The Right to Self-Determination under International Law

"Selfistans," secession, and the rule of the great powers

Milena Sterio

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This book proposes a novel theory of self-determination: the rule of the great powers. This book argues that traditional legal norms on self-determination have failed to explain and account for recent results of secessionist self-determination struggles. While secessionist groups like the East Timorese, the Kosovar Albanians, and the South Sudanese have been successful in their quests for independent statehood, other similarly situated groups have been relegated to an at times violent existence within their mother states. Thus, Chechens still live without significant autonomy within Russia, and the South Ossetians and the Abkhaz have seen their conflicts frozen because of the peculiar geopolitical equilibrium of power within the Caucuses region.

The rule of the great powers asserts that only those self-determination-seeking entities that enjoy the support of the majority of the most powerful states (the great powers) will ultimately have their rights to self-determination fulfilled. The great powers, potent military, economic and political powerhouses such as the United States, China, Russia, Japan, the United Kingdom, France, Germany, and Italy, often dictate self-determination outcomes through their influence in global affairs. Issues of self-determination in the modern world can no longer be effectively resolved through the application of traditional legal rules; rather, resort must be had to novel theories, such as the rule of the great powers.

This book will be of particular interest to academics and students of law, political science, and international relations.

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Preface

The topic of self-determination has always posed difficult questions under international law. Recent examples thereof, however, emphasize the shortcomings of the traditional understanding of external self-determination. While the peoples of East Timor, Kosovo, and South Sudan have been successful in asserting and exercising their rights to external self-determination, through secession, other similarly situated groups have been denied their quests for separation from their mother states and for independent statehood. Thus, peoples such as Tibetans, West Papuans, Kashmiris, Palestinians, Chechens, Northern Cypriots, Bosnian Serbs, South Ossetians, and the Abkhaz still live a contested existence within their mother states. Some of these peoples have formed *de facto* states, and some have faced harsh human rights abuses; nonetheless, the international community has not supported the self-determination struggles listed above.

It is the scope of this book to examine such recent cases of external self-determination, and to propose a novel understanding of this longstanding theory. Self-determination in its traditional reincarnation accorded rights to colonized peoples and peoples subjected to foreign occupation. These peoples were entitled to autonomy within their mother states, as well as to remedial secession leading to independence. Self-determination in its traditional form, however, is unclear on cases falling outside of the decolonization or end-of-occupation paradigms. It is unclear if international law bestows a right of self-determination on non-colonized and non-occupied peoples. Unsurprisingly, results of self-determination struggles of such non-colonized and non-occupied peoples have been inconsistent, as the lists above indicate. Some peoples have been successful in reaching independent statehood where others haven't. In order to account for disparate results, this book proposes a new theory of self-determination: the great powers' rule.

The great powers are super-sovereign states: an exclusive club of the most powerful states economically, militarily, politically, and strategically. These states include veto-wielding members of the United Nations Security Council (United States, United Kingdom, France, China, and Russia), as well as economic powerhouses such as Germany, Italy, and Japan. The great powers' club possibly also includes non-declared nuclear states, such as Israel, India,

and Pakistan. The great powers' rule dictates that for every self-determination people must demonstrate the existence of four criteria: that it has suffered heinous human rights abuses; that its mother state's central government is relatively weak; that the international community has already gotten involved through a form of international administration of the secessionist territory; and that it enjoys the support of most of the great powers. It is the theory of this book that self-determination outcomes have been dictated over the past decades by the support, or lack thereof, of the great powers, and that the fourth criterion of the great powers' rule is the most important one. Peoples who have enjoyed support by most of the great powers have been able to exercise rights to external self-determination. East Timorese, Kosovar Albanians, and South Sudanese have all been supported by some of the most powerful great powers in their independence struggles.

Conversely, peoples who have not enjoyed support by the great powers have been denied similar self-determination rights. Although the list of such peoples is lengthy, this book will focus on three cases: Chechnya, South Ossetia, and Abkhazia. Chechens, South Ossetians, and the Abkhaz have seen their conflicts "frozen" because of the great powers' strategic interests in maintaining the status quo. The great powers' rule is a pseudo-legal theory, which has replaced the traditional legal criteria for self-determination. Unfortunately, the International Court of Justice (ICJ) has, until now, failed to develop a novel normative framework for non-colonial self-determination. Consequently, the great powers' rule has developed in international politics and has flourished in the absence of any jurisprudential controls over its contours. It is the conclusion of this book that the development of the great powers' rule is an unfortunate occurrence, because the rule could contribute toward the creation of dependent independent states, such as Kosovo and South Sudan, and could thereby cause regional instability and violence. Self-determination questions could be resolved under international law, if international law were to develop in a sufficient manner in order to address difficult issues posed by self-determination quests exercised by non-colonized and non-occupied peoples.

List of abbreviations

CERD	Convention on the Elimination of all Forms of Racial Discrimination
CPA	Comprehensive Peace Agreement
EU	European Union
FRY	Federal Republic of Yugoslavia
ICJ	International Court of Justice
IMF	International Monetary Fund
INTERFET	International Force for East Timor
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
NATO	North Atlantic Treaty Organization
NGO	non-government organization
OSCE	Organization for Security and Cooperation in Europe
SFRY	Socialist Federal Republic of Yugoslavia
SSLM	South Sudan Liberation Movement
UN	United Nations
UNAMET	United Nations Mission in East Timor
UNMIK	United Nations Mission in Kosovo
UNMISET	United Nations Mission of Support in East Timor
UNOMIG	United Nations Mission in Georgia
UNOTIL	United Nations Office in Timor Leste
UNTAET	United Nations Transitional Administration in East Timor
WMD	weapons of mass destruction
WTO	World Trade Organization

Introduction

> Why not just stand still and draw a circle round your feet and name that Selfistan?[1]

Salman Rushdie sarcastically and prophetically wrote this in his novel, *Shalimar the Clown*. I respectfully borrow the term "Selfistan" from Mr. Rushdie, for the purposes of discussing self-determination under international law in the 21st century. In the modern world, some groups ("peoples") seem to have been able to form their "selfistans" through the exercise of external self-determination, with the support of the most powerful nations (the "great powers") on our planet. It is the purpose of this book to decipher who such peoples are, and why their struggles have been viewed as legitimate and deserving of independence and statehood, while others have been denied the same quests.

The notion of self-determination is not novel in modern international law. It stems back to the beginning of the 20th century, when world leaders in the wake of World War I realized that national peoples, groups with a shared ethnicity, language, culture, and religion, should be allowed to decide their fate—thus, to self-determine their affiliation and status on the world scene. The same idea applied later in the same century to colonial peoples, and by the 1960s, it became widely accepted that oppressed colonized groups ought to have similar rights to auto-regulate and to choose their political and possibly sovereign status. However, as decades passed and as separatist minority groups throughout the world began challenging the concept of state territorial integrity, it became clear that the notion of self-determination had to be somehow confined. Thus, courts and scholars came up with two different forms of self-determination: internal and external. The former potentially applies to all peoples, and signifies that all peoples should have a set of respected rights within their central state. In other words, peoples should have cultural, social, political, linguistic, and religious rights, and those rights should be respected by the mother state. As long as those rights are respected by the mother state, the "people" is not oppressed and does not need to challenge the territorial integrity of its mother state. The latter form of self-determination, so-called external self-determination, applies to oppressed peoples, whose basic rights

are not being respected by the mother state and who are often subject to heinous human rights abuses. Such oppressed peoples, in theory, have a right to external self-determination, which includes a right to remedial secession and independence. In theory, the distinction between internal versus external self-determination is easy to draw, and a scholar or a judge should have no difficulty deciding which minority groups should accrue the more drastic right to external self-determination. Simply look to the human rights record of the mother state, and, if the record shows violations, then the minority group should be allowed to separate. In reality, the distinction is very difficult to draw. Numerous minority groups around the globe have been mistreated and have asserted their rights to external self-determination, only to find themselves rebuffed by the world community. By way of contrast, some minority groups have found strong support in the eyes of external actors and have garnered sufficient international recognition to be allowed to separate. Why? What is so unique about some minority groups and about their quests for independence that would justify the authorization to remedially secede? When exactly—under what circumstances—does the right to external self-determination accrue? As Antonio Cassese has written, "[t]o explore self-determination . . . is also a way of opening a veritable Pandora's box" because "[i]n every corner of the globe peoples are claiming the right to self-determination."[2]

Scholars and courts have struggled with this question over the past decades, and have attempted to delineate parameters under which peoples would be entitled to such a drastic form of self-determination. The first limiting factor here is the purposeful distinction between minority groups and peoples: any right of self-determination, whether internal or external, is bestowed by international law on the latter, but not the former. Under international law, the term "people" implies a subset of a minority group, a more defined "self" whose members have common characteristics and a subjective belief in the unity of that "self." Minority groups, however, are larger entities with some, but not necessarily all, common characteristics, and without the required sense of uniqueness and distinctiveness from their mother state. Minority groups are entitled to the protection of some rights under international law, but those rights do not entail the right to political autonomy or self-governance. Rather, minority group rights entail the respect of the group's culture, heritage, language, or religion. Through the distinction between the larger entity, a minority group, and much smaller and specific entities, peoples, international law has curtailed the number of instances in which rights of self-determination can be claimed by any entity. When Wilson and Lenin spoke of self-determination post-World War I, they did not envision that every minority group around the planet would be entitled to self-governance. Hence, the concept of a "people" ensures that self-determination remains limited to specific entities that can assert peoplehood and prove all of its essential characteristics.

The second limiting factor in the application of the self-determination theory lies in the distinction between internal and external self-determination, and the disagreement over the applicability of the latter to non-colonial and

non-occupied peoples. Some scholars have simply concluded that only colonized peoples and peoples subject to foreign occupation and domination could ever accrue the right to external self-determination. According to this argument, non-colonized and non-occupied peoples have merely rights to internal self-determination under international law; thus, for these peoples, the distinction between internal and external self-determination is irrelevant as the only possible form of self-determination entails the former (rights within the existing mother state). Other scholars and some courts have hinted at the possibility of external self-determination for peoples outside the decolonization/foreign occupation paradigm. According to this argument, in some extreme circumstances peoples will have a right to external self-determination, leading to remedial secession and the disruption of the territorial integrity of their existing mother state. For most scholars and courts, such a right to external self-determination may only be triggered in exceptional circumstances where no possibility exists for peaceful cohabitation of the mother state and the struggling people.

Thus, much disagreement exists over the application of self-determination and the precise contours of this theory. Disparate results of self-determination struggles have demonstrated the difficulty of applying this theory to real-life situations: while the East Timorese, the Kosovar Albanians, and the Southern Sudanese have been successful in exercising rights to external self-determination, Chechens, South Ossetians, and the Abkhaz peoples have been denied the same rights. Many other peoples across the globe have been stifled in any self-determination claims, both internal and external. Thus, the Saharawis have not been able to exercise self-determination vis-à-vis Morocco; the Biafrans have not been successful in similar claims against Nigeria; Serbs in Republika Srpska and Turkish Cypriots in Cyprus have existed in de facto, unrecognized state-like entities for several decades, because these peoples' self-determination claims have never been formally accepted; West Papuans have been absorbed into Indonesia and their rights to self-determination suspended; Tibetans have struggled for autonomy against China; and the Bougainville have asserted (so far unsuccessful) claims against Papua New Guinea.[3]

The general aim of this book is to analyze these difficult self-determination questions in a provocative manner, by both examining recent international relations issues for practical applications of self-determination quests, as well as by reviewing international legal standards that govern such independence struggles. In particular, this book will focus on the more drastic dimension of self-determination, the right to *external self-determination*. This book will conclude that peoples today are able to achieve external self-determination and independence solely through the support of the most powerful states, the so-called great powers. This exclusive club of super-sovereign states has evolving membership and currently includes countries such as the United States, the United Kingdom, France, Russia, and China (the "veto" countries of the United Nations Security Council), as well as other economic powerhouses, such as Germany, Italy, and Japan. This book will observe that the great powers'

rule seems to have morphed itself into a prevailing international relations theory, which has come to dominate the legal theory of self-determination, leading toward recognizing statehood and secession only in instances where such a result coincides with the great powers' geopolitical interests.

As mentioned earlier, the great powers are political, military, and economic powerhouses, states that enjoy super-sovereign status on our planet because of their wealth, potent militaries, as well as beneficial institutional positions in organizations such as the United Nations (UN), the European Union (EU), or the North Atlantic Treaty Organization (NATO). Thus, the great powers are able to unilaterally preclude other states from engaging on a certain path, or to unilaterally enable other states to exercise a particular course of action. The great powers' rule has become all encompassing in the field of international relations, and as such has replaced the traditional criterion of legality for self-determination quests of peoples. Instead of proving that they have a legal case for self-determination, peoples today must abide by the great powers' rule.

The aim of this book is to develop and to propose a new normative theory (the great powers' rule) for the exercise of external self-determination, ultimately leading toward remedial secession. This book will posit that the great powers' rule entails four criteria, which each people seeking external self-determination must demonstrate. First, a people must show that it has been severely oppressed by its mother state—that it has faced harsh human rights violations and abuses at the hands of the central authorities. Second, a people must demonstrate that its mother state's central government is relatively weak and simply cannot administer the province or region in which the relevant people live effectively. Third, a people must show that it has already been administered by some international organization, which has facilitated power sharing between the people and the mother state, and which has engaged in institution-building and capacity-development for the struggling people. Finally, and most importantly, a people must garner the support of the great powers. This book will conclude that the fourth criterion is the most significant one because it often determines the fate of various peoples struggling for the recognition of their rights across the globe. Moreover, the fourth criterion is often dispositive of the first three criteria: when the great powers support a people, they often emphasize its suffering through international media outlets in order to legitimize its struggle and to demonize the mother state. Moreover, the great powers often provide logistical, political, financial, and military support to a struggling people whom they support, in order to empower the people, to weaken its central government, to demonstrate that the central government can no longer rule effectively over the relevant people, and to orchestrate international involvement in the given region on a significant organizational level. Thus, if a people enjoys the support of the great powers, it will often manage in satisfying the first three criteria of the great powers' rule theory. The first three criteria are important nonetheless because they set a threshold of great powers' involvement – the great powers most often do not get involved in more minor situations, where a people's rights are mildly

abused by the central government, because all states, whether a great power or not, seem to prefer the territorial status quo. Non-disturbance of international borders is an international law norm, and it is one that even the great powers respect. The great powers may become involved in a conflict between a people and its mother state only in instances of severe violations by the mother state. Ultimately, this book will offer an assessment of the desirability of the great powers' rule in the realm of self-determination. This book will conclude that it would have been preferable for the world court and other international and regional tribunals to develop precise normative criteria for a legal framework of self-determination and its applicability in difficult situations and conflicts. Because institutions like the world court have never engaged in the development of precise norms of self-determination, the great powers' rule has dominated virtually all external self-determination struggles. In the post-Cold War world, we have returned to a great powers' dominance, where "selfistans" may form only if the majority of the great powers view them as beneficial and strategically advantageous.

In Part I, this book focuses on the existing legal theory of self-determination. Chapters 1 through 3 will explain how the theory of self-determination has evolved over the 20th century, and how it has impacted on other legal theories, such as statehood and sovereignty. These chapters will also highlight the significance of state recognition, the paradigm of intervention, and their impact on self-determination quests. Chapter 4 will then develop the new great powers' rule, by analyzing its four criteria and by positing that the great powers' rule has become dominant in self-determination matters, at the expense of the existing legal rules on external self-determination. Chapter 5 will focus on relevant international jurisprudence, in order to highlight the presence of the great powers' rule in the world court's case law, and to demonstrate that this rule has penetrated the ranks of the highest judicial institutions, thus coloring those self-determination claims that have been argued at the world court.

Part II will focus on case studies, to demonstrate the obliteration of legal norms by the great powers' rule in real instances of external self-determination struggles. Chapters 6 through 10 will discuss the cases of East Timor, Kosovo, Chechnya, Georgia, and South Sudan, in order to compare and contrast external self-determination failures and success, and in order to prove that all the successful peoples have enjoyed the great powers' support. Conversely, these case studies will demonstrate that all the peoples who have been denied meaningful self-determination rights and the possibility to form their own state through external self-determination have been stifled by the great powers, because of the latters' interest in preserving the status quo. Finally, in its concluding remarks, this book will bring together Parts I and II, by incorporating the great powers' rule into the existing paradigm of self-determination, and by highlighting, through the case studies, how the great powers' rule has functioned in the modern world. Throughout its course, this book will unveil a new theory of external self-determination, the so-called great powers' rule.

Notes

1 S. Rushdie, *Shalimar The Clown*, Jonathan Cape, 2005.
2 A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995, p. 1.
3 For a full list of peoples and groups seeking various forms of autonomy and self-determination from their mother states, *see* M. Weller, *Escaping the Self-Determination Trap*, Brill, 2008, pp. 160–170 (Annex II, Tables of Settlements and Steps toward Settlement).

Part I

The theory of self-determination and the great powers' rule

Part I of this book will explore the theory of self-determination and will explain how the great powers' rule has come to dominate self-determination struggles and outcomes. Chapters 1 through 4 will thus demonstrate how the legal theory of self-determination has become dominated by the political phenomenon of the great powers' rule.

Chapter 1 will focus on the theory of self-determination, its historical origins, and judicial underpinnings. This chapter will highlight the definition of the term "people," relevant for the purposes of determining which entities can legally claim rights to self-determination. This chapter will also explore the distinction between internal self-determination, which provides for a form of autonomy for a people living within a larger mother state, and external self-determination, which may lead toward that people's separation from the mother state. Chapter 2 will explore recent applications of self-determination struggles and will thus provide an overview of two significant cases underlying the theory of self-determination, the Aaland Islands case decided by a committee of jurists within the League of Nations in the 1920s, and the Quebec Secession case, decided by the Canadian Supreme Court in 1998. This chapter will also discuss self-determination issues within the context of two recent state collapses: that of the Soviet Union and that of the former Yugoslavia. In each instance, new states emerged once the larger mother states ceased to exist and, in each instance, the legal theory of self-determination could have provided one of the arguments for independence and statehood of the newly created states. Chapter 3 will compare the legal theory of self-determination with four other theories of international law: statehood, recognition, sovereignty, and intervention. Each of these four theories is somehow linked to self-determination issues, and the linking agent may be found in the great powers' rule. This chapter will thus introduce the notion of the great powers rule, and will explain how it has affected statehood, recognition, sovereignty, and intervention, as well as how all of these have affected recent self-determination struggles. Finally, Chapter 4 will focus on the great powers' rule itself. This chapter will define the great powers and will explore how the phenomenon has worked in the global arena: essentially, super-sovereign states (the great powers) dominate international relations and have become instrumental in shaping outcomes of

recent self-determination struggles. This chapter thus introduces four novel criteria of self-determination, brought about by the great powers' rule: a self-determination-seeking people must demonstrate that it has been severely oppressed by its mother state; that the mother state's central government is weak; that it has been administered by some international or regional organization, such as the United Nations (UN) or the European Union (EU); and that it has garnered the support of the great powers. This chapter will conclude that the fourth criterion, the great powers' support, will be outcome determinative. In other words, if it wishes to successfully exercise rights to autonomy and independence, any people seeking self-determination will have to obtain the great powers' support. This phenomenon of the great powers' rule is a political theory but has replaced legal criteria in the application of self-determination standards to various peoples around the globe.

Chapters 1 through 4 will therefore introduce the theory of the great powers' rule and its application to recent self-determination quests. Part II will focus on case studies, which will demonstrate how the great powers' rule has operated over the last few decades.

1 The notion of self-determination

> It is for the people to determine the destiny of the territory and not the territory the destiny of the people.[1]

Self-determination in international law is the legal right for a "people" to attain a certain degree of autonomy from its sovereign. As early as 1918–1919, leaders such as Vladimir Lenin and Woodrow Wilson advanced the philosophy of self-determination, the former based on violent secession to liberate people from bourgeois governments, and the latter based on the free will of people through democratic processes. Today, the principle of self-determination is embodied in multiple international treaties and conventions, and has crystallized into a rule of customary international law, binding on all states.

The principle of self-determination has a long history and has been used and discussed throughout the 20th century. It has evolved into a norm of customary law, and its contours represent a wide-ranging spectrum of alternatives for the minority group seeking to self-determine its fate. Thus, self-determination rights for a minority group may involve simply political and representative rights within a central state, on the one hand, or may amount to remedial secession and ultimately independence, on the other. This chapter will explore:

1. the history of the right to self-determination as it has evolved throughout the 20th century
2. the meaning of the term "people"
3. the distinction between so-called internal self-determination, involving various types of autonomy for the minority group within the larger mother state, and external self-determination, leading potentially toward remedial secession.

