnia-Herzogovina, Macedonia, and Slovenia. The formula, developed by Lord Carrington, included the requirement that each of the "states" make adequate arrangements for the "protection of minorities, including human rights guarantees and possibly special status for certain areas."[77] The Carrington formula was later modified to include the requirement to respect the UN Charter, the Helsinki Final Act, and the Charter of Paris. The acceptance of the conditions in the formula paved the way for the recognition of the new states by the EC. Bosnia-Herzogovina, Slovenia, and Croatia were admitted into the U.N. on May 26, 1992.[78]

Notwithstanding the admission of the new states, Croatia and Bosnia-Herzogovina were still subject to attacks from Yugoslavia. However, that fact neither deterred their admission nor brought into question its validity. In fact, the President of the General Assembly was careful to note that the continued attacks against the states constituted attacks against UN members and were illegal under the UN charter.[79] The United States' representative was even more forthright in his assessment of the situation, stating that

> [t]he changes that have taken place in Yugoslavia have fundamentally altered the previous structures. If Serbia and Montenegro desire to sit in the U.N., they should be required to apply for membership and be held to the same standards as all other applicants. Specifically, they must prove to the Members of the U.N. that the so-called Federal Republic of Yugoslavia is a peace-loving State.[80]

For all intents and purposes, neither the U.N. nor the EC took the view that Yugoslavia constituted a post-colonial case. What factors could have justified a different approach to the new states from the former Yugoslavia?

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77. REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 3 OF SECURITY COUNCIL RESOLUTION 713, at Annex II, U.N. Doc. S/23169 (1991) (mimeographed document). In November, a more detailed formula was produced by the European Community Peace Conference meeting in the Hague. *See* Franck, *supra* note 6, at 24, n.52

78. GENERAL ASSEMBLY, PROVISIONAL VERBATIM RECORD OF THE 86TH MEETING, 46TH SESS., U.N. Doc. A/46/PV.86 (Prov. ed. 1992) (mimeographed document).

79. *Id.* at 11.

80. *Id.* at 12.

### 2. The Differences Between the Yugoslavian Case and the Post-Colonial Cases

Unlike the other post-communist situations, the secessionists in Yugoslavia had to contend with the forceful resistance of the parent state. The Yugoslavian cases therefore have the appearance and the substance of the post-colonial types. Even upon closer examination, one finds it hard to identify any substantive factor that differentiates the Yugoslav cases from the post-colonial ones. The Security Council resolution concluding that the crisis constituted a threat to international peace and security relied, *inter alia*, on the hundreds of thousands of refugees that had been generated by the war, the heavy loss of human life, and the adverse consequences of the war on countries in the region. These are hardly distinguishing factors. These same factors were present, but were virtually taken for granted, in the secessionist conflicts in Biafra, Eritrea, and currently in the southern Sudan, all of which are typical post-colonial cases.

At the risk of seeming cynical, it may be noted that the one significant difference between the Yugoslav cases and the other post-colonial cases is geography. The Yugoslav cases constituted the first test of post-colonial type secessionist conflict in Europe. Faced with the prospect of instability and the threat to regional security that has characterized similar conflicts outside Europe and was likely to flow from this crisis, the EC reacted by recognizing the new states. Presumably, the acceptance of the legitimacy of the secessions was part of the strategy of managing the crisis by minimizing threats to peace and security in the region. This strategy was not dictated by any legal principle or the desire to develop a basis for dealing with similar situations in the future. Indeed, it is unlikely that the EC will react similarly to situations outside Europe even if the conditions appear similar unless its strategic or other interests are at stake. This view underscores the preponderance of strategic, economic, and political interests as well as the limited relevance of legal principles in determining the responses to cases of secession.

The problem with this cynical assessment is that it overlooks the possibility of a genuine commitment by the international system to develop new rules for dealing with post-colonial type secessions in the post-cold war period. This possibility could be a very significant development in post-cold war international law and deserves a close examination.

## V. THE DEVELOPMENT OF A NEW INTERNATIONAL LAW REGIME FOR POST-COLONIAL SECESSION

The responses of the international system to the Yugoslavian crisis are significant because they could well indicate the direction of international law on questions of secession in the future. Thomas

Franck has identified the following responses to the crisis:

1. The international system does not recognize a general right of secession but may assist the government of a state that is of good standing to find constructive alternatives to secessionist claim.

2. The international system regards egregious and protracted violence by and against the secessionist forces as likely to give rise to a threat to international peace by endangering flows of refugees, tempting potential external intervention, and disrupting international trade in essential goods and services. This is sufficient to transform a civil war from a domestic to an international dispute, validating systematic intervention in the form of debate, recommendations for settlement, demands for cease fire, and an embargo on supplies used in combat imposed equally on government and secessionists. The international system in such a situation will no longer presumptively side with governments against secessionists except, perhaps, where the secession is being fomented or supported by an external intervening party.

3. With the prior consent of the government and the secessionists, the international system may provide peacekeepers charged to secure the combatants' disengagement from an agreed neutralized and demilitarized zone.