History of self-determination

Prior to World War I, international law did not concern itself with any discussion of self-determination for minority groups. Rather, once a group or a national movement succeeded in gaining independence from its mother state,

other states would simply acknowledge the group's statehood. This changed after World War I, at the Paris Peace Conference, where self-determination "was a guiding principle for statesmen who remapped central and eastern Europe."[2] Thus, peace-makers at the conference decided to adopt the so-called principle of nationalities, whereby they would draw new borders along national lines.[3] The seeds of the idea of self-determination coincided historically with the break-up of a major European powerhouse, Austria–Hungary, at the end of World War I. Austria–Hungary had been comprised of many different ethnic groups all living within the auspices of a large European empire. While the different ethnic groups were not exactly colonized, in the true sense of the word, their status and their rights depended entirely on their sovereign monarch, the Austro-Hungarian emperor, who could unilaterally decide to strip away a group's rights or to favor one group over another. Once Austria–Hungary lost World War I and decomposed into a series of nation states, the idea of self-determination became appealing to thinkers such as Woodrow Wilson and Vladimir Lenin.[4] However, it remained unclear whether a general norm of international law would develop from the ideas laid out at Versailles, or if this peace conference would remain a "case-specific exercise of great power diplomacy."[5] The latter proved to be true, when Woodrow Wilson's proposal to include the principle of self-determination in the Covenant of the League of Nations was defeated.[6] Moreover, as will be discussed later, two commissions appointed by the League of Nations in connection with the Aaland Islands status dispute determined that international law did not recognize a general right of self-determination, absent extreme circumstances when a minority group is denied any basic rights.[7]

After World War II, self-determination acquired the status of a legal right. However, the contours of that right were deeply embedded in the idea of decolonization: self-determination meant that colonized peoples had the right to freely determine their political fate. Outside the decolonization paradigm, as will be discussed later, the existence of any general self-determination rights has been controversial.

The principle of self-determination was first enshrined in a major treaty with the adoption of the United Nations Charter after World War II. In Article 1(2), the United Nations Charter provided that one of the purposes of this organization was "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[8] The United Nations Charter thus envisaged self-determination, but did not define the concept or distinguish between various forms of self-determination. The Charter did not impose direct legal obligations on member states; rather, it contemplated that member states should allow minority groups to self-govern as much as possible. Under the Charter, self-determination did not translate into the right for minority groups to separate from sovereign mother states, or into the right for colonized peoples to achieve independence. Despite these limitations, "the fact remains that this was the first time that self-determination had been laid down in a multilateral treaty," and "the adoption of the UN

Charter marks an important turning point; it signals the maturing of the political postulate of self-determination into a legal standard of behavior."[9]

Two decades later, the principle of self-determination was espoused in two additional treaties: the United Nations Covenant on Economic, Social, and Cultural Rights and the United Nations Covenant on Civil and Political Rights. Article 1 of both of these Covenants provided that:

> [a]ll peoples have the right to self-determination . . . The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[10]

Under the Covenants, the right to self-determination acquired a new meaning: here, the right became a continuing one, an obligation on behalf of the Covenants' member states to respect a people's right to some form of democratic self-governance. Moreover, the right to self-determination was expressed in two different formats, one for non-colonized and the other for colonized peoples. First, non-colonized peoples living within larger mother states became entitled to a form of internal governance within their mother state. Non-colonized peoples, however, did not acquire the right to seek independence from their mother states. Second, the Covenants granted peoples of dependent territories (colonies and trusts) the right to freely decide their international status. Thus, colonized peoples acquired the right to determine their political fate: to form an independent state or to remain a part of their existing colonizer or to associate with another state. Unlike non-colonized peoples, colonized ones could rely on the Covenants to exercise their right to self-determination and to seek a legal separation from their colonizer through remedial secession.[11]

Toward the end of the decolonization movement in the early 1970s, the legal position on self-determination could be summarized as follows.[12] First, all peoples subjected to colonial rule had the right to self-determination, pursuant to the provisions of the Covenants, as well as to two Resolutions passed in the General Assembly—Resolution 1514 of 1960, the so-called Declaration on Granting Independence to Colonial Countries and Peoples, and Resolution 1541, passed one day later, which contained an annex specifying the modalities of self-determination for colonized peoples.[13] Second, for colonized peoples, the right to self-determination entailed the choice to freely decide their future status. Third, the right belonged to a people as a whole, living in a given colonial territory. Thus, if various ethnic groups lived in a single colony, their right to self-determination had to be exercised as a whole, with all ethnic groups uniting to a single "self" that corresponded to the entire territory of that colony. This observation flows from the principle of *uti possidetis*, leading toward the respect of colonial borders and their elevation to the status of international frontiers. As

will be discussed in Chapter 5, the International Court of Justice has confirmed the supremacy of the principle of *uti possidetis*, and has thereby deprived some ethnic groups living within larger colonies of the opportunity to seek self-determination.[14] Fourth, the wishes of the colonized population did not necessarily have to be ascertained through referendum. As will be discussed in Chapter 5, the lack of referendum in some territories, such as Western Sahara, has deprived those populations of the opportunity to express their wishes and their opinion as to whether they would rather form an independent state or associate with another already existing state.[15] Fifth, once a colonized people exercised its right to self-determination, that right expired. In other words, once a colonized people formed an independent state, that people became devoid of the right to form a democratic government or to freely choose its rulers. Self-determination within the decolonization paradigm was about the formation of independent states in lieu of former colonies; how the new states were governed or whether the populations of the new states were oppressed or ruled by non-democratic dictators was irrelevant. Finally, non-colonized peoples had the right to self-determination within their mother states, and could rely on this right to argue for the establishment of autonomy or regional political governance. Non-colonized peoples did *not* have the right to seek independence from their mother states based on the theory of self-determination. Thus, as of the early 1970s, the right to self-determination existed for all peoples, but was limited in its scope with respect to non-colonized peoples, and was limited in its application to colonized peoples, as already discussed.

Nonetheless, an argument can be made that the right to self-determination continued to develop and to evolve starting in the 1970s, so that in the modern-day era, the right can be relied on by peoples seeking independence from their sovereign mother states, outside the decolonization paradigm. Some scholars believe that the right of self-determination developed outside the decolonization context post-World War II.[16] In 1970 the United Nations General Assembly adopted the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations ("Friendly Relations Declaration" or "Declaration"). The Declaration affirmed the principle of self-determination in the UN Charter as the right of "the people of a colony or non-self-governing territory" to freely determine its political fate.[17] The Declaration further states that outside the decolonization context, states enjoy the right to territorial integrity, except if a state's government does not represent "the whole people belonging to the territory without distinction as to race, creed or color."[18] This language has been interpreted to confer the right to self-determination, and potentially, secession on *racial* or *religious* groups living in a larger mother state, if the former are denied access to the political decision-making process. Subsequent UN Declarations, adopted in the 1990s, affirm the right to self-determination for other kinds of group, including linguistic, national, or cultural groups.[19] Thus, "secession is a remedy of final recourse that may come into play when it is the sole means by which a substate group can exercise its

right of political participation on a basis of equality."[20] In addition to the Friendly Relations Declaration, two other international treaties assert the existence of a right to self-determination. Common Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights, quoted earlier, confirm the right of "all peoples" to self-determination.[21] While it is true that the drafting history and text of the covenants suggest that the right to self-determination was to apply specifically in the decolonization context, they also suggest another dimension to this right: the idea of government by democratic principles. Under this view, self-determination for non-colonized peoples entails a right to self-government within the larger mother state; inherent in such self-government is the idea of meaningful choice for any people to democratically elect its representatives.

In the last decade of the 20th century, the idea that all groups ought to be entitled to participate in self-government gained substantial support. In 1992 Thomas Franck argued that democracy was "on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes."[22] This idea gained traction in international practice. For example, in 1994 the UN Security Council authorized a military intervention in Haiti, for the specific purpose of restoring "the legitimately elected President."[23] Moreover, a history of plebiscites across the globe suggests that democratic principles are inherently relevant in examining separatist claims. Had the Quebecois voted to separate from Canada in 1995, it is plausible to suggest that most of the outside world would have honored the Canadian desire to split into two different states.[24] When the ethnic Albanian Kosovars voted to separate from Serbia in 2008, many states honored their secessionist quest and recognized them as a new state.[25] Similarly, in East Timor, when the people voted in referendum to secede from Indonesia, most of the outside world recognized the Timorese as a new state.[26] Thus, states' newly created commitment to democracy, over the last decade of the 20th century, has significant implications for separatist claims, and under a preferable vision of democracy, achieving a mutually consensual outcome, between the mother state and the secessionist group, is the preferred way to resolve any disputes.

> International law's deepening devotion to democracy remains what it has long been—a commitment above all to full participatory rights within established states. Emerging norms recognizing a right to self-government lend support to separatist claims principally when those same norms have already been profoundly, irrevocably breached.[27]

Contrary to this view, some scholars maintain that the decolonization movement after World War II did not give rise to a group right of self-determination, because, "once foreign domination ended, the right of self-determination was spent."[28] According to some scholars, the famous 1970 Friendly Relations Declaration, adopted by the United Nations General Assembly, did not espouse the idea that minority groups had a right to self-determination. In fact,

according to this view, at the time that the Declaration was adopted both the Eastern and the Western blocs were wary of supporting separatist groups, as evidenced in their failure to support Ibo in the Biafran War, ethnic groups in the Belgian Congo warfare in the early 1960s, or any other secessionist groups elsewhere in the world.[29] Thus, it is implausible that they would have supported the creation of a general right of self-determination in the Declaration itself. Moreover, the negotiation record of the Declaration demonstrates that many states were concerned with a broad articulation of any right of self-determination, because they wished to avoid any negative impact that such a right would have on existing state boundaries. For example, the Canadian government worried that a formulation of a broad right of self-determination might justify the "dislocation" of a multi-ethnic state and imply "full independence."[30] Poland had qualms about the stability of "existing frontiers," and India expressed its view that "the right of self-determination did not apply to sovereign and independent states" because otherwise, "the principle of self-determination would lead to fragmentation, disintegration and dismemberment of sovereign states."[31] Thus, the negotiation record shows that numerous states apprehended the creation of a general right of self-determination. In addition, the text of the Declaration demonstrates the ambiguity with which states viewed the right of self-determination outside the decolonization context. The term "self-determination" is mentioned eight times in the Declaration; the first seven mentions are either general references or occur in the decolonization context.[32] On the eighth occurrence, "self-determination" is mentioned in a proviso clause, which reads as follows:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.[33]

Thus, the only reference to self-determination in the proviso clause is to "self-determination of peoples as described above," and none of the "descriptions of above" refers to the right of self-determination outside the decolonization context. In fact, in the sentence preceding the proviso, the right to self-determination is concerned with peoples in a "colony or non-self-governing territory."[34] Thus, it can be inferred that the purpose of the proviso was to restrict the application of the language preceding it to colonial peoples, and not to create new rights for other minority groups. Finally, even if the proviso introduced a new right of self-determination, it would not follow that secession was specifically authorized by the proviso. For any people, even a colonized one, the Declaration specifies that a variety of statuses short of independence "constitute modes of implementing the right of self-determination."[35] Thus,

a people could exercise its right to self-determination through a form of political or territorial autonomy, special group rights, trusteeships, protectorates, and so forth. The proviso is structured to prohibit any action that would hinder the territorial integrity of states. It states explicitly that "[e]very state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."[36] It is true that the proviso also places a duty on all states to "promote . . . realization of the principle of equal rights and self-determination of peoples."[37] However, in light of the negotiation record of the Declaration, state practice at the time of its adoption, as well as the plain language of the Declaration, it appears that the proviso clause confers such a duty on states to promote self-determination rights of peoples only in the context of decolonization, and not in the context of helping struggling minority groups to gain independence from their established mother states.

Finally, even if the Declaration could be read to confer a broad right of self-determination, this does not mean that such a right would automatically become a part of international law. Prominent authors, such as Antonio Cassese, Ian Brownlie, and Peter Malanczuk have concluded that, in 1970, there did not appear to be any customary norm of international law authorizing self-determination for non-colonial peoples.[38] Neither can the right of self-determination post-World War II be derived from an international law right to be governed by democratic principles. International law does not recognize a right to live under a democratic regime, and many states today are not ruled by democratic governments. Prominent British jurist, James Crawford, concluded in 1998 that "State practice since 1945 shows very clearly the extreme reluctance of States to recognize or accept unilateral secession outside the colonial context."[39] Crawford dismisses Bangladesh as a successful example of secession, as this was a "fait accompli achieved as a result of foreign military assistance in special circumstances."[40] For Crawford, other examples, such as Eritrea and the Baltic states, involved mutual consent. Thus, any time that the central government opposes secession, secessionists are unable to succeed, as has been the case with northern Somalia, and certainly with South Ossetia and Abkhazia. According to Crawford, there is no unilateral right to secede under international law, and any self-determination for peoples "is to be achieved by participation in its [the mother state's] constitutional system, and on the basis of respect for its territorial integrity."[41]

Regardless of which of the two views exposed here one adopts, it is certain that the contours of the right to self-determination have undergone changes toward the end of the 20th century and the beginning of the 21st century, due to dissolutions of European countries, such as the former Yugoslavia and the former Soviet Union, which will be discussed in Chapter 2, as well as to other geopolitical changes across the globe allowing for separatist movements to function more freely, as has been the case in the Caucasus (South Ossetia and Abkhazia) and in Africa (Sudan). These issues will be explored in the third section of this chapter. Moreover, it is too simplistic today to argue that the right

to self-determination *never* exists outside the decolonization paradigm. Several examples throughout the second half of the 20th century demonstrate that some peoples have been able to assert their rights to external self-determination. Whether such peoples succeeded in their self-determination plights because of political and military assistance or due to special circumstances, the fact remains that self-determination has resulted in secession in some instances, and has caused territorial changes and border alternations. The better view under modern-day international law may be that self-determination rights exist under limited circumstances, such as, for example, when a people is not entitled to government by democratic principles within its mother state.

In order to assess when self-determination rights accrue, the fundamental inquiry lies within the concept of a "people." What is a "people" under international law? The following section explores this concept.

What is a "people" for the purposes of self-determination?

Under the principle of self-determination, a group with a common identity and link to a defined territory is allowed to decide its political future in a democratic fashion.[42] For a group to be entitled to exercise its collective right to self-determination, it must qualify as a "people."[43] Traditionally, a two-part test has been applied to determine when a group qualifies as a people.[44] The first prong of the test is objective and seeks to evaluate the group to determine to what extent its members "share a common racial background, ethnicity, language, religion, history, and cultural heritage," as well as "territorial integrity of the area the group is claiming."[45] The second prong of the test is subjective and examines "the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct 'people,'" and "the degree to which the group can form a viable political entity."[46]

The meaning of the term "people" has its historical underpinnings in the idea that indigenous groups should be allowed to practice modes of self-government. In fact, indigenous peoples are in a better position to identify the needs and wants of their own communities; thus, it makes sense to let them express such needs and wants through a form of self-government.[47] Self-rule by smaller minority groups operating within a larger central state is entirely consistent with notions of democracy, so that even if the minority group, or people, does not have the capacity to exercise jurisdictional authority equivalent to a true state, it nonetheless deserves a measure of autonomy that it is capable of exercising. How does one define membership in an indigenous group, defined well enough to constitute a people? First, often the existence of a people in a given territory precedes the creation of the larger mother state therein. Such is the case of indigenous groups in Brazil, in Australia, and in Canada, to name a few examples. Such minority groups often self-identify as a people, thereby satisfying the subjective element of the definition presented earlier—that members of a people must perceive themselves as distinctly forming a

separate entity. Moreover, many indigenous groups or peoples are dispersed into small communities of a few hundred people. This can be problematic if one attempts to define peoples territorially. Territorial self-government of peoples presupposes "that all people resident within a particular jurisdiction, and so subject to its rules, have input or democratic voice in the making of these decisions."[48] Thus, identifying peoples in a territorial manner is problematic and can jeopardize the possibility of self-rule for peoples. Instead, other factors within the objective criterion of the definition of the term "people" should be looked to, such as whether the group shares a common race, ethnicity, language, religion, culture or history. Territoriality, if unaccompanied by these traits, may be entirely at odds with the definition of a group as a people.

The term "people" is also distinct from the notion of minority rights. The latter confer on a minority group living within a larger state a set of rights: cultural, linguistic, religious, but not necessarily political. "Minority rights protect the existence of national, religious, linguistic or ethnic groups, facilitate the development of their identity and ensure that they can fully and effectively participate in all aspects of public life within the state."[49]

Under modern-day international law, minority groups' rights are protected from abuse by their mother states, and are guaranteed the respect of basic rights.[50] For example, Article 27 of the International Covenant on Civil and Political Rights provides that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right . . . to enjoy their own culture, to profess and practice their own religion, or to use their own language."[51] The Human Rights Committee issued a general comment in 1994 focusing on Article 27, in which it concluded that states had positive obligations to protect minority rights. According to the Human Rights Committee, "[t]he protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned."[52] Moreover, minority rights are protected in the so-called Copenhagen Document, an instrument prepared by the Conference (now Organization) on Security and Cooperation in Europe at a 1990 meeting in Copenhagen devoted to human rights.[53] According to the Copenhagen Document, "[p]ersons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will."[54] Finally, minority rights are specifically protected in the Framework Convention for the Protection of National Minorities, a multilateral treaty resulting from the political commitments of states signatory to the Copenhagen Document.[55] The Framework Convention guarantees to persons belonging to ethnic minorities the right to equal treatment before the law, as well as rights to use their language, to develop their culture and ethnic identity, their religion, traditions and cultural heritage.[56]

The right for minority groups to have their language, culture, religion or ethnicity respected by the mother state is not synonymous with the right to

self-determination. While all minority groups enjoy the former, only those minority groups that qualify as peoples enjoy the latter. Some larger states view minority groups as populations attached to a territory, which do not qualify, under international law, for larger protections as those afforded to "peoples." For example, Spain and the United Kingdom may view the population of Gibraltar as simply a group inhabiting a certain territory. Thus, Spain and the United Kingdom may be willing to accord the population of Gibraltar the status of a minority group (and all the associated protections), but not the status of a people (and the associated right of self-determination). Some minority groups may be too small and too subjectively uncertain of their own right to self-government. Such may be the case of indigenous groups, such as the James Bay Crees in Canada. The Crees are certainly a minority group and have enjoyed human rights protections by the Canadian government. However, it is unclear that they are a people disposing of the right to self-determination.[57] Thus, all peoples are also a minority group, but not all minority groups qualify as a people. In that sense, a people may be a subset of a minority group, a more precisely defined club of specific members who possess more singularly similar characteristics and a more singular belief in the necessity of their own self-government. All minority groups are entitled to a level of protection by the mother state, and all mother states should be committed to the protection of human rights of all individual members of every minority group. However, if every minority group were entitled to self-determination, "there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve."[58] Thus, the distinction in international law between a minority group and a people is purposeful and incredibly significant. The right to self-determination only attaches to peoples, while minority groups are protected through their mother states' commitment to the respect of basic human rights, such as those already described.

Often, identifying a people may be the first step toward assessing that group's rights to self-determination. For example, most commentators would agree that the Albanian Kosovars within Serbia constitute a "people," or that the French-speaking Quebecois represent a "people" within Canada. That identification, however, is not simultaneous with the conclusion that any people deserves the right to self-govern in an independent manner, as a single, separate state, through the exercise of *external* self-determination. Rather, the identification of a group as a people signals that the group deserves rights, which can be fulfilled equally well within the central mother state, through so-called *internal* self-determination.

Internal v. external self-determination

Self-determination of such groups that qualify as a people can be effectuated in different ways: through self-government, autonomy, free association, or, in extreme cases, independence. Co-existence of a people within a larger central state, where the people has rights to self-government, political autonomy,

cultural, religious and linguistic freedoms, is an example of *internal* self-determination. In other words, if the mother state is willing to allow the people to exercise its rights within the mother state, then, that people's right to self-govern can be fulfilled internally. Such is the case of the Quebecois within Canada, of indigenous groups in Brazil and in Australia, and such was the case of national minorities living in the former Yugoslavia and the former USSR, before their respective dissolutions.

However, what happens if the people asks for more? Once the determination has been made that a specific group qualifies as a people and thus has the right to self-determination, the relevant inquiry becomes whether the right to self-determination ought to be fulfilled *externally*, through secession and independence?[59] The exercise of a people's right to external self-determination signifies that the people is seeking to separate from the mother state, and to self-govern outside of the confines of that larger states—thus, externally. As mentioned earlier, the right to self-determination can take different forms that are less intrusive on state sovereignty than secession is.[60] Understandably, the international community views secession with suspicion,[61] and traditionally, the right to independence or secession as a mode of self-determination has only applied to people under colonial domination or some kind of oppression.[62] However, modern-day theories of secession have recognized three different justifications for this extreme result. First, the nationalist theory of secession holds that a "territorially concentrated group may secede if and only if it is a nation and the majority of members of the nation . . . want to secede."[63] Second, choice theories of secession claim that any geographically defined group should be able to secede if the majority of its members choose to. Finally, the modern-day international law has come to embrace the right of non-colonial people to secede from an existing state, "when the group is collectively denied civil and political rights and subject to egregious abuses."[64] This type of secession has been referred to as a just cause theory of secession, holding that a group can secede if it has "just cause" for doing so—for example, if it has been the victim of systematic discrimination and or abuse, or if its territory has been illegally taken away and incorporated into another larger state. This right has become known as the "remedial" right to secession, and has its origin in the infamous 1920 Aaland Islands case.[65] This case will be discussed in more detail in Chapter 2; thus, the subsequent paragraph merely provides a brief overview of the "just cause" theory of secession as developed through the arguments advanced in this case.

The Aaland Islands were a small island nation situated between Finland and Sweden, belonging to the former and seeking to reunite with the latter.[66] In fact, the Aalanders claimed that they were ethnically Swedish, and that they wished to break off from Finland and to become a part of Sweden.[67] In an advisory opinion, the second Commission of Rapporteurs operating within the auspices of the League of Nations held, first, that this issue was properly of international, not domestic jurisdiction, and, second, that the Aalanders had a right to a cultural autonomy, which had to be exercised within Finland.[68] Only

if Finland disrespected their ethnic and cultural autonomy would the Aalanders' right to separate from Finland be triggered.[69] The Commission of Rapporteurs, while denying the existence of a general right of self-determination, suggested that secession could be available as a "last resort when the State lacks either the will or the power to enact and apply just and effective guarantees" for minority rights. This view fits nicely within the idea of "just cause" secession, justifying the people's need to seek external self-determination, rather than relying on modes of internal self-determination.

Other international documents have espoused this approach and have distinguished between modes of international versus external self-determination. The 1970 Friendly Relations Declaration preconditions the right of non-colonial people to separate from an existing state on the denial of the right to a democratic self-government by the mother state.[70]

A leading scholar analyzing the Declaration has found that secession may be warranted under the following circumstances: "[w]hen the central authorities of a sovereign state persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the State structure."[71] A similar clause, striking a balance between the right to self-determination and territorial integrity, was inserted in the 1993 Vienna Declaration of the World Conference on Human Rights, accepted by all UN member states.[72] The Vienna Declaration states the following:

> In accordance with the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.[73]

Other UN bodies have also referred to the right to remedial secession, such as the 1993 Report of the Rapporteur to the UN Sub-Commission Against the Discrimination and the Protection of Minorities on Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities,[74] and the General Recommendation XXI adopted in 1996 by the Committee on the Elimination of Racial Discrimination.[75]

This view was recently affirmed by the African Commission on Human and Peoples' Rights, which ruled the following:

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right

> to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire . . . the Quest for independence of Katanga therefore has no merit under the African Charter on Human and Peoples' Rights.[76]

It is entirely logical that the right to external self-determination, leading toward secession, would exist only in exceptional circumstances, where the mother state chooses to oppress the people in the most heinous ways, or where the people's right to participate in the central government is non-existent. As Marc Weller has stated: "The right to opposed unilateral secession stands in obvious tension with the claim to territorial integrity and unity of existing states."[77] The principle of territorial integrity is a *jus cogens* norm of international law: a norm so fundamental that no states are permitted to derogate from it.[78] Another norm that is corollary to the principle of territorial integrity, the principle of *uti possidetis*, ensures that international borders remain intact. According to the International Court of Justice, the principle of *uti possidetis* is an "obligation to respect pre-existing international frontiers in the event of a State succession."[79] As such this principle gives predominance to the idea of territorial integrity of pre-existing states over any external self-determination quests of various peoples. Thus, an act of external self-determination, resulting in secession, not covered by the right to colonial self-determination is typically (yet not always) considered unlawful in international law.

Entities that have exercised their right to external self-determination in such an unlawful manner are most often denied the attribute of statehood. Such unlawful entities "have come into being in violation of essential rules of the international community as a whole,"[80] and, despite possessing the objective criteria of statehood, such as a territory, population, and government, they are not recognized as states and not engaged by other states as a legitimate partner in international relations. Examples of such illegal exercises of external self-determination include Northern Cyprus, which illegally used force to attain de facto independence from Cyprus, Southern Rhodesia which unilaterally declared independence from Great Britain by a white minority government, and Republika Srpska, which claimed independence from Bosnia after engaging in unlawful war practices such as ethnic cleansing. In all such instances of unlawful secession, the central government of the larger state from which these entities attempted to separate has claimed the right to forcefully reincorporate the renegade territory. The international community has supported this view, and has offered little opposition to the forcible reintegration of Biafra and Katanga, as well as Chechnya most recently.[81] All these instances confirm that the right to external self-determination exists in international law only as a small exception to the general rule affirming the territorial integrity of states. Otherwise, minority groups that qualify as peoples are allowed to pursue internal self-determination rights within their larger mother states.

The distinction between internal and external self-determination serves the purpose of limiting secession to extremely narrow circumstances, because "[t]he right to opposed unilateral secession stands in obvious tension with the claim to territorial integrity and unity of existing states."[82] By allowing only those peoples whose central governments have been heinously hostile to secede through the exercise of external self-determination, and by limiting all other peoples to forms of autonomy within their central state through the exercise of internal self-determination, international law achieves the goal of preserving territorial integrity of existing states, except in truly exceptional circumstances.

Many other scholars have already attempted to delineate the contours of the modern-day right to external self-determination. This book will not remake any such arguments, neither will it focus on the distinction between internal versus external self-determination. Instead, we will focus on a novel approach: the so-called great powers' rule. The great powers' rule is a political theory, according to which the success of any external self-determination-seeking entity depends entirely on the support, or lack thereof, that the entity enjoys from the great powers. In Chapter 4, I will discuss novel criteria that constitute the great powers' rule and which, as case studies in Chapters 6 through 10 will demonstrate, must be fulfilled by any external self-determination seeking people. The great powers' rule has replaced normative international law in the field of self-determination; politics have effaced law. What may remain of the theory of self-determination in the future is uncertain (unless the International Court of Justice were to choose to address self-determination issues within the context of a future case). At the start of the new millennium, the great powers' rule dictates results of self-determination quests. External self-determination rights exist if they fit within the parameters of the great powers' rule. An entity will become an independent state through the exercise of external self-determination if the great powers approve of such a result. While politics has always been intertwined with international law, the great powers' rule seems to have superseded most legal norms and it may become a futile attempt to discuss self-determination in the future without any reference to the great powers and their interests.

Notes

1 Western Sahara, 1975 ICJ 12, 122.
2 D. Orenlichter, "International Responses to Separatist Claims: Are Democratic Principles Relevant?", *Secession and Self-Determination*, Stephen Macedo and Allen Buchanan eds., 2003, p. 21.
3 Ibid.
4 Self-determination pursuant to Wilson's and Lenin's idea fits squarely within the paradigm of dissolution of existing states, and is thus non-threatening to the territorial integrity of remaining states.
5 Orenlichter, op. cit., p. 21.
6 Ibid.

7 *See* Chapter 2.
8 United Nations Charter, Art. 1.
9 A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995, p. 43.
10 United Nations Covenant on Economic, Social and Cultural Rights, Art. 1, 993 U.N.T.S. 3, 1966; United Nations Covenant on Civil and Political Rights, Art. 1, 999 U.N.T.S. 171, 1966.
11 For a full discussion of the right of self-determination under the two Covenants, *see* Cassese, op. cit., pp. 52–62.
12 For a detailed discussion of the right to self-determination for colonized peoples during the decolonization era, *see* Cassese, op. cit., pp. 72–73.
13 G.A. Res. 1514, 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples; G.A. Res. 1541, 1960.
14 *See* Chapter 5 and the discussion of the Western Sahara case.
15 Ibid.
16 *See*, *e.g.*, Orenlichter, op. cit.; *see also* Cassese, op. cit., p. 119.
17 G.A. Res. 2625, UN GAOR, 25th sess., Supp. No. 28, 121, UN Doc. A/8018, 1970.
18 Ibid.
19 See United Nations World Conference on Human Rights, Vienna Declaration and Program of Action, UN Doc. A/CONF.157/24 (part I), para. 2 (1993), 20–46; Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, G.A. Res. 50/6, 1995, para. 1, UN Doc. A/RES/50/6, 1995.
20 Orenlichter, op. cit., p. 23.
21 Dec. 16, 1966, 993 United Nations Treaty Series 171, entered into force Mar. 23, 1976; Dec. 16, 1966, 993 United Nations Treaty Series 3, entered into force Jan. 3, 1976.
22 T. Franck, "The Emerging Right to Democratic Governance", *American Journal of International Law*, 1992, Vol. 86, 46.
23 S.C. Res. 940, 1994.
24 On the Quebec secession case, *see* Chapter 2.
25 On Kosovo, *see* Chapter 7.
26 On East Timor, *see* Chapter 6.
27 Orenlichter, op. cit., pp. 38–39.
28 D.L. Horowitz, "A Right to Secede?", *Secession and Self-Determination*, Stephen Macedo and Allen Buchanan eds., 2003, p. 60.
29 Ibid., p. 61.
30 *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation among States*, UN General Assembly, 25th Sess., Supp. No. 18, pp. 99, 98, UN Doc. A/8018, 1970.
31 Ibid. pp. 19, 25, 21.
32 Friendly Relations Declaration, op. cit.
33 Ibid.
34 Ibid.
35 Ibid.
36 Ibid.
37 Ibid.
38 Cassesse, op. cit., pp. 123–124; I. Brownlie, *Principles of Public International Law*, Oxford University Press, 2008, pp. 601–602; P. Malanczuk, *Akehurst's*

Modern Introduction to International Law, 7th edn, Routledge, 1997, pp. 334, 339–340.

39 J. Crawford, "State Practice and International Law in Relation to Secession", *British Yearbook of International Law*, Clarendon Press, 1999, p. 114.

40 Ibid., p. 115.

41 Ibid., p. 116.

42 M.P. Scharf, "Earned Sovereignty: Judicial Underpinnings", *Denver Journal of International Law and Policy*, 2003, Vol. 31, 373–379.

43 Ibid.

44 Ibid. Note, however, that the term "people" has been purposely left undefined under international law and that the tests seeking to determine when a group qualifies as a people have been flexibly applied. *See supra*, note 40.

45 Ibid.

46 Ibid.

47 On indigenous self-determination, *see* M. Moore, "An Historical Argument for Indigenous Self-determination", *Secession and Self-Determination*, Stephen Macedo and Allen Buchanan eds., 2003, p. 89.

48 Ibid., p. 107.

49 M. Weller, *Escaping the Self-Determination Trap*, Brill, 2008, p. 24.

50 On the status of minority rights generally, *see* D. Wippman, 'The Evolution and Implementation of Minority Rights', *Fordham Law Review*, 1999, Vol. 66, 597.

51 International Covenant on Civil and Political Rights, Art. 27.

52 Human Rights Committee, General Comment 23, U.N. Doc. A/49/50, 1994, Vol. 1, 108.

53 "Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE", *International Legal Materials*, 1990, Vol. 29, 1305.

54 Ibid., para. 32.

55 "Framework Convention for the Protection of National Minorities", *International Legal Materials*, 1995, Vol. 34, 351.

56 Ibid., Arts 4, 5, 10.

57 Note that some scholars have argued that the Canadian government treatment of indigenous populations such as the Crees, while according them rights to control their development and natural resources, is too paternalistic because it perpetuates undesirable colonial attitudes toward native populations. *See*, for example, A. Buchanan, "The Quebec Secession Issue: Democracy, Minority Rights, and the Rule of Law", *Secession and Self-Determination*, Stephen Macedo and Allen Buchanan eds, 2003, p. 263.

58 Weller, op. cit., p. 21.

59 Secession under international law refers to separation of a portion of an existing state, whereby the separating entity either seeks to become a new state or to join yet another state, and whereby the original state remains in existence without the breaking off territory. Successful secessions around the globe have been rare, because secession seems inherently at odds with the principles of state sovereignty and territorial integrity, which have been core values of international law for centuries. *See* J.C. Dunoff, S.R. Ratner, and D. Wippman, *International Law: Norms, Actors, Processes*, 3rd edn, 2010, p. 106 (defining secession and noting how rare successful instances thereof have been) [hereinafter "Dunoff et al."].

60 Scharf, op. cit., p. 379.

61 Ibid., p. 380 (noting that secession is "synonymous with the dismemberment of states"). Note the 1970 statement by then UN Secretary-General U. Thant: "As far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member States", Secretary-General's Press Conferences, in 7 *UN Monthly Chronicle* 36, Feb. 1970.

62 Ibid. Note that under this view, the independence of a colony was not considered a secession, because that term referred only to the separation from a state of a portion of its domestic territory. *Id.* Moreover, the international community has also leaned on the theory of "salt-water colonialism," under which self-determination only applied to lands separated from the metropolitan mother state by oceans or seas.

63 W. Norman, "Domesticating Secession", *Secession and Self-Determination*, Stephen Macedo and Allen Buchanan eds., 2003, p. 198.

64 Scharf, op. cit., p. 381.

65 Ibid.

66 Dunoff et al., op. cit., pp. 118–119.

67 Ibid., p. 119.

68 The League of Nations created an International Committee of Jurists to determine whether the League of Nations had jurisdiction over this issue, and the Committee's report generally held that the League of Nations had such jurisdiction over this issue. Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion on the Legal Aspects of the Aaland Islands Question, *League of Nations Official Journal*, Special Supp. No. 3, at 5–10, 1920. Then, the League of Nations appointed a Commission of Rapporteurs to recommend a solution to the Aaland Islands problem, and the Rapporteurs report held that "[t]he separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees." The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106, 1921 [hereinafter "Aaland Islands Report"].

69 Aaland Islands Report, op. cit. (holding that "in the event that Finland . . . refused to grant the Aaland population the guarantees which we have just detailed . . . [t]he interests of the Aalanders . . . would then force us to advise the separation of the islands from Finland").

70 "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color." G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028, 1970.

71 Cassesse, op. cit., p. 119.

72 "Vienna Declaration and Programme of Action, World Conference on Human Rights", para. 2, UN doc. A/CONF.157/23, 1993', reprinted in *International*

Legal Materials, 1993, Vol. 32, 1661 ("Vienna Declaration"). Note that the Vienna Declaration, unlike the 1970 Declaration on Friendly Relations, "did not confine the list of impermissible distinctions to those based on 'race, creed or color,' indicating that distinctions based on religion, ethnicity, language or other factors would also trigger the right to secede." Scharf, op. cit., p. 382.

73 Vienna Declaration, para. 2.

74 Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, Commission on Human Rights: Sub-commission on Prevention and Protection of Minorities, 45th Sess., Agenda Item 17, UN Doc. E/CN.4/Sub.2/1993/34, 1993, para. 84.

75 Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 51st Sess., Supp. No. 18, pp. 125–126, para. 11, UN Doc. A/51/18, 1996.

76 Katangese Peoples' Congress vs. Zaire, African Comm. On Human and Peoples' Rights, Comm. No. 75/92, 1995, para. 6.

77 Weller, op. cit., p. 32.

78 *Jus cogens* is defined in Article 53 of the Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, Art. 53.

79 Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Merits, 1986 ICJ 564.

80 Weller, op. cit., p. 33.

81 Ibid., p. 33–34.

82 Ibid., p. 32.

2 Recent applications of self-determination

Throughout the 20th century, the right to self-determination has evolved under international law. Even those who dispute the existence of the right to self-determination outside the colonial context would agree about the existence of scholarly and jurisprudential debate around this subject. Recent cases illustrate the willingness of some in the international community to acknowledge the presence of a possible right of self-determination for non-colonized peoples. In order to address this issue, this chapter will focus first on the development of self-determination rights in the 20th century, before turning to a discussion of state dissolutions in the 1990s, having produced self-determination-seeking entities.

From Aaland Islands to Quebec: self-determination throughout the 20th century

The infamous Aaland Islands case, briefly discussed in the previous chapter, situates itself well at the confluence of the self-determination debate. At the end of World War I, with the fall of two large empires, Austria–Hungary and the Ottoman Empire, ethnic groups which one could classify as peoples today, sought the establishment of nation states. As a result, several new states were created: Czechoslovakia, Yugoslavia, Finland, Estonia, Latvia, Lithuania, and Poland.[1] The rhetoric of Vladimir Lenin and Woodrow Wilson at the Paris Peace Conference supported this view—that peoples living within determined boundaries ought to be able to form their own states.[2] Self-determination in this context fits within the paradigm of decolonization or dissolution of states, a situation where a large empire ceases to exist and new states inhabited by distinct peoples are created. Self-determination in this context does not pose any threats to the norm of territorial integrity of states, because self-determination-seeking entities wish to create new states on the territory of the former empire, which no longer exists. Thus, the creation of new states through self-determination in the decolonization or dissolution context does not entail challenges to the territorial integrity of any existing states. Lenin and Wilson envisioned this type of self-determination at the Paris Peace Conference—a process through which nation states could be born, replacing failed empires.[3]

Contrary to this kind of self-determination, the Aalanders, through a legally novel claim, sought to separate from Finland in order to join Sweden—a territorial maneuver that would have altered Finland's borders and threatened its territorial integrity. Thus, the Aaland Islands case represents a first of its kind: international jurisprudence on the topic of self-determination outside the decolonization or dissolution context.

The Aaland Islands are an archipelago of about 300 small islands situated between Sweden and Finland. From the 17th century on, the islands were administered by Finland, which was then a province of Sweden.[4] In the beginning of the 19th century, as a result of several wars, Sweden ceded Finland and the islands to Russia. After the Russian revolution in 1917, Finland declared itself independent.[5] The Aalanders, who spoke the Swedish language and considered themselves ethnically Swedish, sought the opportunity to secede from Finland and to reunite with Sweden.[6] Finland and Sweden brought this issue before the League of Nations, which created an International Committee of Jurists to decide whether the League had jurisdiction over this issue, or whether Finland had domestic sovereignty over the Aalander problem.[7] The Committee reached several important conclusions regarding self-determination.

First, the Committee observed that "Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish."[8] Because of this, the Committee thus concluded that "the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method is, exclusively, an attribute of the sovereignty of Every State which is definitively constituted."[9] In other words, the Committee concluded that under normal circumstances, issues regarding national groups living within existing states are matters of domestic jurisdiction, as "[a]ny other solution would amount to an infringement of sovereign rights of a State."[10]

However, the Committee carved out specific exceptions to this conclusion. First, the Committee observed that it did not wish to give any opinions "concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose, give to an international dispute, arising therefrom, such a character that its object should be considered as one which is not confined to the domestic jurisdiction of the State concerned, but comes within the sphere of action of the League of Nations."[11] Thus, the Committee alluded to the possibility of international involvement in order to protect human rights of a minority group, if those rights were abused by the mother state. This represented a significant advancement of international law, which, at the time, seemed mostly concerned by interstate relations and uninterested in human rights issues. Moreover, this observation of the Committee alludes to the idea of external self-determination by a people whose rights are abused by the mother state. The Committee seemed to recognize the necessity of international intervention in limited instances where the protection of the minority group was at stake, and where living within the larger mother state

may no longer be a plausible option for the abused group.[12] While the Committee does not specifically endorse this idea, it nonetheless leaves open the possibility that international law should govern some minority groups' struggles, and that the international community should get involved in cases of abuse by the mother state. Second, the Committee stated that its general rule about domestic jurisdiction over a national group only applies "to a nation which is definitively constituted as a sovereign State and an independent member of the international community."[13] According to the Committee, under both domestic and international law, "the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law."[14] Thus, if a state is not fully formed, or is undergoing a transformation or a dissolution, this situation of transition will interest the international community. In these exceptional instances, according to the Committee, the principle of self-determination of peoples may become relevant.[15] In the case of Finland, the Committee concluded that the Aaland Islands were not definitely incorporated de jure into the state of Finland, and that because of this transient situation, the issue of the Aalanders was within the purview of international jurisdiction, exercised by the League of Nations.[16]

After the Committee determined that the League of Nations could properly exercise jurisdiction over the Aaland Islands issue, the League appointed a Commission of Rapporteurs to recommend a solution to his problem. The Commission reached several noteworthy conclusions in its report.[17] First, the Commission drew a distinction between the state of Finland, which had been ruled and oppressed by Russia, and the Aaland Islands, which are ruled by Finland but have not been oppressed or persecuted. Thus, the Commission concluded that the Aalanders could not rely on the precedent of Finland, which gained its independence from Russia through a separation or secession during World War I, because Finland's "tenderest feelings have been wounded by the disloyal and brutal conduct of Russia," and because the Aalanders had never been treated the same way by Finland.[18] Moreover, the Commission refused to accept a general rule that minority groups living within existing states should have the right to separate themselves to either declare independence or to rejoin another state. "To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity."[19] According to the Commission, the separation of a minority group from its mother state should be an "exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."[20] The Commission here confirms the Committee's allusion to possible instances of external self-determination, in cases where the mother state chooses to mistreat the minority group. Although neither the Committee

nor the Commission uses the term "self-determination" in this instance, the language is sufficiently clear on this issue and espouses the same idea—that of a minority group's expression of the desire to self-determine its political fate.[21] The Commission's language is thus tremendously significant in the development of modern-day international law on self-determination, because the Commission expressly admits the possibility of separation of minority groups from their mother state in exceptional circumstances.