4. The international system does not prohibit secession. It will extend recognition to a secessionist territory government if (a) that government has demonstrated effective continuous control over its territory; (b) the government has made provision for accepting relevant international obligations by, *inter alia*, making provision in its constitution and by ratifying relevant international legal instruments for the protection of the nationality, cultural, linguistic, and religious rights of its minorities; and (c) where it has taken constitutional steps to ensure the political autonomy for its postmodern tribal minorities if they desire it.

5. A new state created by secession is entitled to those boundaries that were administratively applicable to it prior to independence when it was a unit of a parent state.[81]

There is no doubt that this assessment correctly reflects the responses of the international system to the crisis in Yugoslavia. The first three responses, however, are not exclusive to the Yugoslavian crisis. The responses of the international system to the Congo crisis in the 1960s[82] and the problems in Cyprus over the creation of the Turk-

81. Franck, *supra* note 6, at 19-27.

82. The secession of Katanga from the Congo Republic in 1960 was the first test of the U.N. position on post-colonial self-determination. *See generally* E.M. Miller, *Legal Aspects of the United Nations Action in the Congo*, 55 AM. J. INT'L L. 1 (1961). Soon after the Katanga Province declared its independence, Belgium sent troops to assist the rebel province. In response, the Security Council called on Bel-

ish Republic of Northern Cyprus (TRNC) were similar.[83]

The progression from the initial response of neutrality to the acceptance and support for the secessionists is unique to the Yugoslavian crisis. There is no evidence that this is the result of a conscious effort to develop a regime to deal with the crisis and similar situations in the future. They seem like ad hoc reactions to the crisis as it developed. This does not, of course, rule out the potential of these responses as indications of the probable normative and systematic development of a new regime on post-colonial self-determination. However, any such potential is undermined by a number of factors. First, for the regime to be developed, the conduct of the international community in relation to the structures created from the crisis and in respect of which the regime is developed will need to be supportive and consistent. The *raison d'etre* in developing the regime is the preservation of international peace and security and the maintenance of order generally. To be effective, the regime must also be backed up by the willingness to protect the entities that are created as a result of the operation of the regime. These features have been absent in relation to the Yugoslavian crisis. The admission of the new states into the U.N. was an obvious indication of their acceptance as sovereign states entitled to rights and protection under the UN Charter. In the case of Bosnia, for instance, the territory has been subject to Serbian attacks since its creation, but a Kuwait type intervention to protect Bosnia as a member of the U.N. under aggression has never been an issue in the efforts to stop the war in the former Yugoslavia. If the operation of the regime permits the creation of a new state that nonetheless remains subject to the forceful aggression of its former parent state, then the regime looses its credi-

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gium to withdraw its forces and authorized the dispatch of UN troops in response to a request from the Congo Republic. However, the UN action was stated to be limited as a response to the involvement of Belgian troops and the Secretary General and the Security Council both declared that the UN forces would not intervene to influence the outcome of any internal conflict. By implication, the initial UN response was to remain neutral beyond the Belgian intervention and treat both the secessionists and the central government equally. In late 1961, this position of neutrality changed when the Security Council adopted a resolution condemning the secession of Katanga and affirming the territorial integrity of the Congo Republic as a whole. This resolution led to the active intervention by the U.N. in the conflict itself and subsequently influenced a settlement in favor of the central government. *See* S.C. Res. 5002, *supra* note 15. *See also Questions Concerning the Situation in the Republic of the Congo (Leopoldville), supra* note 15.

83. In the case of Cyprus, U.N. efforts to seek a negotiated solution between the secessionists and the parent state are still continuing after a decade of the unilateral declaration of the TRNC. It is worth noting that in its initial response to the crisis, the Security Council condemned the secession and declared it void, calling on states not to recognize the TRNC. *See* S.C. Res 541, *supra* note 16. It must be stressed, however, that the Security Council resolution was not meant as a statement on the validity of the secession as such in international law. It condemned the particular act of secession on the basis that it violated treaty arrangements in force relating to the territory. *See generally* Blay, *supra* note 4, at 100.

bility and essence.

Whatever the motivation for its development may be, the regime does not appear to be intended to operate outside the Yugoslavian context. Despite the many similarities, including the religious dimension, between the secessionist claims in Yugoslavia and in the Southern Sudan, there has been no indication from either the EC or the U.N. that the regime may be worth applying in that context. The explanation for this may be that the responses to the crisis in Yugoslavia were not intended to develop any regime as such for secessionist cases. While they may have the potential to be developed into such a regime, the failure to respond to similar cases in the same manner removes any degree of consistency that may be associated with the regime and undermines its potential as an indication of the normative development of international law on secessionist self-determination.

Claims of post-colonial self-determination will continue so long as ethnicity and nationalist parochial sentiments remain a part of the culture of human nature. In the post-cold war era when the democratic governance is gradually being accepted as a possible right and a necessary standard to be expected from all nations,[84] the events of Yugoslavia and the responses being developed provide the international system with a good opportunity to develop a regime on post-colonial self-determination. The failure to use the opportunity to develop prescriptions on the subject will only exacerbate the uncertainty of the law on the issue and the ambivalence towards secessionist conflicts.

84. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).