Moreover, the Commission again addressed the possibility of external self-determination for the Aalanders when discussing its recommendation for this minority group and its autonomy status within Finland. The Commission concluded that the Aalanders wished to protect their culture and language.[22] The Commission recognized that the Aalanders were distinct from the Finnish population, but that there was no need for the Aalanders to separate from Finland, because Finland was ready to grant the Aalanders "satisfactory guarantees" that their language and culture would be preserved.[23] Thus, because Finland appeared willing to protect the Aalanders' cultural and linguistic heritage within the larger Finnish state, the Aalanders had no need to resort to the more drastic solution of separating from Finland. The Commission, however, noted that if Finland refused to grant the Aalanders such cultural and linguistic guarantees, then the Commission would "advise the separation of the islands from Finland, based on the wishes of the inhabitants which would be freely expressed by means of a plebiscite."[24] The Commission, in this instance, again alluded to the possibility of external self-determination for the Aalanders, if the Finnish government was unwilling to grant this minority group adequate protections and safeguards. The League of Nations ultimately recommended that the islands remain a part of Finland, but that they be subject to a special autonomy regime, which would include the teaching of Swedish in schools. This special regime remains in place today.[25]

The seeds of the notion of external self-determination were planted by the Commission in the 1920s, and they would be further developed by the Canadian Supreme Court in the infamous Quebec secession case several decades later. It is interesting to compare the two cases (Aaland Islands and Quebec): while they stem from completely different eras, address distinct geographical regions, and use different language, their approach to issues of self-determination is strikingly similar.[26]

For several decades, French-speaking residents of Quebec have demanded greater independence from Canada. Referendum on the issue of complete independence from Canada conducted in 1995 showed 49.4 per cent of the Quebec population in favor of secession from Canada, with only a slight majority voting against.[27] In light of such a large proportion of the Quebecois population voting in favor of secession, the Canadian Parliament requested the Supreme Court of Canada to issue an opinion on the legality of a unilateral secession of Quebec from Canada under both Canadian and international law.[28] The Canadian Supreme Court opinion embraces the Aaland Islands precedent while using more modern rhetoric and terminology. Substantively, however,

the Commission and the Canadian Supreme Court tackle the issue of secession in a strikingly similar manner, 70 years apart.

The Canadian Supreme Court distinguished between the right to internal self-determination and the right to external self-determination. The former is "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state," while the latter "arises in only the most extreme cases" and "potentially takes the form of the assertion of a right to unilateral secession."[29] The Canadian Supreme Court alluded to the possibility that when a people's right to self-determination is "being totally frustrated" internally, it may be entitled to exercise it externally, via secession.[30] However, the Canadian Supreme Court concluded that in the case of Canada, the population of Quebec was "equitably represented in legislative, executive, and judicial institutions," and that the state of Canada fully respected the principle of (internal) self-determination with respect to Quebec.[31] For example, the Quebecois in Canada "occupy prominent positions within the government," and they "freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world."[32] Thus, according to the Canadian Supreme Court, the Quebecois people were not denied their rights to internal self-determination and, accordingly, it was unnecessary to discuss the possibility of rights to external self-determination.[33] While the Commission in the Aaland Islands opinion did not use the same terminology of internal versus external self-determination, it did substantively make the same distinction when it discussed the issue of secession of the minority group from its mother state. According to the Commission, such a separation by a minority group could occur only in "exceptional cases," when the mother state was unwilling to accommodate the minority group in its quest for rights. Similarly to the Canadian Supreme Court, the Aaland Islands Commission concluded that the Aalanders were not oppressed by Finland, and that Finland agreed to guarantee the protection of the Aalanders' language and culture within the Finnish state, so that any discussion of secession was unnecessary in that context.

The Canadian Supreme Court also discussed the issue of states' territorial integrity and the potential conflict thereof with self-determination rights. According to the Court, the exercise of any self-determination right "must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states."[34] Moreover, "[t]here is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a 'people' to achieve a full measure of self-determination."[35] Finally, according to the Court, "the general state of international law with respect to the right of self-determination is that the right operates within the overriding protection granted to the territorial integrity of 'parent' states."[36] This view of self-determination as existing within the framework of existing territorial states is entirely consistent with the opinion of the Aaland Islands Commission, which repeatedly emphasized the status of Finland as a sovereign state and

the necessity to protect Finnish territorial borders against any usurpation brought along by assertions of minority rights in the form of self-determination. In sum, the Canadian Supreme Court, like the Aaland Islands Commission, held that a people has a right to internal self-determination first, and that only if that right is not respected by the mother state, the same people's right to break off may accrue.[37] In other words, the right to separate is conditioned on the non-respect of the right to some form of provincial autonomy.[38] Moreover, the Canadian Supreme Court, like the Aaland Islands Commission, reaffirmed the supremacy of territoriality and the territorial integrity of existing states over any notions of self-determination; the latter may disrupt territoriality only in the most extreme circumstances, where a people is oppressed by the mother state.

In addition to these jurisprudential developments in the 20th-century debate over self-determination, the international community has been forced to address issues of self-determination and secession in the context of the dismantling of states in the 1990s. When the former Yugoslavia collapsed, the international community was faced with the application of self-determination principles to newly emerging entities. The following discussion will highlight some of those issues and the difficulty of applying self-determination principles in any modern-day context that includes civil warfare and minority groups' struggles against one another.

State dissolution and self-determination: the SFRY and the Soviet Union

The world witnessed the dissolution of two states in the early 1990s: the former Yugoslavia and the Soviet Union. In both cases, new entities emerged from former mother states, claiming rights of statehood and, in both cases, the mother state ceased to exist. It is thus useful to analyze the applicability of the theory of self-determination to the newly emerged states, born out of the decomposition of the Socialist Federal Republic of Yugoslavia ("SFRY") and the Soviet Union.

The SFRY

In the early 1990s, the international community was faced with the difficult task of applying principles of self-determination and potentially secession in the context of a rapidly decomposing state: the former Yugoslavia. The SFRY was a federal state comprised of six republics (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) and two autonomous provinces (Kosovo and Vojvodina). In 1991, internal wars erupted in Yugoslavia, following the de facto collapse of the SFRY central government and the announced separation of Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia from the federal structure of the SFRY. Serbia, along with the two provinces of Vojvodina and Kosovo, and Montenegro, renamed themselves the

Federal Republic of Yugoslavia (FRY) and claimed to be the continuation of the SFRY.

The international community's first task was to assess whether SFRY was in the process of dissolution, or whether Slovenia, Croatia, Bosnia and Herzegovina and Macedonia had seceded from their parent state.[39] The response had enormous significance. If SFRY were dissolving then emerging entities would form new states and adopt new regimes; all assets and liabilities of the former Yugoslavia would have to be proportionately divided and no particular entity would be entitled to use force against anyone else for any other reason. If, however, secession were occurring then the international community would have to conclude that Slovenia, Croatia, Bosnia and Herzegovina and Macedonia had seceded—perhaps illegally—from their parent state, the SFRY. In this instance, because secession is at best tolerated under international law only in the most extreme circumstances, the purported continuation of the SFRY, the FRY, could be entitled to use force against the other entities to prevent them from seceding and to restore prior SFRY borders, as well as to claim all former Yugoslav assets for itself, as the only legitimate actor in the decomposition of Yugoslavia. It is unsurprising that Serbia and Montenegro, the founders of the FRY, claimed the case of secession, and that all the other entities supported the view that Yugoslavia was dissolving.

In the early 1990s, the international community was particularly concerned with putting an end to the raging civil war in the former Yugoslavia, and it thus wanted to adopt a legal standpoint which would facilitate the ordering of a possible ceasefire to all warring entities. The European Community, which had "assumed the leading role in mediating territorial disputes in the former Yugoslavia," sought a legal label for the process of decomposition that had started taking place in this country.[40] Thus, the European Community sought a clarification: was Yugoslavia in the process of dissolution or secession? This issue was addressed in the First Opinion of the so-called Badinter Commission, a body of experts appointed by the European Community to answer difficult legal questions pertaining to the former Yugoslavia in the early 1990s.[41] The Badinter Commission concluded, perhaps unsurprisingly, that the SFRY was in the process of dissolution.[42] This legal view allowed the European Community to demand from all former Yugoslav republics that they refrain from the use of force, because former SFRY borders were no longer in existence and no republic was entitled to use force against the other ones to reclaim more territory to itself. It is interesting to note that despite the Badinter Commission opinion adopting the view that the former Yugoslavia was a case of dissolution, and not secession, many scholars have analyzed this situation as a case of secession. In fact, some scholars have pointed to the case of the former Yugoslavia to advance the idea that the right to remedial secession has crystallized as a norm in international law. These scholars claim that the republics of Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia were entitled to secede because they had been denied the proper exercise of their right to democratic self-government, and, in some

cases, had been subject to ethnic violence by the central government in Belgrade.[43]

> These authorities suggest that if a government is at the high end of the scale of representative government, the only modes of self-determination that will be given international backing are those with minimal destabilizing effect and achieved by consent of all parties. If a government is extremely unrepresentative and abusive, then much more potentially destabilizing modes of self-government, including independence, may be recognized as legitimate. In the latter case, the secessionist group would be fully entitled to seek and receive external aid, and third-party states and organizations would have no duty to refrain from providing support.[44]

This conflict between the view of the Badinter Commission and the opinion of scholars who argue that secession applied in the context of the former Yugoslavia illustrates the difficulty of applying the international law on secession to real-life conflicts.[45] In the case of Yugoslavia, the debate essentially centered on the issue of continuation of the SFRY: once Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia seceded from the SFRY, was the left-over territory of the FRY (essentially Serbia with Kosovo and Montenegro) a continuation of the SFRY, or was it now an entirely new state? If one wanted to argue the case of secession, one needed also to adopt the view that the parent state remained in existence and that the FRY was a continuation of the SFRY. Is that possible when more than half of the parent state's territory has separated? Is there a territorial size requirement for a parent state to be able to argue that its situation fits within the paradigm of secession, and not dissolution? In any case of secession, the parent state's territory, population, and government change. How do we know which of these essentially new parent states can claim that secession occurred and it (the parent state) is the same state as before, and which of such parent states must be classified as new actors on the international scene? Was the FRY truly a new actor, or could it legally claim to be a continuation of the SFRY, after Slovenia, Croatia, Bosnia and Herzegovina and Macedonia seceded?

The Badinter Commission, after it concluded that the SFRY was in a state of dissolution, had to address an additional issue regarding secession and self-determination in this then-troubled region. Once Bosnia and Herzegovina and Croatia effectively separated from the SFRY, the Serbian minority living within these two new states claimed that, as a people, it had a right to self-determination. The Serbs in Bosnia-Herzegovina and Croatia hoped that they would be entitled to exercise their external self-determination rights, to secede from Bosnia-Herzegovina and Croatia, and to rejoin the FRY. The European Community feared any territorial expansion of Serbia, in the form of the FRY, and was reluctant to grant Bosnian and Croatian Serbs any legal rights to self-determination. The Badinter Commission was thus charged with answering the following question: "Does the Serbian population in Croatia and

Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?"[46] The Badinter Commission's legal opinion paralleled the European Community's political stance vis-à-vis the FRY. The Badinter Commission, in its Second Opinion, stated that international law "does not spell out all the implications of the right to self-determination."[47] Moreover, the Badinter Commission concluded that "the right to self-determination must not involve changes to existing frontiers at the time of independence."[48] Thus, much like the Aaland Islands Opinion and the Quebec case described earlier, the Badinter Commission positions any discussion of self-determination rights within the paradigm of existing territorial borders, which cannot be altered. The Badinter Commission then recognized that the Serbs in Bosnia-Herzegovina and Croatia must "be afforded every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law."[49] The commission recognized the existence of the principle of self-determination, and that under this principle Serbs in Bosnia-Herzegovina and Croatia should "be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned."[50]

Thus, the Badinter Commission was extremely careful in its approach to the issue of self-determination with respect to the Bosnian and Croatian Serbs. First, it conceived of them as a minority group and not as a people. This distinction, described in Chapter 1, is significant in international law, as only peoples may claim the right to self-determination, whereas minority groups can only claim certain types of cultural and linguistic protection. Moreover, while recognizing the applicability of the principle of self-determination to the Bosnian and Croatian Serbs, the Badinter Commission determined that an expression of this principle in this context should be the right for Serbs to choose their nationality. In other words, Serbs living in Bosnia-Herzegovina and Croatia may exercise some rights internally, such as those ordinarily accorded to minority groups under international law. However, they may not exercise their rights to external self-determination, but they can choose to claim a different nationality.

This legal opinion is fraught with inconsistencies and poses more questions than it sheds any light on the difficult legal question which it purported to answer. First, if Serbs in Bosnia-Herzegovina and Croatia are not a people but only a minority group, why does the Badinter Commission discuss self-determination rights at all? Second, the right to choose one's nationality has nothing to do with the right to self-determination. Accepting the existing framework of internal/external self-determination, one can speak about meaningful rights within a parent state, such as the right to a preservation of cultural, linguistic, religious, and ethnic heritage, or about circumstances giving rise to the right to remedial secession, should the parent state choose to abuse the people. However, the right to choose one's passport has no direct bearing on either type of self-determination. Finally, in practice, the Badinter

Commission opinion proved of little value. Serbs in Croatia have either remained in Croatia as a minority group, or they have relocated to Serbia. While every Serb's account of his or her life in Croatia or in Bosnia-Herzegovina necessarily varies depending on his or her particular circumstances, it is undisputable that many Serbs in Croatia and in Bosnia-Herzegovina have encountered difficulties, especially those who chose to affirm their Serbian nationality.[51] Thus, giving Serbs the right to choose their nationality has done little to appease tensions already present within these societies, or to advance the rule of international law. Moreover, Serbs in Bosnia-Herzegovina have formed their own de facto state, Republika Srpska, and Bosnia-Herzegovina remains divided as of today between the Muslim–Croat federation (the official Bosnia-Herzegovina) and the Serb-controlled Republika Srpska.[52] Thus, although the Badinter Commission was unwilling to grant any self-determination rights to the Serbian minorities, Bosnian Serbs have de facto exercised their right to external self-determination and have founded an entity with separate government, police force, schools, and economies from its *de jure* parent state.

The case of the former Yugoslavia remains an academically troubling application of self-determination principles. Confusion remains over whether the SFRY dissolved or if many of its former republics seceded from the mother state. Difficult legal issues plague the de facto existence of the Republika Srpska. And nobody was certain if the FRY could claim any successor status to the former Yugoslavia. The case of the former Yugoslavia illustrates challenges inherent in the application of traditional self-determination concepts to a modern-day paradigm of secession, outside the confines of decolonization. The case of the Soviet Union underlies similar issues and will be discussed next.

The Soviet Union

The dissolution of the former Soviet Union in the early 1990s resulted in the creation of many new states. The Baltic states, Estonia, Latvia, and Lithuania, declared independence in 1990, as did 12 additional Soviet republics soon thereafter.[53] The case of the Baltic republics is slightly different from that of the other 12 republics, because, arguably, the Baltic republics had the right to self-determination under international law whereas the other 12 republics only derived this right from Soviet constitutional law.

The Baltic republics existed as sovereign, independent states between the two world wars. In fact, in 1918, the Russian Soviet Federated Socialist Republic, the successor state to the failed Russian Empire, recognized the sovereignty of Estonia, Latvia, and Lithuania, and these three states became members of the League of Nations.[54] The Baltic States' sovereignty ended in 1940, when the Soviet government occupied and annexed them, following the conclusion of the secret Molotov-Ribbentrop Accords in 1939.[55] Most western states have refused to recognize the legal validity of the Soviet annexation of the Baltic States, but during the Cold War, the Soviet Union remained mostly

unchallenged in its occupation and incorporation of these states.[56] In 1989, the Soviet authorities changed their view toward the Baltic States and announced that the Soviet occupation thereof was illegal. Following this announcement, the Baltic republics "embarked on a programme to reverse the consequences of the illegal agreements concluded in 1939."[57]

All three states declared independence in 1990, but premised such independence on the invalidity of the Soviet secret pact with Hitler in 1939, as well as the illegal annexation of the republics into the Soviet Union in 1940.[58] The Baltic States thus proclaimed that Soviet acts of occupation and annexation constituted international crimes and that, as such, they could not give rise to a valid legal title. Therefore, *de jure*, pre-1940 Baltic sovereignty should have continued to exist.[59] It is remarkable to note that the Baltic states refrained from asserting a right to self-determination under international law, although they most likely would have been able to construe a solid argument for self-determination. The three Baltic republics were illegally occupied by the Soviet Union; their exercise of external self-determination leading toward remedial secession would have fallen within the framework of self-determination existing for peoples subject to foreign domination and occupation. Thus, international law would have most likely condoned the Baltic exercise of self-determination.[60] The Baltic States most likely did not rely on self-determination arguments because they wanted to avoid the applicability of a 1990 Soviet law, which proscribed procedures for the accomplishment of secession of the republics from the Soviet Union; the law required the approval of two-thirds of the concerned republic's population of a proposed secession.[61] Because all three Baltic states had significant Russian minorities living within their borders, it was questionable whether referendum results in any of the three states would demonstrate two-thirds approval for independence from the Soviet Union. Thus, in order to avoid having to dispute referendum procedures under domestic law, the three Baltic states chose to forego their rights to self-determination under international law.[62]

Nonetheless, all three Baltic states held referendum; a significant majority of the Estonian, Latvian, and Lithuanian populations did approve statehood and independence for each respective country.[63] Inadvertently, the three Baltic states achieved statehood through a self-determination-seeking mechanism, popular referendum. The fact that these three states did not specifically rely on the international right to self-determination does not detract from the validity and legitimacy of this right for the peoples of these three Baltic states. Most Western states recognized the three Baltic states as sovereign and independent following referendum. However, most Western states chose to refrain from providing strong support for the Baltic states immediately, most likely because of fear of alienating the Soviet Union. The Conference on Security and Co-operation in Europe first rejected the three Baltic states' petitions for membership.[64] Moreover, in April 1990, French President François Mitterand and German Chancellor Helmut Kohl issued a joint statement affirming the validity of Lithuanian declaration of independence, but urging Lithuania to

suspend it and to instead negotiate secession issues with the central Soviet authorities.[65]

> The case of the Baltic republics neatly illustrates how concerns about "global balance" and the territorial integrity of the Soviet Union restrained, or at least slowed down, not only the furtherance of, but also international support for, the quest for self-determination.[66]

Ironically, despite having a solid legal argument for self-determination, the three Baltic states were able to achieve statehood and independence peacefully through the avoidance of self-determination-type arguments.

Unlike the Baltic republics, the other 12 Soviet republics arguably had no right of self-determination or secession under international law.[67] These republics had not been illegally occupied or annexed like the Baltic regions; moreover, these republics had not been colonies and existed lawfully within the larger Soviet empire. However, these 12 republics most likely had a right to self-determination under the 1977 Soviet Constitution, which provided in Article 72 that: "Each Union Republic shall retain the right freely to secede from the USSR."[68] This provision had never been applied until 1990, when a new law was hastily passed, providing for the holding of referendum by any Soviet republic wishing to secede.[69] Because the 1990 law was incredibly complex, one may wonder as to whether it truly constituted the application of the right of self-determination. In fact, it was this law that the three Baltic states sought to avoid when they construed their independence-seeking argument on the invalidity of the Molotov-Ribbentrop Accords, and not on any inherent right of self-determination. Nonetheless, as scholars have already noted, the 1990 law was remarkable because "it was the first piece of national legislation regulating the right of secession in a detailed way."[70]

The 1990 law was never applied, because a political crisis caused a precipitous collapse of the Soviet Union, and the 12 republics achieved de facto independence, outside any legal parameters of either international or domestic law. Most of the 12 republics held referendum on the issue of secession, not within the 1990 law or not based on any international legal rule.[71] The fact that most of these republics chose to hold referendum:

> proves that the republics, although lacking any legal claim to secession or independence under international law, sought a form of legitimation for their breaking away in the general legal principle of self-determination. They therefore had resort to the practice of referendums, which undoubtedly constitutes a fair and widely used application of that principle.[72]

Other states also chose to legitimize the collapse of the Soviet Union and the emergence of new states from the perspective of self-determination. When the foreign ministers of then 12 member states of the European Community met in December 1991 to determine on the common policy toward breakaway

republics of the Soviet Union and the former Yugoslavia, they relied on self-determination in two ways. First, the European Community foreign ministers issued the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union ("EC Guidelines" or "Guidelines"); these Guidelines start off with the following language: "The Community and its member States confirm their attachment . . . in particular [to] the principle of self-determination."[73] As Antonio Cassese has noted:

> By these words the Twelve intended to emphasize that they regarded the progressive breaking up of the two States as a realization of the political principle of self-determination and as a historical process furthered by the concept that each people should freely choose its international political status.[74]

In addition to a positive commitment to self-determination in the first sentence of the Guidelines, this principle conditioned the recognition on any new states on the respect for the "rule of law, democracy and human rights," as well as on the establishment of "guarantees for the rights of ethnic and national groups and minorities."[75] In other words, recognition by the European Community of any new state was specifically conditioned on whether the new state established a democratic rule, through which rights to internal self-determinations of peoples and minority groups would be respected. The European Community foreign ministers thereby linked secession exercised through external self-determination with internal self-determination: "They made it clear that they were prepared to endorse the achievement of independent statehood, i.e. external self-determination, only on condition that the breakaway republics fully respected the principle of representative democracy, that is, internal self-determination."[76] As will be discussed in Chapter 3, the European Community foreign ministers announced a novel theory of recognition that they, as super-sovereign European players, were able to impose on newly emerging states lacking in sovereign powers.[77] This concept of sovereignty on a sliding scale will be explored in Chapters 3 and 4, and will be instrumental in the development and discussion of the so-called great powers' rule, which constitutes the main argument of this book.

The discussion of the former Yugoslavia and the Soviet Union illustrates the difficulty of applying self-determination and secession principles to an already existing conflict. Because the theory of self-determination was essentially developed within a decolonization paradigm, under which colonized peoples were granted rights to self-determine their political fate, the theory is much more difficult to apply outside this context. Self-determination for non-colonized peoples is a troubling prospect: it may entail an alteration of the mother state's borders, in order to accommodate an external self-determination-seeking entity. The mother state's borders were arguably legitimate, in situations where the mother state is not a colonial power. Thus, allowing for external self-determination of non-colonized peoples runs afoul of the basic

international law principle of territorial integrity of states. The League of Nations in the Aaland Islands case and the Canadian Supreme Court in the Quebec secession case hint at the possibility that international law may condone external self-determination for non-colonized peoples in very limited instances, but both of these courts stop short of attempting to develop a legal framework for the exercise of such external self-determination. In the context of the former Yugoslavia, the Badinter Commission refuses the label "secession" and refuses to grant Bosnian Serbs the right to self-determination. And, in the context of the Soviet Union, three Baltic states avoided reliance on self-determination in their arguments for independence and statehood. All these cases demonstrate the difficulty of applying the legal theory of self-determination to territorial conflicts outside the decolonization context. Moreover, the discussion in this chapter underscores the politically charged context of most secessionist conflicts, and will serve to underscore the argument exploited, in Chapter 4, over the role of the great powers in any self-determination debate. As will be argued, it is the great powers' rule that most often determines the positive or negative outcomes of a people's struggle for independence.

Notes

1 P. Eberhardt, *Ethnic Groups and Population Changes in Twentieth-Century Central-Eastern Europe: History, Data, and Analysis*, M.E. Sharpe, 2003, pp. 12–13.
2 D. Orenlichter, "International Responses to Separatist Claims: Are Democratic Principles Relevant?", *Secession and Self-Determination*, Stephen Macedo and Allen Buchanan eds, 2003, p. 21 (noting that at the Paris Peace Conference, "the boundaries of new and reconfigured states were to be drawn along national lines").
3 Ibid. (noting that at the Paris Peace Conference, "self-determination was a guiding principle for statesmen who remapped central and eastern Europe following World War I").
4 "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question", *League of Nations Official Journal*, Supp. 3, 1920, pp. 7–10.
5 Ibid.
6 Ibid.
7 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
12 Orenlichter, op. cit., p. 21 (noting that the Committee of Jurists and the Commission of Rapporteurs reports "hinted at possible exceptions in circumstances implicating the rights of minorities").
13 Report of the International Committee of Jurists, op. cit.
14 Ibid.
15 Ibid.

16 Ibid.
17 "The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs", League of Nations Doc. B7.21/68/106, 1921.
18 Ibid.
19 Ibid.
20 Ibid., p. 28.
21 Orenlichter, op. cit., p. 22 (concluding that "the concept of remedial secession hinted at by the Commission of Rapporteurs continues to resonate in legal doctrine and political philosophy").
22 Aaland Islands Question Report, op. cit.
23 Ibid.
24 Ibid.
25 *See*, for example, J.C. Dunoff, S.R. Ratner, and D. Wippman, *International Law: Norms, Actors, Process*es, 3rd edn, 2010, p. 122.
26 Other cases have also addressed the issue of self-determination; these, however, will be discussed in Chapter 5.
27 Ibid., p. 135.
28 Ibid.
29 Reference re Secession of Quebec, 1998, 2 S.C. Res. 217, para. 126.
30 Ibid., para. 135.
31 Ibid., para. 136.
32 Ibid.
33 Ibid., para. 138 (the Canadian Supreme Court concluded that "exceptional circumstances", where a people is being denied its rights to internal self-determination, are not applicable to the people of Quebec).
34 Ibid., para. 130.
35 Ibid.
36 Ibid., para. 131.
37 Ibid., para. 134 ("when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession"). Note that the Canadian Supreme Court declined to answer the issue of under what circumstances such a right to secession accrues, as it determined that the population of Quebec is entitled to meaningful internal self-determination and thus is not in a position to claim the right to external self-determination. Dunoff et al., op. cit., p. 222.
38 Quebec Secession, op. cit., para. 135 (noting that only when "the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated" does the right to external self-determination accrue).
39 Dunoff et al., op. cit., p. 126.
40 Orenlichter, op. cit., p. 34.
41 Ibid. (describing the establishment of the Badinter Commission).
42 Conference on Yugoslavia Arbitration, Commission Opinion No. 1, 31 I.L.M. 1494, 1992.
43 M.P. Scharf, "Earned Sovereignty: Judicial Underpinnings", *Denver Journal of International Law and Policy*, 2003, Vol. 31, 373–384.
44 M. Sterio, "On the Right to External Self-Determination: 'Selfistans,' Secession and the Great Powers' Rule", *Minnesota Journal of International* Law, 2010, Vol. 19, 137–146.

45 It is also worth noting that many scholars have criticized the Badinter Commission Opinion no. 1. *See*, for example, D.L. Horowitz, "A Right to Secede?", *Secession and Self-Determination*, Stephen Macedo and Allen Buchanan eds, 2003, p. 52 (arguing that the Badinter Commission decision was "ill-considered"); Michla Pomerance, "The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence", *Michigan Journal of International Law*, 1998, Vol. 20, 32–48.
46 Conference on Yugoslavia Arbitration, Commission Opinion No. 2, 31 I.L.M. 1497, 1992.
47 Ibid.
48 Ibid.
49 Ibid.
50 Ibid.
51 Carolin Leutloff-Grandits, *Claiming Ownership in Postwar Croatia: The Dynamics of Property Relations and Ethnic Conflict in the Knin Region*, LIT, 2006, p. 129.
52 Dunoff et al., op. cit., p. 129.
53 For a general discussion of self-determination within the context of the Baltic states, *see* A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995, pp. 258–268.
54 Ibid., p. 258.
55 Ibid.
56 Ibid., p. 262 (noting that the United States and several other Western states never agreed to the Soviet claim to sovereign title over the Baltic states).
57 Ibid., p. 260.
58 Ibid.
59 Ibid.
60 But *see* Ibid., p. 262 (arguing that while the existence of the right of self-determination for the people of the Baltic states was certain, its mode of implementation was not; noting that under international law, it was not clear *how* the Baltic states could secede from the Soviet Union).
61 Ibid., pp. 260–261.
62 Ibid., p. 261.
63 In Estonia, 77.83% of the population voted yes to the question of Estonian independence; in Latvia, 73.68% of the population voted in favor of Latvian independence; and in Lithuania, 90.47% of the voters voted for Lithuanian independence. All three referendum were held in early 1991. *See* ibid., pp. 262–263, note 9.
64 Ibid., p. 263.
65 *The International Herald Tribune*, April 27, 1990, at 6.
66 Cassese, op. cit., p. 264.
67 On self-determination within the context of the Soviet Union collapse more generally, *see* M.H. Halperin, D. Scheffer and P.L. Small, *Self-determination in the New World Order*, Carnegie Endowment for International Peace, 1992, pp. 27–32; R. Mullerson, "Self-Determination of Peoples and the Dissolution of the USSR", *Essays in Honour of Wang Tieya*, Dordrecht, 1993, pp. 567–585.
68 J. Hazard, "Soviet Republics in International Law", *Encyclopedia of Public International Law*, 1985, Vol. 10, 418–422.
69 Cassese, op. cit., pp. 264–265.
70 Ibid., pp. 265–26.

71 Ibid., p. 266, note 17 (noting that independence referendum were held in Georgia, Turkmenistan, Ukraine, Uzbekistan, and Moldavia).
72 Ibid., p. 266.
73 "Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union", *International Legal Materials*, 1992, Vol. 31, 1486 [hereinafter "Guidelines"].
74 Cassese, op. cit., p. 267.
75 Guidelines, op. cit.
76 Cassese, op. cit., p. 268.
77 *See* Chapter 3.

3 Self-determination and other theories

The theory of self-determination is theoretically and practically linked to other legal theories, which include statehood, recognition, sovereignty, and intervention. In each instance, this chapter will describe and demonstrate how these theories are intertwined, and how a minority group's quest for self-determination often depends on these four legal theories. First, a group's ability to self-determine its political fate often hinges on its ability to prove that it qualifies as a new state. Second, a self-determination-seeking group must demonstrate that it merits recognition by external actors—in other words, that it will behave as a "good" state and that it will be a legitimate state partner on the global scene. Third, such groups must show that their sovereignty quests warrant respect, and that their proposed territorial units should be treated as sovereign entities. Finally, in some instances, self-determination-seeking groups need the external actors' help in the form of intervention for the achievement of such self-determination goals, as illustrated by the case of Kosovo. Before engaging in such discussion, however, this chapter will briefly describe the phenomenon of the great powers by describing who they are and how they have achieved their super-sovereign status on the world scene. Although Chapter 4 includes a more detailed discussion of the great powers, for the purposes of this chapter, it is relevant to briefly describe what the phenomenon of the great powers truly entails by focusing on their own identity.

Prelude: which are the great powers?

The great powers are super-states: the most militarily, economically, and politically potent players in the international arena. The great powers are also super-sovereign because, in light of their enhanced status in global relations, they possess more persuasive influence and thus more de facto decision-making authority. Conversely, all other non-great powers enjoy less sovereignty and have had to yield some of their *de jure* sovereign powers to the great powers. Which states qualify, then, for "great power" status?

First, states that emerged as victors post-World War II, such as the United States, the United Kingdom, France, Russia (successor to the former Soviet

Union), and China can claim this label. All these states enjoy veto power on the United Nations Security Council and thus possess institutional sovereignty within the world's most supreme organization. Some of these states have developed into economic powerhouses, such as the United States and China, and have been able to dictate global trade and financial policies. The United Kingdom and France have become members of the European Union (EU) and an argument can be made that the EU itself should be viewed as a great power. However, as this book discusses states in their most traditional sense, I have chosen to discuss individual EU member states as great powers, and not the union itself. Second, additional states may be added to the great powers' club in light of their economic powers. These states include other G-8 members: Italy, Germany, and Japan. These states were not included in the Security Council veto structure mostly because they were perceived as "rogue" states because of their actions in World War II. However, these states have emerged as dominant players in regional and other, more specialized organizations. Germany has played an increasingly dominant role within the EU, and Japan has been an Asian powerhouse. Another state that could be added to the great powers' club in light of its recent rise in the manufacturing and commercial world is India. India has become increasingly prominent in Asia, as well as across our planet, because of its rising economy, its non-declared nuclear status, and its potential to become a hugely important alley to the older, more traditional great powers. All these states, Italy, Germany, Japan, and India, have been prominent players in trade and monetary organizations, and have exerted considerable influence in the global arena. Third, non-declared nuclear states may also possibly be added to the great powers' club because of their inherent military advantage. Thus, in addition to India, states such as Israel and Pakistan possess considerable clout in the global arena because of the nuclear threat they can wield over other states. Fourth, rogue and volatile states could also arguably become members of the great powers' club, because of their unpredictable (and sometimes frightening) foreign policy, and the threat posed thereby on other states. These states include Iran, Syria, North Korea, and Afghanistan.

Membership of the great powers' club is exclusive and seems to require heightened attributes of sovereignty on behalf of member states; membership in this elite circle has been in a state of flux as newer great powers, such as China and India, emerged on the world arena as potential leaders and super-sovereign players. The three sections that follow will discuss issues of statehood, recognition, sovereignty, and intervention within the context of self-determination. A discussion of the great powers and self-determination follows in Chapter 4.

Self-determination and statehood

The theory of self-determination is closely linked to the theory of statehood at the time of attempted state creation—when a self-determination-seeking entity asserts its right to form a new state. While self-determination does not

legally depend on statehood, a people that chooses to exercise its right to external self-determination may need to prove to the outside world that it satisfies the criteria of statehood.

Once an entity breaks off from its mother state and seeks to become recognized as a new state, the legal question that arises is whether that entity satisfies the relevant international legal criteria of statehood. According to the 1933 Montevideo Convention, an entity can achieve statehood if it fulfills four criteria: if it has a defined territory; a permanent population; a government; and the capacity to enter into international relations.[1] Moreover, scholars have elaborated additional criteria for statehood, including independence, sovereignty, permanence, willingness, and ability to observe international law, a certain degree of civilization, and, in some cases, recognition.[2] Statehood is a legal theory that seeks to justify the attribution of statehood on objective criteria, which are, in theory at least, independent from the political reality underlying many attempts at secession or separation.[3] In other words, because statehood is an entirely *legal* theory, political acts are not supposed to have any bearing on an entity's quest for statehood. As long as an entity can point to the fact that it has a territory, population, government, and the ability to enter into international relations with other states, it ought to attain the legal label of statehood. In theory, whether other states choose to recognize this kind of entity should not affect this entity's legal claim to statehood.

In practice, however, the theory of statehood has led to anomalous results.[4] For example, the first criterion of the Montevideo Convention requires that an entity have a defined territory. Many entities that we routinely consider to be states have a disputed and often undefined territory.[5] For example, Israel's territory is disputed by its Arab neighbors; the two Koreas have battled over their border for decades; Somalia's and Sudan's territories are disputed by potent rebel movements.[6] As to the second criterion, many entities that we view as states have impermanent, migratory populations. The Democratic Republic of Congo, Sudan, and Iraq, to name but three, have all experienced significant refugee crises, resulting in shifts in their respective populations, without thereby losing their statehood on the international scene.[7] Other states have very small populations, such as the Pacific Island state of Nauru (10,000), or the city state of San Marino (24,000), and yet such entities are still treated as states.[8] Regarding the third criterion, entities with collapsed governments have also remained "states" in the past. For example, throughout the 1990s Afghanistan did not have a stable government, and yet it remained treated as a state and retained its seat in all major international organizations.[9] Somalia has not had a central government for over two decades, and yet it has been treated as a sovereign state on the international scene.[10] Finally, as to the fourth criterion, many entities routinely considered states do not have the capacity to enter into international relations.[11] Small nations such as Liechtenstein and Monaco depend on Switzerland and France respectively for their national defense.[12] Several Pacific island nations, likewise, depend on the United States and New Zealand for their defense and have been dubbed "freely associated

states."[13] Other small nations depend on the United States, and/or other economically powerful nations, for trade and commercial relations.

These examples demonstrate that the criteria of statehood only matter at the initial stage, when a self-determination-seeking entity is seeking to attain statehood. Thus, when the people of South Sudan decided to separate from the rest of Sudan and to form an independent nation, the world community should have examined whether South Sudan satisfied the four criteria of statehood. Similarly, when the Kosovar Albanians voted to secede from Serbia and to form their own state, the relevant legal inquiry should have consisted of determining whether Kosovo satisfied the four criteria of statehood. However, once the determination of statehood is met and an entity joins the sovereign club of states, the retention of the four criteria of statehood becomes irrelevant. A state remains a state, absent extraordinary circumstances, such as when a state dissolves into smaller subunits. In most other circumstances, the label of statehood remains impossible to lose, for good reasons, perhaps. If entities routinely became states and then lost the label of statehood due to a territorial dispute, the lack of government, a migratory shift in population, or the inability to conduct foreign relations in some manner, the end result would consist of endless chaos and violence. Thus, statehood matters at the time of state *creation*; it no longer matters during state *existence*, absent truly exceptional circumstances.

Because the legal theory of statehood seems crucial at the time of state creation, it is important that the theory remain consistently applied to all entities exercising their right of external self-determination. Alas, this has not been the case in recent history, and often the geopolitical reality of a given region dictates whether an entity is treated as a state by the international community. Chapters 6, 7, 8, 9, and 10 will examine the cases of East Timor, Kosovo, Chechnya, Georgia, and South Sudan; these chapters will demonstrate that statehood criteria have often been applied through a political prism, resulting in both the granting and denial of statehood to legally similarly situated self-determination-seeking entities. Thus, statehood in practice seems to hinge on recognition: in other words, an entity seems to be treated as a state only if the outside world, and specifically, the most powerful states, wishes to recognize it as such. A cynic might ask why international law cares about statehood at all. In other words, why would a newly independent state care for proving to anyone on the outside that it meets the requirements of statehood? If the people who live in a given country are happy with the achievement of independence through the exercise of external self-determination, they should not have to worry about proving to the outside world that their home nation qualifies as a state under international law. However, the reality proves the opposite: a new "state" faces crucial challenges after its assertion of independence, such as economic and trade issues, developmental problems, security concerns, and monetary hurdles. Thus, an entity seeking to become a state on the international scene must first persuade external actors that it is a state in order to become fully engaged in international relations with such external actors, on

which it often depends. As I argue in Chapter 4, a self-determination-seeking entity will be recognized as a new state only if it garners the support of the most powerful states in the international legal arena, the so-called great powers.

Self-determination and recognition

Recognition, unlike statehood, is not a legal theory; rather, it is a *political* act exercised by sitting governments of existing states vis-à-vis a newly created entity. Recognition and statehood, in theory, are distinct and a state can recognize an entity that does not satisfy the four criteria of statehood; conversely, a state can choose *not* to recognize an entity that *does* satisfy the attributes of statehood.

There are two theories of recognition under international law: the declaratory view and the constitutive view.[14] Under the former, recognition is seen as a purely political act having no bearing on the legal elements of statehood.[15] Under this view, outside states can choose to recognize the new state, or not, but that decision does not influence the legal determination of statehood.[16] Under the latter, recognition is seen as one of the main elements of statehood.[17] Thus, an entity cannot achieve statehood unless it is recognized by outside actors as a state.[18]

While most academics would support the declaratory view,[19] the constitutive view has teeth in practice nonetheless. In fact, one of the four criteria of statehood—the capacity of the entity seeking to prove statehood to enter into international relations—seems closely linked to recognition, because an entity claiming to be a state cannot conduct international relations with other states, unless those other states are willing to enter into such relations with that entity.[20] In other words, the conduct of international relations is a two-way street, involving the new "state" as well as outside actors that have to be willing to accept the new "state" as their sovereign partner.[21] No state can exist in a vacuum—a fact well established by international practice. When Southern Rhodesia (now Zimbabwe) decided to separate from Great Britain and to form an independent state in 1965, most of the world refused to recognize Southern Rhodesia as a state.[22] Consequently, Southern Rhodesia remained isolated from the world and was unable to conduct international relations.[23] The non-recognition of Southern Rhodesia by outside actors prevented it from fully exercising the attributes of legal statehood.[24] Thus, recognition, whether it is considered as a political or legal act, has a direct impact on the pragmatic determination of statehood: whether an entity will be able to truly act as a state on the international scene.

> While international recognition is no longer widely considered to be a required element of statehood, in practice the ability to exercise the benefits bestowed on sovereign states contained in the Westphalian sovereignty package requires respect of those doctrines and application of them to the state in question by other states in the interstate system.[25]

In addition to the declaratory and constitutive views, scholars have advanced a third, intermediary view on recognition. The intermediary view seeks to combine the declaratory and constitutive view while acknowledging what truly goes on in practice. It asserts that recognition is a political act independent of statehood, but that outside states have a duty to recognize a new state if that state objectively satisfies the four criteria of statehood.[26] "Recognition, while in principle declaratory, may thus be of great importance in particular cases. In any event, at least where the recognizing government is addressing itself to legal rather than purely political considerations, it is important evidence of legal status."[27]

Finally, another wrinkle to the international theory of recognition was added in the early 1990s, following the breakup of the former Soviet Union and of the former Yugoslavia. At that time, EC foreign ministers developed guidelines on the recognition of new states in Europe.[28] The EC foreign ministers, concerned with the existence and maltreatment of minorities within the former Soviet Union and the former Yugoslavia, announced that one of the criteria of recognition of new states within the EC would be the respect of human rights, as well as the protection of minority rights.[29] Thus, an entity applying for statehood within the EC had to prove that it treated minority groups fairly and that it respected minority rights in its territory.[30] As discussed in Chapter 2, the EU foreign ministers conditioned the recognition of new states, established through the exercise of external self-determination and remedial secession, on these new states' promise for the respect of internal self-determination of any peoples and minority groups living within their borders. The recognition criteria developed by the EC specifically linked external self-determination with internal self-determination by allowing for the former only in cases where the latter would also become available. The most powerful players in the European Community pledged to support new sovereign partners if such new partners promised to behave democratically. Non-democratic entities would not be recognized in Europe and would thereby be denied the opportunity to successfully exercise external self-determination.

While these criteria have not reached the status of international custom and do not bind states that are not members of the EC, they show nonetheless an evolution of international law in the field of recognition.[31] In fact, it seems that international law today allows outside actors to impose additional requirements on entities striving for recognition.[32] Regional bodies, organizations, and states can thus choose to require that the entity seeking recognition comply with specific criteria that have nothing to do with the historically accepted legal contours of statehood. This phenomenon illustrates once more the fact that powerful states or groups of states, such as the EU, often dictate the fate of independence-seeking movements by choosing to legitimize their plight (or not) under specific conditions.

In the context of the EC, such imposition of additional criteria of recognition was used several times by the Badinter Commission, an arbitral body of experts established to deal with the various issues arising out of the Yugoslav crisis in

the 1990s.[33] With respect to Macedonia, the Badinter Commission recommended that it not be recognized as a new state unless it agreed to insert a clause in its constitution promising not to claim additional territory against neighboring states.[34] After Macedonia agreed to follow the Badinter Commission recommendations, the EC foreign ministers decided to impose yet an additional requirement on Macedonia by indicating that this new state would be recognized only if it used a name that did not include the word Macedonia.[35] This "requirement" resulted from a geopolitical grievance by EC member Greece, which was afraid that the new state of Macedonia would have territorial claims to a part of northern Greece that had also been known as Macedonia centuries ago.[36] The use of such additional criteria of recognition by the EU signals a regional trend of conditioning recognition on the respect of fundamental rights and rules of international law, as well as on obedience with the regional geopolitical equilibrium.[37] In other words, regional authorities are telling new states that they will only be accepted as full players if they vouch to respect the rule of law and to adhere to preserving regional stability and peace.

Moreover, the use of the additional criteria for recognition just described demonstrates the leverage and power that super-states have on the international scene. As I posit in Chapter 4, entities seeking to become recognized as new states must garner the support and help of the most powerful states. As a corollary, entities seeking to become recognized as new states must at times accept the rules set forth by super-states, as Macedonia did when it sought to separate from the former Yugoslavia. The acceptance of these new recognition rules by the weaker states demonstrates their acquiescence in the new global order of sovereign, more sovereign and less sovereign states. Whether an entity ultimately acquires the right to self-determine its fate and whether it is ultimately recognized as a new state correlates directly to whether that entity enjoys the support of the most sovereign states, the great powers.

Self-determination, sovereignty, and intervention

The principle of self-determination is also closely linked to the notions of state sovereignty and intervention.[38] State sovereignty, in its Westphalian form, typically includes the following characteristics: an equality of states within the international community, a general prohibition on foreign interference with internal affairs, a territorial integrity of the nation state, and an inviolability of international borders, inter alia.[39] However, as early as the mid-19th century, scholars noticed a "sliding scale of sovereign equality" among states, by linking "the degree of sovereignty a state has to the degree of equality it enjoys on the international stage."[40] The notion of unequal state sovereignty was further enhanced through the creation of the United Nations and its Security Council structure, giving veto power to five super-states: the United States, Russia, France, Great Britain, and China. As already described, scholars and historians have dubbed such powerful states the "great powers," and this evolving club

of super-sovereign states currently also includes three other G-8 countries: Germany, Italy, and Japan.[41] The great powers possess higher, unequal sovereignty attributes than other states, because they have enhanced decision-making authority in the institutional context, as well as in the economic realm.[42] Because the great powers are essentially more "sovereign" than other states, they may engage in interventions and cross other states' borders, in the name of preserving some higher ideals. Thus, in the modern world, great powers may "cross theoretically unbreachable frontiers either individually or collectively," in a variety of differently justified state interventions.[43] One such form of intervention, which arises where great powers breach frontiers to avoid human suffering and tragedy, has been termed "humanitarian intervention."[44] A self-determination-seeking people may be aided by the great powers' decision to organize a humanitarian intervention, to prevent a central government from oppressing that people. Conversely, the great powers may decide not to help a struggling minority movement, by refusing to stage an intervention and by implicitly turning a blind eye to the oppressive policies by the governing regime.

Some American presidents have embraced this intervention theory, and have even attempted to stretch its contours by constructing a so-called "involuntary sovereignty waiver" justification for the application of intervention. Richard Haass, the former Director of Policy Planning for the State Department in the G.W. Bush administration and the current chairman of the Council on Foreign Relations, advanced the idea that countries constructively waive their traditional sovereignty shield and invite international intervention when they undertake to massacre their own people, harbor terrorists, or pursue weapons of mass destruction.[45] According to Haas, state sovereignty does not enjoy absolute protection in the modern world and has been eroded through the forces of globalization; thus, we need to adjust our way of thinking to account for "weak states" and need to "outlaw regimes" that jeopardize their sovereignty "by pursuing reckless policies fraught with danger for their citizens and the international community."[46] Haass further reasoned that "sovereignty is not a blank check," and considered that the great powers have unique intervention rights with respect to rogue regimes, which forfeit their sovereign privileges and their immunity from external, armed intervention.[47] Thus, according to Haass, there are three circumstances that justify intervention:

1 where a state commits or fails to prevent genocide or crimes against humanity on its territory
2 where countries take action to protect their nationals against other states, is such other state harbor international terrorists
3 where states pursue weapons of mass destruction.[48]

These three exceptions to the norm against intervention are justified, according to Haass, because sovereignty is conditional, and "[w]hen states violate minimum standards by committing, permitting, or threatening

intolerable acts against their own people or other nations, them some of the privileges of sovereignty are forfeited."[49] Thus, under this theory, what a state does within its own territory affects many other states, so that it can no longer be asserted that a state may internally do whatever it wishes, as such actions necessarily impact on other states,[50] and as such actions give rights to other states to intervene. In other words, when a state engages in a particular kind of offensive behavior, it has involuntarily "waived" its sovereignty.[51]

The theory of involuntary sovereignty waiver has been advanced in recent decades to justify different types of intervention against different "rogue" regimes. For example, in 1991, a UN-sanctioned intervention on behalf of the Kurds was justified on the grounds that the Kurds in northern Iraq were suffering severe human rights deprivations from the Iraqi government.[52] More recently, the NATO intervention in Kosovo in 1999 exemplifies the notion of humanitarian intervention justified on involuntary sovereignty waiver grounds. Serbia engaged in a campaign of human rights violations in Kosovo; by doing so, it waived its sovereignty over the Kosovar region and "invited" outside actors to intervene. Thus, outside actors were legally justified in encouraging and providing for the Kosovar independence, because Serbia's claim to territorial sovereignty was not absolute and remained subject to external influences.[53] In other words, the Serbian sovereignty over Kosovo had diminished to such a minimum, because of the Serbian government's oppressive policies over Kosovo, that the notion of territorial sovereignty became trumped by the necessity of humanitarian intervention.

Thus, the idea of self-determination, in the modern world, seems closely linked to state sovereignty and intervention. Because states are only "conditionally" sovereign, they may not suppress legitimate self-determination movement infinitely. If states choose to oppress self-determination movements, then such movements may seek help from external actors, typically, the great powers, which may intervene to help the struggling movement achieve some form of self-determination. In some instances, the great powers may intervene, as in the case of Kosovo, to aid the struggling movement to exercise the most drastic form of external self-determination, namely, remedial secession and independence. In other instances, the presence or influence of one great power in the territory of a self-determination-seeking entity may persuade other great powers not to intervene, thereby precluding any form of assistance to the struggling people. Such has been the case of Chechnya, and to some extent, of South Ossetia and Abkhazia. In all three instances, the presence of Russia has steered other great powers from intervening in these regions in a more forceful manner.

The presence of the great powers on the international legal scene has eroded the sovereignty of other, "lesser" states; the lesser states' sovereignty has thus become conditional. Moreover, the great powers have indicated their willingness to intervene in the affairs of such lesser states, to aid independence-seeking movements, when such movements are viewed as legitimate by the great powers. The notion of self-determination has therefore become intertwined

with the notions of state sovereignty and intervention, and all three are intrinsically linked with the presence of the great powers.

As described in this chapter, it is impossible to discuss the self-determination rights of any people without also addressing that people's claim for statehood and for recognition by the international community. A purported state that has not been recognized by any other sovereign states cannot exist in isolation, and the capacity to engage in international relations, the fourth pillar of the Montevideo Convention, presupposes that other states are willing to treat the purported state as such. A people claiming the right to external self-determination but unable to assert the case for its statehood and unrecognized by most of the world community will not be able to truly fulfill its self-determination quest. In addition, as discussed in this chapter, it is impossible to argue about the self-determination rights of a people without also discussing issues of sovereignty and intervention, as both of the latter are often linked to a self-determination struggle. The concept of sovereignty implies that no external actors will intervene in the territory of the sovereign entity; yet, as described here, the great powers are at times willing to intervene against other less sovereign states, in order to support or defeat a self-determination movement. Self-determination in the modern world has ties to all four other theories (statehood, recognition, sovereignty, and intervention), and the great powers have been exerting their influence in all of these realms.

Notes

1 Montevideo Convention on the Rights and Duties of States, 165 *LNTS* 19, 1933 [hereinafter "Montevideo Convention"].
2 J. Crawford, *The Creation of States in International Law*, Clarendon Press, 1979, pp. 25–30, 36–37, 40–44, 47–49, 71–74, 400–402, 404–408, 417–418.
3 In fact, the Montevideo Convention states that "[t]he political existence of the state is independent of recognition by the other states." Montevideo Convention, op. cit., Art. 3.
4 J.C. Dunoff, S.R. Ratner, and D. Wippman, *International Law: Norms, Actors, Process*es, 3rd edn, 2010, p. 115.
5 Ibid., pp. 115–116.
6 Ibid., p. 116.
7 Refugees International, Democratic Republic of Congo. Online. Available at: www.refugeesinternational.org/content/country/detail/2900/ (accessed Aug. 25, 2008); L. Polgreen (2006), "Refugee Crisis Grows as Darfur War Crosses a Border," *New York Times*. Available at: www.nytimes.com/2006/02/28/international/africa/28border.html (accessed Aug. 25, 2008); "Refugees International," *The Iraqi Displacement Crisis*. Available at: www.refugeesinternational.org/content/article/detail/9679 (accessed Aug. 25, 2008).
8 Dunoff et al., op. cit., p. 115.
9 Ibid., p. 116.
10 Foreign Policy, *The Failed States Index* (2011). Available at: www.foreignpolicy.com/failedstates (accessed Mar. 31, 2012) (including Somalia for the fourth year in a row as the top failed state in the world).

11 Ibid.
12 Ibid.
13 Ibid. (describing the special arrangements that Micronesia, Palau, the Cook Islands, and Niue—the so-called freely associated states—have with the United States and with New Zealand).
14 Dunoff et al., op. cit., p. 137.
15 Ibid.
16 Ibid. ("[a]n entity that meets the criteria of statehood immediately enjoys all the rights and duties of a state regardless of the views of other states").
17 Ibid., p. 138.
18 Ibid. ("the refusal by states to afford recognition would mean that the entity claiming statehood would not be entitled to the rights of a state").
19 Ibid.
20 Ibid. (arguing that "if states refuse to acknowledge that an entity meets these criteria . . . they might continue to treat the claimant as something *less* than a state;" thus, an unrecognized state may find that its passports are unacceptable to the immigration authorities of other states).
21 Thus, an important treatise states that "[r]ecognition, while declaratory of an existing fact, is constitutive in nature, at least so far as concerns relations with the recognizing state". *Oppenheim's International Law*, Robert Jennings and Arthur Watts eds, 9th edn, 1992, p. 133.
22 Dunoff et al., op. cit., p. 138. Note that the UN Security Council condemned the Southern Rhodesia declaration of independence and declared that it had no legal validity. S.C. Res. 217, Nov. 20, 1965.
23 Dunoff et al., op. cit., p. 138 (noting that nearly all states refused to conclude treaties with Southern Rhodesia).
24 Note that the situation was resolved in 1978, following a peace accord which led to a majority government in Zimbabwe. *Id.*
25 M.J. Kelly, "Pulling at the Threads of Westphalia: 'Involuntary Sovereignty Waiver'? Revolutionary International Legal Theory or Return to Rule by the Great Powers?," *UCLA Journal of International Law and Foreign Affairs*, 2005, Vol. 10, 361–388.
26 Ibid.
27 Crawford, op. cit., p. 133.
28 Ibid.
29 "Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," *International Legal Materials*, 1992, Vol. 31, 1486 (requiring "respect for the provisions of the Charter of the United Nations . . . especially with regard to the rule of law, democracy and human rights," and "guarantees for the rights of ethnic and national groups and minorities" in order for a new state to be recognized).
30 Ibid.
31 In fact, the Badinter Commission, an arbitral body of experts operating in the early 1990s to resolve legal issues arising from the Yugoslav dissolution, added a new criterion for recognition of new states, because "it embraced democratization and respect for human rights" as such criteria. E. Hasani, "Self-Determination Under the Terms of the 2002 Union Agreement Between Serbia and Montenegro: Tracing the Origins of Kosovo's Self-Determination," *Chicago-Kent Law Review*, 2005, Vol. 80, 305.

32 For example, the EU set out the respect of human rights as a "fundamental prerequisite for recognition." B.S. Brown, "Human Rights, Sovereignty, and the Final Status of Kosovo," *Chicago-Kent Law Review*, 2005, Vol. 80, 235–247.
33 Dunoff et al., op. cit., pp. 114–115.
34 "Conference on Yugoslavia Arbitration Commission Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and Its Member States," *International Legal Materials*, 1992, Vol. 31, 1507 [herein-after "Badinter Opinion No. 6"]. Note that the debate over Macedonian recognition was sparked by Greek claims that Macedonia would have territorial claims against northern Greece, a region also known as Macedonia. Dunoff et al., op. cit., p. 142.
35 Dunoff et al., op. cit., p. 143. Ultimately, this issue was resolved when Macedonia was admitted to the UN under the name of the "Former Yugoslav Republic of Macedonia" pending settlement of the name issue with Greece. The United Sates government decided in 2004 to refer to the country as the Republic of Macedonia.
36 Ibid.
37 The latter proposition of conditioning recognition on the respect of the regional geopolitical equilibrium is well illustrated by the Greek opposition to the recognition of Macedonia if the new entity wanted to be called by that name. In fact, nothing in the international legal doctrine on recognition authorizes states to require new entities to change their name if they wish to be recognized; yet, in practice, such results are possible and have occurred at least once in Europe.
38 In fact, the earned sovereignty theory also supports this view of qualified state sovereignty, as it perceives sovereignty as "a bundle of authority and functions which may at times be shared by the state and sub-state entities as well as international institutions." *See* J.R. Hooper and P.R. Williams, "Earned Sovereignty: The Political Dimension," *Denver Journal of International Law and Policy*, 2003, Vol. 31, 355–357 [hereinafter "Hooper & Williams"].
39 Kelly, op. cit., p. 381.
40 Ibid.
41 Ibid., p. 365.
42 Ibid., pp. 365–366.
43 Ibid., p. 381.
44 Ibid.
45 Haass originally constructed this theory in 2002, with respect to states which commit atrocities against their own people or harbor terrorists. N. Lemann, "The Next World Order," *New Yorker*, Apr. 1, 2002, pp. 45–46. Haass subsequently amended this theory in 2003, when he included states that pursue weapons of mass destruction. *See* R.N. Haass, "Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University: Sovereignty: Existing Rights, Evolving Responsibilities," *International Human Rights in Context*, Henry J. Steiner, et al. eds, 3rd edn, 2008, pp. 698–699. Available at: www.iwar.org.uk/news-archive/2003/01-15.htm (accessed Mar. 31, 2012) [herein-after "Georgetown Speech"].
46 *See* Kelly, op. cit., p. 403 (citing R.N. Haass, *Intervention: The Use of American Military Force in the Post-Cold War World*, revd edn, 1999, p. 13.).
47 Georgetown Speech, op. cit.; *see* Kelly, op. cit., p. 403.
48 Kelly, op. cit., p. 404.

49 Ibid., p. 405 (citing R.N. Haass, *Intervention: The Use of American Military Force in the Post-Cold War World*, revd edn, 1999, p. 13.).
50 Ibid., pp. 404–405.
51 Ibid., p. 402 (citing Lemann, op. cit.).
52 M.P. Scharf, "Earned Sovereignty: Judicial Underpinnings," *Denver Journal of International Law and Policy*, 2003, Vol. 31, 373–383.
53 Several influential authors have supported external intervention in Kosovo on humanitarian grounds. *See* T.M. Franck, "Lessons of Kosovo," *American Journal of International Law*, 1999, Vol. 93, 857; A. Cassese, "*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of forcible Humanitarian Countermeasures in the World Community?," *European Journal of International Law*, 1999, Vol. 10, 23; R.A. Falk, 'Kosovo, World Order, and the Future of International Law," *American Journal of International Law*, 1999, Vol. 93, 847; L. Henkin, "Kosovo and the Law of 'Humanitarian Intervention'," *American Journal of International Law*, 1999, Vol. 93, 824; R. Wedgewood, "NATO's Campaign in Yugoslavia," *American Journal of International Law*, 1999, Vol. 93, 828. Other authors have supported NATO actions against the FRY with reservations, arguing that the Kosovo case should not set a precedent for the future but should be considered an exception due to regional (European) considerations. *See* W.M. Reisman, "Kosovo's Antinomies," *American Journal of International Law*, 1999, Vol. 93, 860.

4 The great powers' rule or a new theory of self-determination

This chapter will argue that each self-determination-seeking entity needs to meet four different criteria in order to have its quest validated by the international community. These four criteria include a showing by the relevant people that it has been oppressed, that its central government is relatively weak, that it has been administered by some international organization or group, and that it has garnered the support of the most powerful states on our planet. This chapter will conclude by positing that the fourth criterion is the most crucial one: that any self-determination-seeking group must obtain the support of the most powerful states, which I refer to as the "great powers." In fact, the fourth criterion or the great powers' support encompasses and engulfs the three other criteria.

First, regarding the showing of oppression, while it is true that self-determination struggles have often been conditioned or caused by gross human rights violations by the mother state, it is also true that the great powers play a dominant role in our media and in the way that conflicts are portrayed. For example, the great powers may portray the secessionist group as the culprit in a civil war, or, conversely, they may label the mother state as the oppressor. Thus, in order to meaningfully cast human rights violations committed against a minority group, the great powers must accept that the mother state is at fault and that the minority group represents the victim. Second, regarding the showing of weakness by the central government of the mother state, here again, the great powers' support plays an enormous role. If the great powers decide to logistically and strategically aid a struggling minority group, this will in turn enhance the group's military power and consequently weaken the mother state's central government. Third, regarding the involvement of international organizations in the self-determination struggle, here again, the great powers exercise enormous influence. They can exercise veto power on the Security Council and thereby preclude any United Nations' involvement, if they deem that a self-determination struggle is not worthy of their concern or not deserving of their help. They can similarly influence other international organizations into getting involved, or not, in an otherwise internal conflict. In sum, it is the great powers' support, or lack thereof, that determines the fate of numerous peoples on our planet struggling to gain independence.

This chapter will posit that the right to external self-determination accrues for different peoples if and when the great powers decide to recognize those peoples' causes. Ultimately, this chapter will argue that such a result is unfortunate, as it inappropriately mixes the legal with the political realms, and that any rule by the great powers inherently challenges the notion of state sovereignty and equality. This chapter will first describe the great powers, before turning to a discussion of the four criteria for self-determination, and a determination that the fourth criterion (the great powers' support) has become the most important one. Finally, this chapter will provide a critical assessment of the soundness of the great powers' rule in the context of self-determination.

The great powers and self-determination

As mentioned earlier and as previously discussed in Chapter 3, the great powers are states that wield the most financial, strategic, political, and military power on our planet. They are more sovereign than there are non-great powers because of their enhanced status, as well as their ability to exercise influence in a coercive way vis-à-vis other states. Moreover, the great powers enjoy a privileged position within international institutions, where they occupy seats of the most prominent disposition. For example, some great powers enjoy veto power on the United Nations Security Council. Almost all great powers enjoy leadership positions within more specialized international organizations, such as the World Trade Organization (WTO) or the International Monetary Fund (IMF). Many great powers are leaders within regional organizations, such as the European Union, where the European great powers wield enormous influence institutionally. Some great powers routinely have representation on the International Court of Justice, in the form of de facto permanent national judges on the world court. Some great powers have similar representation on other international tribunals, such as the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, and the Special Court for Sierra Leone. The great powers have exercised leadership roles in the creation of these tribunals, and they have furnished prosecutors, judges, and defense counsel for all three courts in larger numbers than any other states. Thus, institutionally, the great powers play a prominent role in the global arena and are often able to influence the decision-making process within international or regional organizations.

In addition, and as discussed earlier, the great powers may engage in interventions, crossing other states' borders and offending other states' sovereignty.[1] The great powers may assert an economic or military influence over another state or region, thereby strengthening or weakening the latter. The great powers may establish international tribunals, organize criminal proceedings against leaders from other states, or simply influence a Security Council resolution on an issue in a way most favorable to them, thereby justifying an intervention against another state. The great powers, by being super-sovereign, have rendered other states less sovereign. In other words,

because the great powers have often encroached on the sovereignty of other, less powerful states, those other states have experienced a decline in their own powers and their own ability to conduct foreign affairs.

Which are the great powers today? As discussed in Chapter 3, although membership in this exclusive club seems to be in a state of permanent flux, some confirmed members have included the United States, the Soviet Union (now Russia), Great Britain, France, Germany, Italy, and Japan, as well as some newer powerhouses such as China and India.[2] In fact, the last two states may become super-sovereign over the next century, as some have predicted, because of their superior industrial and manufacturing base, their extreme emphasis on education, and their sometimes fanatical work ethic. Four of the first seven (United States, Great Britain, France, and the Soviet Union), in addition to being historical powerhouses, enjoy special privileges on the United Nations Security Council, in the form of a veto power.[3] Thus, these four states can add veto power to their arsenal of great powers' attributes.

An argument can be made that two other categories of state deserve membership in the great powers' club: non-declared nuclear states, such as Israel and Pakistan, as well as rogue and volatile states, such as Iran, Syria, North Korea, and Afghanistan. Nuclear states, such as Israel and Pakistan, possess an advantage over other, non-nuclear states because of the mere possibility of the use of such devastating weaponry. The threat of the use of nuclear weapons may elevate states such as Israel and Pakistan to a super-power status. In other words, these states may engage in super-sovereign-type behaviors on the international scene because they know that most other states would never be able to retaliate for fear of nuclear repercussions. Rogue states wield power on the global scene because of their ability to risk consequences and isolation at any cost. In other words, rogue states may engage in all sorts of questionable behavior because they remain undeterred by traditional diplomacy tools, economic sanctions, or even the risk of military interventions by other great powers. Rogue states may also engage in extremely unpredictable behavior, surprising others in their political or military actions and taking advantage of the surprise factor to their own benefit. Rogue states are not powerful, like other great powers, because of their enhanced financial, political or military ability; rather, they are powerful because they are willing to do just about anything, without fear of sanctions and without regard for the well-being of any other states. These states have expressed a willingness to engage in risky diplomatic, political, and military actions. Moreover, these states dispose of serious military weapons and armies comprised of dedicated (and sometimes erratic) soldiers and military commanders. Thus, the "rogueness" and volatility of these states gives them an "edge" in international affairs, and may potentially elevate them to the status of a true great power.

Whether the last two groups of states should be considered great powers is debatable. While these states may be super-sovereign in some respects, they have not been engaged in serious military interventions across the globe and have not played the same kind of dominant economic and political role that

other, true great powers have. While it is not necessary, for the purposes of this book, to precisely delineate which states have acquired the super-sovereign great power status, I posit that my conclusions work better with the first two categories of great powers in mind. Thus, for the purposes of the discussion of self-determination within this book, I will focus on the first two groups of great powers (United States, United Kingdom, France, Russia, China, Japan, Germany, and Italy). The discussion that follows will highlight the role of the great powers in interventions across our planet, and the impact of the great powers' rule on state sovereignty. Through the great powers' rule, other states have become increasingly less sovereign, and many self-determination quests have been resolved positively or negatively through interventions staged with the support of the great powers.

The great powers, through their super-sovereign status, wield a tremendous amount of influence regarding issues of self-determination across the planet. It is often the great powers' willingness, or unwillingness, to support a self-determination quest that ultimately determines the fate of struggling groups.

Four criteria for self-determination: oppression, relatively weak central government, international involvement, and great powers' support

The right to self-determination for different groups or peoples varies from region to region. As will be discussed in subsequent chapters, while the Timorese, the Kosovars, and the Southern Sudanese were able to fully exercise their rights to the most extreme form of self-determination, leading toward remedial secession, the Chechens, the South Ossetians, and the Abkhazians have been denied such rights. Arguably, the last three peoples have been denied any form of self-determination, as many have asserted that these peoples' rights are routinely oppressed by Russia and/or Georgia. What does this suggest about the modern-day contours of the right to self-determination? What are the modern-day criteria that a people must fulfill in order to be able to legitimately gain some degree of self-determination?

I argue that a people seeking self-determination must satisfy the following four criteria: it has to show that it has been oppressed; that its central government is relatively weak; that it has already been administered in some form by some international organization; and that it has the support of the great powers.

First, the people seeking to exercise its right to self-determination must prove that it has been subject to oppression and that its citizens have faced harsh human rights abuses and violations. Typically, a people attracts global attention only when it can show how horrifically it is being treated and how abusive its central government is. Instances of mild human rights violations typically do not attract the same level of international political and media scrutiny, and central governments that commit minor minority group abuses

typically go unnoticed.[4] Thus, peoples that have managed to showcase their struggles have always been able to demonstrate a high level of suffering and a consistent policy of harsh abuse by the central government. For example, the world was appalled at the harsh treatment inflicted on the Kosovar Albanians by the Milosevic-ruled Serbian authorities. Similarly, the East Timorese were able to depict decades of unfavorable treatment and human rights abuses at the hands of the central Indonesian government, and the South Sudanese were equally able to highlight the suffering inflicted against them by Khartoum-directed militias.[5] Other separatist movements have faced more minor forms of repression, insufficient to persuade the world community that some form of action may be needed to help the separatist movement. Such groups include the Basque in Spain, the Quebecois in Canada, the Kurds in Turkey, the Turkish Cypriots in Cyprus, the Zanzibaris in Tanzania, the Saharawis in Morocco, and the Biafrans in Nigeria.[6] Thus, the degree of suffering and oppression of the separatist people by its mother state plays a determinative role in self-determination quests.

Second, the same people must show that its central government—the oppressive regime committing abuses—is relatively weak and cannot properly administer the people's province or region. In fact, none of the peoples across the globe who have succeeded in asserting their rights to self-determination has been governed by a strong, powerful government. Typically, self-determination-seeking groups have been able to demonstrate that their central government, although claiming that it wants to govern such groups, is militarily, politically, or structurally unable to assert proper control. Thus, typically, breakaway regions have been marred by civil unrest and violence, that have further contributed to the idea that these peoples or groups, in order to have any kind of civic stability, must be allowed to separate. Successful self-determination struggles underscore this point. Violence and warfare had plagued the territories of Indonesia, Serbia, and Sudan mother states to the East Timorese, Kosovar, and South Sudanese peoples, which have both been successful in their self-determination struggles.[7] Central governments of many unsuccessful separatist groups have been relatively strong and stable. Thus, the Chechens were unable to succeed in their attempted autonomy from Russia, the Basque have been stifled in separatist claims by Spain, and the Kurds have been denied external self-determination by the government of Turkey.[8] These examples illustrate a sliding scale of potential self-determination success: the more unstable a central government is, the higher the probability of self-determination success by a separatist people. The more stable a central government is, the lesser the probability of separation by a self-determination-seeking people.

Third, the self-determination-seeking people must show that some form of international administration of its region has been needed in recent years, and that international authorities have had to govern because of the brutality and inefficacy of the central government. This criterion is linked to the second one: peoples seeking self-determination have successfully shown that their central government was weak, causing violence and unrest, and that

international authorities have needed to step in to preserve or re-establish peace. Thus, international organizations and groups have been involved in virtually all self-determination-seeking regions. Organizations such as NATO, the United Nations, and the European Union have been present in Kosovo for many years; the United Nations was instrumental in organizing self-determination-seeking referendum in East Timor; the United Nations has also played a key role in orchestrating the separation of Southern Sudan from the rest of Sudan in 2011.[9] By way of contrast, international organizations have played a much more limited role within the territories of unsuccessful self-determination-seeking entities, such as Chechnya, South Ossetia, and Abkhazia.[10] Thus, a higher degree of involvement by the international community significantly improves the separatist people's chances of succeeding. A higher degree of involvement by the international community can also serve to weaken the mother state's government, or to negotiate with the mother state and persuade it to give up the secessionist territory. And in several instances, the international community has been involved in negotiating a transition plan, under which the separatist entity earns its sovereignty through years of shared government and shared sovereignty with the mother state. For example, in Kosovo, the international community was involved in the creation of the infamous Ahtisaari Plan, under which Kosovo and the Federal Republic of Yugoslavia (predecessor state to Serbia) were instructed to negotiate a final status solution for Kosovo; during those negotiations, Kosovo essentially "shared" sovereignty with Serbia and a variety of international organizations and administrators.[11] As discussed in detail in Chapter 7, NATO countries engaged in a series of air strikes on the territory of the Federal Republic of Yugoslavia; in the wake of the bombing campaign, an international administration of Kosovo was established through Security Council Resolution 1244 and the creation of the United Nations Mission in Kosovo, as well as a provisional self-government of Kosovo ("Provisional Institutions of Self-Government"). In addition to these international institutions and interim governing bodies, the Serbian government maintained other bodies and institutions that operated under the control of the Serbian government. These so-called "parallel structures" were present in Kosovo from 1999 until its declaration of independence in 2008; such parallel structures reflect an instance of "shared" sovereignty between Serbia and Kosovo.[12] Thus, parallel structures enabled Kosovar Albanians to develop their own sovereign institutions, under the auspices of the international community, while maintaining Serbian involvement and governance in this province through the existence of Serbian institutions. While the utility of parallel structures and shared sovereignty remains open for debate, it is certain that a peaceful plan and exercise of shared sovereignty would not have been possible in Kosovo without international assistance. This argument is probably true for many other regions in the world, where the mother state and a separatist group would not be able to peacefully share power absent the international community's involvement.

Finally, a self-determination-seeking people must prove that external actors, including the great powers, view its struggle as legitimate, and that external actors, including the great powers, are ready to embrace it as a new sovereign partner. I allege that this ultimate criterion is the most important one, and that it routinely determines the fate of various peoples struggling for the recognition of their rights across the globe. For example, when the Kosovar Albanians declared independence from Serbia in 2008, Kosovo was immediately recognized as a new state by virtually all the great powers, excluding Russia.[13] The great powers' willingness to embrace Kosovo as a new state played a tremendous role in two ways. First, Kosovar Albanians were most likely encouraged by some of the great powers to declare independence from Serbia; knowing that they would be supported by such important super-sovereign states was a great incentive for the Kosovar Albanians, as well as a reassurance that their future state would not fail. Second, many neutral states were persuaded into recognizing Kosovo after witnessing the great powers' support of this new state. Many smaller states depend on the great powers for trade and economic aid, and will choose to follow the great powers in foreign relations and diplomacy matters. Similarly, the South Sudanese were not successful in their self-determination plight until they garnered the support of the United States, one of the most influential great powers. As described in Chapter 10, the South Sudanese were largely ignored by the world community during the Cold War and in the 1990s; their secessionist struggle attracted the great powers' attention post-September 11, 2001, when the Western great powers began to fear the rise of another influential Islamic state (Sudan) in Africa. Consequently, the great powers decided to weaken Sudan by supporting an independence-seeking South. While the Southern Sudanese people's struggle for self-determination may have been legitimate and legal under international law remains undisputed, it is striking that the great powers did not truly intervene in South Sudan until the early 2000s, despite decades of violence and oppression by the Sudan government. Without the great powers' support, the people of South Sudan would have never become independent.

Thus, support by the great powers of a self-determination-seeking entity plays a dispositive role in secessionist matters. Only entities that have had the support of some of the great powers have succeeded in self-determination struggles. Others like the Biafrans, the Kurds, or the Turkish Cypriots, have been forced to co-exist within their original mother states. The great powers' support for any self-determination-seeking movement has become a necessary criterion of dispositive value for any people's struggle for autonomy from its mother state. Unfortunately, the existence of this fourth criterion of external self-determination, the support of the great powers, has transformed a positive legal theory of self-determination into a political game. The existence of a right of external self-determination used to be measured through legal norms; nowadays, it is examined through a political lens. Thus, the great powers' rule as applied to the law of self-determination is an unfortunate occurrence, but nonetheless a practical reality.

The fourth criterion or the great powers' rule: determinative of self-determination quests

Whether the great powers decide to legitimize a people's struggle for self-determination is crucial for the outcome of such a struggle. First, the great powers control hugely important media outlets and the global access to information.[14] If the great powers decide not to give media coverage to a struggling people or region, that people will remain unnoticed on the global scene, and its suffering will attract no significant external involvement. Alternatively, its suffering will be downplayed by the great powers and will be discarded as not warranting true intervention. The plight of the Kosovar Albanians under the Milosevic regime and their quest to free themselves of Milosevic's oppression featured prominently in most major media outlets throughout the second half of the 1990s. The genocide in Darfur, Sudan, committed by Janjaweed militia groups with alleged support from the Sudanese government made headlines over the past decade. However, the world has heard little in recent years on Tibet, because of China's totalitarian control of all national media outlets, or on Chechnya, because of similar media censorship exercised by Russia.[15] Moreover, when the people of West Papua voted in 1969 in popular referendum on the question of this island's independence from Indonesia, the Western media was conspicuously absent and thus did not report widely on voter abuses and intimidation committed by the Indonesian forces. Lone reports of such violence "fell on deaf ears."[16] As these cases exemplify, the great powers wield a tremendous amount of power through their control of the media, and the ability to prevent popular opinion from forming on a given subject through the censorship of available information.

Second, the great powers have, throughout the years, provided key military and logistic support to states across the globe. Some central governments have been able to retain control over portions of their territories simply because of important external support by the great powers. For example, throughout the Cold War, Indonesia was able to retain control over East Timor with the help of some of the great powers, namely, the United States, Great Britain, and Australia.[17] Similarly, Turkey has been able to "ward off claims of a separate Kurdistan, thanks to Ankara's six-decades-long closeness to Washington."[18] Finally, Israel has been able to ignore Palestinian claims for independence for decades, with the support of the United States.[19] Conversely, some central governments have not enjoyed such support and have not been able to control breakaway regions and popular movements within their territories. The government of Ethiopia found itself unable to prevent the Eritreans from separating; Indonesia similarly was forced to let go of East Timor, and Sudan of South Sudan.[20] Thus, it is implicitly the great powers that contribute toward the stability, or lack thereof, of central governments across our planet.

Third, the great powers control the United Nations system through their veto powers on the Security Council.[21] While it is true that some great powers, including Germany, Italy, and Japan, as well as rogue states, such as Iran, North

Korea, and Syria, do not have veto power on the Security Council, these countries nonetheless have powerful and important allies on it and these can exercise significant influence in its deliberations. It is only when the great powers agree that the Security Council can authorize the deployment of military troops, peace-keepers, or international administrators to a troubled region.[22] Thus, peoples whose struggles are not viewed as legitimate by the great powers will never be able to garner Security Council support for the creation of some form of an international administration within their region.

Finally, because of the great powers' rule, people that struggle for independence from strong, powerful countries, like the great powers or their allies, will not succeed because "[l]arge and powerful countries with stable polities such as Russia, China, and India can defend their territorial integrity and are unlikely to become candidates for Kosovo-type challenges."[23] Moreover, peoples that struggle for independence from countries that are backed by the great powers are unlikely to succeed, because "[s]tates like Israel and Turkey are proving that, as long as they enjoy American blessings, they can see through secessionism and even undertake cross-border raids on militants threatening their sovereignty."[24] Even the idea of humanitarian intervention, described earlier, remains embedded in this idea of approval by the great powers. Humanitarian intervention is always organized, structured, financed, and led by some of the great powers; other countries simply do not have enough power and leverage on the international scene. Even proponents of the involuntary wavier of sovereignty theory acknowledge that it is up to the great powers to determine when a country has so waived its sovereignty. Richard Haass, a senior level policymaker in the George H.W. Bush administration and the author of the involuntary sovereignty waiver theory, described in Chapter 3, when questioned about the issue of who decides when a state is committing atrocious actions that would trigger intervention, seemed to imply that the United States, and possibly the other great powers, should so decide.[25]

> There is no single source of authority or legitimacy . . . [T]he United Nations is not yet at the point where it alone can decide what is legitimate and what is not. Well then, who decides? Is it the United States or some other government? The answer is that you have to look at the case at hand and you have to try to make a case in the court of international public opinion . . . [Y]ou have to base your actions on norms.[26]

According to Haass, the great powers should act multilaterally to stop genocide, terrorists, and weapons of mass destruction (wmd), even outside of the UN collective security apparatus, and the great powers should have flexibility (read: decision-making authority) to engage in intervention across the globe.[27] Thus, it is the great powers' support, or lack thereof, toward a people's struggle for some form of self-determination that determines the outcome of such a struggle. As recent history and the case studies described in subsequent chapters demonstrate, virtually all peoples who have successfully

exercised some form of self-determination have been supported by the great powers. Examples of such peoples include the Kosovar Albanians, the East Timorese, the Eritreans, and the South Sudanese. The converse is equally true: virtually all peoples who are still living as part of an oppressive, central regime have been unable to garner the support of the great powers. Examples of such peoples include the Chechens, the South Ossetians, the Abkhazians, and the Tibetans.

Another important issue that merits discussion is what motivations drive the great powers in their decision to support, or not, a struggling self-determination people? In other words, why were the great powers supportive of East Timor, Kosovo, and South Sudan, and not of Chechnya, the Georgian provinces, or Tibet? One plausible explanation, albeit a cynical one, is that the great powers seem intent on helping groups, movements, and states when it is in their own geopolitical interest to do so. The great powers may deem that they have a strong regional partner in state X; if that is the case, they may help state X's government economically, politically, and militarily. Consequently, state X will have a strong central government and any opposition and minority movements will be severely quashed, with the help of the great powers. During the Cold War, this is what took place in Indonesia and East Timor: the former was viewed as an important political ally to the West against the Soviet bloc, and thus received aid as well as financial and military support, and East Timor was ignored in its struggle for independence.[28] Similarly, Kosovo may be viewed as an important potential partner to the West in its opposition to any dangerous Serbian expansion; thus, Kosovar independence was favored by the great powers over Serbian territorial integrity.[29] Finally, as alluded to earlier, the great powers' decision to support South Sudan and enable its independence from Sudan may be viewed as an attempt to halt the rise of Islamic states, such as Sudan, in the post-9/11 world. Thus, over the last decade the great powers' geopolitical and strategic interests coincided with the plight of the South Sudanese, and the latter were provided significant support in their self-determination quest. Prior to the new century, the great powers did not derive any significant interest in aiding South Sudan; thus, the people of South Sudan struggled for decades against Sudanese oppression.

The great powers may also derive some of their motivation in choosing not to support self-determination-seeking peoples from their fear of offending another great power. In the case of Chechnya, the great powers chose not to engage in a political, diplomatic, or military scuffle with Russia and they turned a blind eye to the Chechen pleas for independence.[30] Thus, as one scholar has noted about the United States' unwillingness to intervene in Chechnya, "strategic interests have rendered it unwilling to condemn Russia's actions."[31] The case of the Georgian provinces illustrates the geopolitical motivations of the great powers as well. The Western great powers view Georgia as an important ally against Russia and have thus opposed independence movements that threaten Georgian territorial integrity. These great powers have opposed South Ossetian and Abkhazian independence. Russia, on the contrary, has

recognized South Ossetia and Abkhazia because it dislikes Georgia and would like to strengthen its own political and military situation in the Causasus by embracing regional allies like the two breakaway provinces.[32] The great powers conduct affairs on the international scene by focusing on their own strategic interests first, and by choosing to support a group or not in light of those same interests. The right to external self-determination can be easily placed in this dynamic. The great powers embrace the principle, but choose to support it in real situations only when their own interests are served by such exercise of external self-determination by a specific people.

The soundness of the great powers' rule: a *mélange* of law and politics

The right to external self-determination has become entrenched in the notion of the rule by the great powers, which has in turn modified traditional ideas about statehood, recognition, sovereignty, and intervention, as explored in the previous chapter. Today, an entity seeking to exercise its external self-determination rights must prove to the outside actors and the great powers that it qualifies as a state. As already described, because the great powers are essentially more sovereign than all other states, they may engage in interventions across the globe, and such interventions may aid an independence-seeking people, or may directly impede its struggle for independence. Thus, the great powers' rule has directly affected concepts such as "statehood", "recognition", "sovereignty", and "intervention", and has shaped external self-determination struggles in a particularly political manner. In other words, it is only when a people is supported politically by the great powers that it will manage to acquire independence and statehood through the exercise of external self-determination. The legal criteria for external self-determination have become somewhat mooted by the necessity to obtain the political support of the great powers for any struggling people on our planet.

A perfect example of this assertion would be the different treatment by the world community of the Kosovars versus that of the Chechens in these respective peoples' plights for self-determination. In Kosovo, the international community essentially endorsed the Kosovars' claims to self-determination. The United States, one of the most influential great powers, was instrumental in orchestrating the 1999 NATO intervention in the former Yugoslavia, which ultimately forced Slobodan Milosevic to back away from Kosovo.[33] In Chechnya, contrariwise, global reactions were more ambivalent, focusing on the condemnation of violence used by the Russians against the Chechens without an endorsement of the latter's possible right to self-determination, within or outside Russia. As one scholar has noted, the United States was reluctant to engage in any kind of a serious intervention in Chechnya.

> Despite reports of major human rights abuse perpetrated by Russian soldiers against ethnic Chechens, the U.S. took a noncommittal stance,

> making only the occasional rhetorical appeal to Moscow. U.S. ambivalence toward the Russo-Chechen conflict arose from a strategic interest in supporting the new democratically-elected Russian government, courting an important ally in the War on Terror, and avoiding a "re-frosting" in relations between the U.S. and Russia.[34]

As noted, this distinction in the treatment of Kosovar Albanians and Chechens by the United States, and possibly other great powers, may be explained by the difference in status between the former Yugoslavia in the late 1990s and that of Russia.[35] The former was a relatively poor country run by a war fugitive, Slobodan Milosevic, who had been indicted by the International Criminal Tribunal for the Former Yugoslavia for international crimes. Thus, owing no particular allegiance to Serbia, the great powers were quick to support the Kosovar Albanian self-determination movement, and to enable to succeed through a combination of military, logistical, institutional, and political support. Russia, by way of contrast, was a tremendous military power with significant economic resources, despite its poor human rights record. In the 1990s, most Western great powers were keen on encouraging a democratic government in Russia, which would contribute toward the unthawing of the east–west relationship. Post-9/11, Russia was also perceived by the United States as a potential ally in the war against terror, and the Russian government at the time was quick to link Chechen rebels to terrorists. Finally, Russia holds veto power on the Security Council and was in a position to ensure that no United Nations-approved military intervention would ever take place in Chechnya.[36] In light of all of these factors, the United States, as well as other great powers, decided that self-determination of the Chechen people was not a worthy cause.

> At a time in which the United States lacked a clear position on the definition of the self determination of peoples and was somewhat confused over Chechnya's right to secede, it rushed to defend Russia's territorial integrity, asserting that Russia had the right to protect its own borders.[37]

Because of the great powers' strategic interests in Russia, they chose to ignore human rights abuses in Chechnya, as well as the Chechens' arguably legitimate demand for self-determination. Conversely, because of the great powers' lack of interest or support for Serbia, they chose to enable Kosovar Albanians to exercise the most extreme form of self-determination and to secede from Serbia. As Chapter 7 discusses, the Kosovar Albanians were entitled to rights to internal self-determination, but it remains unclear that their rights to external self-determination has been triggered. This example of disparate treatment of the Chechens and the Kosovar Albanians illustrates both the obscuring of legal criteria for self-determination by political factors, as well as the enormous role that the great powers play in these matters.

One may wonder about the soundness of this rule by the great powers. After all, one may argue that if several key states agree or disagree on something,

their consensus should play a crucial role in the decided issue. This is essentially what Haass has advocated nearly two decades ago: a concert of great powers, working together outside the confines of the United Nations system, as the world's policeman.[38] For Haass, this kind of a role played by the great powers in global affairs made complete sense, in the post-Cold War world community composed of rogue and non-rogue actors. For example, if the most important states agree that Kosovo ought to become independent, then one may argue that the independence is a good solution.

However, I believe that rule by the great powers inherently undermines state equality and the entire sovereignty-based system of global international relations. Other scholars have already noted the uneven application of the involuntary sovereignty waiver theory, which only applies:

> to states that can physically withstand the intervention (China and Russia, which are abusing minority ethnic groups within their borders or North Korea, pursuing WMD or those states that are on otherwise friendly terms with the proposed interveners (Pakistan, pursuing WMD, or, although not rising to the level of genocide, Mexico, abusing indigenous nationals in Chiapas, and Turkey, repressing its Kurdish population). Consequently, the policy only operates against countries such as Serbia, Afghanistan, and Iraq that cannot resist American power.[39]

While a decision by the great powers may be politically appropriate and important, it should not have any bearing on the legality of any given issue. Thus, I believe that it is unfortunate that the right to self-determination in the modern-day world entails essentially political criteria. I also believe that it is unfortunate that the legal criteria of self-determination seem to have been brushed aside by the great powers' rule. Self-determination quests could be examined through a legal lens: it would be possible to apply the positive law of self-determination to any secessionist movement, to determine whether its independence could be justified by the theory of self-determination. It would also be possible for the International Court of Justice to develop such a normative framework which would be applicable to self-determination issues outside the traditional decolonization paradigm. It is regrettable that the world court failed to elaborate on such new legal criteria in the Kosovo case, but it may be possible that the world court will choose to do so in a future case. Instead, most self-determination struggles in recent history have been resolved through politics: the great powers have decided, through a pursuit of their own political interests, whether to support particular secessionist groups. And, as I have argued throughout this chapter, support, or lack thereof, by the great powers, has determined the outcome of almost every self-determination struggle over the last few decades. Thus, the legal criteria of self-determination have been effaced and replaced by a political theory: the great powers' rule. Subsequent chapters will illustrate this point by focusing on case law by the

International Court of Justice, as well as on case studies: East Timor, Kosovo, Chechnya, Georgia, and South Sudan.

Notes

1 M.J. Kelly, "Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"? Revolutionary International Legal Theory or Return to Rule by the Great Powers?," *UCLA Journal of International Law and Foreign Affairs*, 2005, Vol. 10, 361–381 (noting that the Great Powers can "cross theoretically unbreachable frontiers either individually or collectively," in a variety of differently justified state interventions).
2 Ibid., p. 365.
3 M. Sterio, "On the Right to External Self-Determination: 'Selfistans,' Secession, and the Great Powers' Rule," *Minnesota Journal of International Law*, 2010, Vol. 19, 137–154.
4 It should be noted that the suffering of many minority groups and peoples has remained isolated, garnering no or little support from the international community. For example, the Rwandan genocide attracted relatively little attention in light of the tremendous magnitude of this crime; moreover, the world community did nothing to intervene to protect the Tutsi people from slaughter committed by the Hutus. Kelly, op. cit., p. 381. The Kurds' plight has largely gone unsupported, even at times when they suffered horrendous abuses, such as in 1988 when Saddam Hussein used chemical weapons against them. Ibid. Other peoples have been fighting against their mother states in relative obscurity. Examples include the Kashmiris fighting for independence from India, the Basque and the Catalan asserting rights within Spain, the Liberation Tigers of Tamil Eelam asserting independence from Sri Lanka, and the Moro Islamic Liberation Front fighting against the Philippines. S. Chaulia (2008), *A World of Selfistans?*, Global Policy Forum. Available at:www.globalpolicy.org/component/content/article/171-emerging/29875.html (accessed Mar. 31, 2012).
5 *See* Chapters 6, 7, and 10.
6 For a full list of ethnic groups seeking some form of greater identity within their mother state, or seeking to leave their mother state, *see*, for example, M. Weller, *Escaping the Self-Determination Trap*, Brill, 2008, pp.160–170.
7 *See* Chapters 6, 7, and 10.
8 Kelly, op. cit., p. 381 (discussing the Kurds); Chaulia, op. cit. (discussing the Basques); Chapter 7 (discussing Chechnya).
9 On the role of international organizations in Kosovo, *see* Panel on International Law, Politics and the Future of Kosovo, held by the American Society of International Law Annual Meeting (2008). Available at: www.asil.org/events/am08post/selectaudio.html (accessed Mar. 31, 2012).; on East Timor, see East Timor: Birth of a Nation, BBC News World Edition, 2002. Available at: http://news.bbc.co.uk/2/hi/asia-pacific/199556673.stm (accessed Mar. 31, 2012); for a discussion of the role of humanitarian organizations in Southern Sudan, *see* Crisis Group, Sudan: Justice, Peace, and the ICC (2009). Available at: www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/152-sudan-justice-peace-and-the-icc.aspx (accessed Mar. 31, 2012).
10 *See* Chapters 8 and 9.

11 For a full discussion of the role of various international organizations in Kosovo, *see*, for example, M. Sterio, "The Kosovar Declaration of Independence: Problems and Dilemmas under International Law," *Georgia Journal of International and Comparative Law*, 2009, Vol. 37, 267.
12 For a detailed discussion of shared sovereignty and parallel structures in Serbia and Kosovo, *see* Organization for Security and Co-operation in Europe, Mission in Kosovo, Parallel Structures in Kosovo 2006–2007. Available at: www.osce.org/kosovo/24618 (accessed Mar. 31, 2012).
13 Ibid.
14 *See*, for example, S.J. Rapp, "Achieving Accountability for the Greatest Crimes—the Legacy of the International Tribunals," *Drake Law Review*, 2007, Vol. 55, 259–272 (discussing the powerful role of the media in inciting the Rwandan genocide); R.A. Schapiro, "Contingency and Universalism in State Separation of Powers Discourse," *Roger Williams University Law Review*, 1998, Vol. 4, 79–101 (discussing the power over national media that the US President has in the United States); J.D. Reader, "The Case Against China Establishing International Liability for China's Response to the 2002–2003 SARS Epidemic," *Columbia Journal of Asian Law*, 2006, Vol. 19, 519–557, note 253 (discussing the deliberate policy of media control that the Chinese government undertakes). These examples illustrate the important role that the media plays domestically and internationally, and the importance of control asserted by powerful governments over their national media.
15 E. Bagot, "US Ambivalence and the Russo-Chechen Wars: Behind the Silence," *Stanford Journal of International Relations*, 2009, Vol. 11, 3–34 (noting that Russia controlled the flow of information about Chechnya and that, as a consequence, the United States either knew nothing about this region or received biased information).
16 J. Robinson, "Self-Determination and the Limits of Justice: West Papua and East Timor," *Future Justice*, 2010, 175 (noting that Australian journalist Hugh Lunn reported that Reuter told its correspondents not to attend West Papua during the vote in 1969).
17 Chaulia, op. cit.
18 Ibid.
19 Ibid.
20 Bagot, op. cit., p. 33.
21 Kelly, op. cit., p. 394.
22 Ibid.
23 Chaulia, op. cit.
24 Ibid.
25 R.N. Haass, "Pondering Primacy," *Georgetown Journal of International Affairs*, 2003, Vol. 4, 91–93.
26 Ibid.
27 Kelly, op. cit., p. 409.
28 *See* Chapter 6; *see also* Chaulia, op. cit.
29 *See* Chapter 7.
30 *See* Chapter 8.
31 Bagot, op. cit., p. 33.
32 *See* Chapter 9.
33 *See* Chapter 7 for a detailed discussion of Kosovo.

34 Bagot, op. cit., p. 33.
35 Edwin D. Williamson, the Legal Advisor to the Secretary of State during the George H.W. Bush administration, has admitted to a differential treatment of Russia versus Serbia on behalf of the United States' State Department. Williamson admitted that the fact that Serbia was denied the former Yugoslavia's seat in the United Nations was "in sharp contrast to Russia's slipping into Soviet Union's permanent seat on the Security Council without much ado." M.P. Scharf and P.R. Williams, *Shaping Foreign Policy in Times of Crises: The Role of International Law and the State Department Legal Adviser*, Cambridge University Press, 2010, p. 92. Williamson then remarked that this difference was rationalized "on the basis that the permanent seat was indivisible and unrecreatable, whereas Yugoslavia's ordinary UN membership was recreatable." Ibid. According to Williamson, Yugoslavia was an "ordinary" member of the United Nations, whereas, implicitly, Russia was a great power holding a seat on the Security Council; according to this logic, it made perfect sense to treat Russia better than Serbia. Ibid.
36 J.I. Charney, "Self-Determination: Chechnya, Kosovo and East Timor," *Vanderbilt Journal of Transnational Law*, 2001, Vol. 34, 455, 458–459.
37 Bagot, op. cit., p. 33.
38 Kelly, op. cit., p. 409.
39 Ibid., p. 413.

5 International jurisprudence

This chapter explores issues of self-determination through a rigorous examination of the jurisprudence of the highest judicial organ, the International Court of Justice (ICJ, otherwise known as the world court). Several cases argued before this tribunal have explored self-determination issues, and a thorough examination of these cases could potentially unveil novel external self-determination criteria in the normative sense (*lex ferenda*). However, as this chapter will discuss and conclude, international court cases on self-determination outside the colonial paradigm remain limited in number and in scope. Most of such non-colonial cases do not address the issue of self-determination squarely, and instead of seeking to develop a normative framework on self-determination outside the traditional decolonization paradigm, such cases avoid the issue and refuse to pronounce a definite rule of positive international law. For example, the ICJ recently addressed issues of self-determination in its advisory opinion on the legality of the unilateral declaration of independence of Kosovo. The world court in this case refused to address certain issues related to external self-determination, and its refusal to do so may confirm the great powers' rule. In other words, the world court in this case decided to abide by the great powers' rule by refusing to examine the legality of their approval of the Kosovar independence. In other cases, the world court has done the same thing, by developing creative ways to avoid addressing the issue of self-determination and by ruling in the great powers' political favor. In each instance, the nationality of ICJ judges may play a role: judges seem sometimes to vote on cases in line with their national states' political stance on issues and countries. International jurisprudence on self-determination may thus implicitly confirm the great powers' rule. Alternatively, it may be concluded that the great powers' rule transcends just politics, and it has infiltrated itself in the reasoning of the world's highest judicial organ. This chapter focuses on five ICJ cases, involving East Timor, Kosovo, Georgia, Western Sahara, and Israel/the Palestinian Occupied Territory.

East Timor (Portugal v. Australia)

As discussed in Chapter 6, East Timor was a Portuguese colony until 1976.[1] After Portugal withdrew as the colonizer, the island was forcibly annexed by

Indonesia in 1976 and incorporated into the territory of Indonesia, which retained de facto control over the island until the last 1990s.[2] *De jure*, Portugal considered itself the official administrator of East Timor, despite Indonesian occupation and purported annexation of the island. In 1989, Australia concluded the so-called Timor Gap Treaty with Indonesia. The subject of the treaty was the regulation and appropriation of natural resources in East Timor, and more particularly, the delimitation of the Timorese continental shelf.[3] Australia, by concluding the treaty with Indonesia and not Portugal, thereby implicitly recognized Indonesia as the *de jure* ruler of East Timor. In other words, Australia recognized Indonesia's sovereignty over East Timor, and reasoned that it was Indonesia that had legal authority to enter into a treaty on behalf of East Timor.[4]

In 1991 Portugal sued Australia in the ICJ, arguing that Australia did not have any legal rights to enter into a treaty with Indonesia because it was Portugal, not Indonesia, that had sovereignty over East Timor. According to Portugal, Australia had, by its conduct, "failed to observe—the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] . . . and . . . the right of the people of East Timor to self-determination and the related rights."[5] In consequence, according to Portugal's argument before the Court, Australia had "incurred international responsibility vis-à-vis both the people of East Timor and Portugal."[6] According to Portugal, any question of Timorese natural resources could only be resolved by Portugal, the only country with *de jure* authority over East Timor. Australia's argument before the Court was jurisdictional: Australia argued that the Court would have to adjudicate on the rights and duties of a third party (Indonesia) in order to resolve this dispute.[7] The ICJ adopted Australia's position. It refused to rule on the validity of the Timor Gap Treaty in the absence of a necessary third party, Indonesia, which was not a party to this litigation because it had not consented to the jurisdiction of the Court. The ICJ thus ruled that it could not decide on the legality of Indonesia's occupation and administration of East Timor because of a jurisdictional issue, the so-called indispensable third-party doctrine, which, in this case, translated into the fact that Indonesia, a necessary third party, did not consent to the litigation and was thereby not present before the Court.[8] However, in passing, the ICJ declared that East Timor remained a non-self-governing territory within the meaning of Chapter XI of the United Nations Charter.[9]

In order to resolve this litigation, the ICJ would have had to decide the most fundamental issue, which centered on the legal status of East Timor. Several possibilities existed over the legal status of East Timor. Either East Timor was a non-self-governing territory with Portugal as its official administrator, or East Timor was a part of Indonesian territory (this position would have effectively recognized the legality of Indonesia's forcible occupation of East Timor), or East Timor was a non-self-governing territory with Indonesia as its administrator. Portugal's argument before the world court was that East Timor was a non-self-governing territory and that only Portugal could be its

legal administrator.[10] This position inherently implied the right of colonial self-determination for East Timor, in light of all the relevant legal precedents that had accrued until 1995 on the issue of self-determination of colonized peoples.[11] Australia could have logically made one of the two other arguments mentioned earlier, in order to supports its decision to enter into the Timor Gap Treaty with Indonesia. Australia could have argued that East Timor was either a province of Indonesia, or that East Timor was a non-self-governing territory effectively controlled by Indonesia. Australia chose the latter position, most likely because adopting the former would have been politically dicey. In fact, for a good world citizen and supporter of human rights, like Australia, it would have been politically very difficult to defend the Indonesia annexation, occupation, and ultimately mistreatment of the people of East Timor. Thus, Australia made the argument that East Timor was a non-self-governing territory, but that, because Indonesia had effective control over the island, it became logical to treat Indonesia as the island's official administration. As early as 1978, in fact, the Australian Minister for Foreign Affairs had stated that:

> [t]his [the Indonesian occupation of East Timor] is a reality with which we must come to terms. Accordingly, the Government has decided that although it remains critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognize de facto that East Timor is part of Indonesia.[12]

Presumably, the Australian Foreign Affairs Minister made this statement in order to justify Australia's decision to enter into negotiations with Indonesia over the Timorese continental shelf. However, the Australian government maintained its position that the people of East Timor had the right to self-determination. Through such rhetoric, Australia managed to preserve its pro-human rights position, through its acceptance of a potential and aspirational East Timorese exercise of self-determination.

The world court, while essentially adopting the Australian position, developed unique reasoning to support its conclusions. First, the ICJ observed that for both parties, Portugal and Australia, East Timor remained a non-self-governing territory and that its people had the right to self-determination.[13] The Court also acknowledged that several United Nations resolutions had referred to Portugal as the "administering power" of East Timor and that this issue was not before the Court.[14] However, the ICJ concluded that it could not infer, from the sole fact that a number of resolutions of the General Assembly and the Security Council refer to Portugal as the administering power of East Timor, that such resolutions intended to establish an obligation on third states to deal exclusively with Portugal as regards the natural resources of East Timor. Irrespective of the binding nature of the resolutions, the Court concluded that they could not be considered dispositive and determinative of the dispute between the parties before the Court.[15]

Second, and in light of this, the Court concluded that it would necessarily have to rule on the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention (that Australia violated its obligation to respect Portugal's status as administering power, East Timor's status as a non-self-governing territory and the right of the people of the East Timor to self-determination and to permanent sovereignty over the island's wealth and natural resources).[16] Indonesia's rights and obligations would thus constitute the very subject matter of such a judgment made in the absence of this state's consent to the jurisdiction of the world court. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[17]

The ICJ's approach toward resolving this litigation was unique. The Court essentially determined that East Timor was a non-self-governing territory with an existing right of self-determination, controlled by a non-traditional administering power (Indonesia). The Court refused to accept Portugal's claim of sovereignty over East Timor, but it also refused to rule on the validity of Indonesia's status vis-à-vis East Timor. The Court's justification for such avoidance of an important legal issue was its reliance on the indispensable third-party doctrine. Because an indispensable third party (Indonesia) had not consented to the Court's jurisdiction, the Court could not rule on the validity of the Timor Gap Treaty. Consequently, the Court implicitly affirmed Indonesia's occupation of East Timor. According to one commentator, the Court "let Portugal's legitimate political grievance and East Timorese's unassailable moral rights become obscured by the misapplication of procedural requirements."[18] The Court missed a unique opportunity to develop *lex ferenda*, a normative framework on the law of self-determination. The seemingly routine manner in which "the court invoked the indispensable third-party doctrine in a case involving violations of an *erga omnes* obligation does not foretell a satisfactory outcome for future cases involving a similar right."[19] In fact, the Kosovo case, discussed later, is an affirmation of the latter statement: that future cases involving the right of self-determination (like the case of the Kosovar Albanians) will not be effectively resolved by the ICJ. Thus, although the right of self-determination has routinely recurred in international discourse, it "has eluded a precise workable definition in international law."[20] Moreover:

> [t]he court could have used the East Timor Case to infuse the principle with a modicum of legal determinacy and define in detail the legal and practical consequences flowing from it-a potentially salutary result as the principle will continue to occupy, if not haunt, international politics for some time to come.[21]

The ICJ's unwillingness to answer any legal issues regarding self-determination in the East Timorese context can be easily explained by politics and the politically charged context of this entire situation. As explained in

detail in Chapter 6, the Western great powers, including Australia, had supported Indonesia as a powerful military ally throughout the Cold War.[22] Because of such support, the Western great powers were essentially willing to "sacrifice" East Timor and to tacitly approve the Indonesian forcible annexation and occupation of this island. The ICJ judges in 1995 seemed blocked by the political context of the de facto situation in East Timor: although, arguendo, Portugal was still the island's *de jure* administrator, Indonesia had had effective control for two decades. The world court's judges seemed unwilling to withdraw all support for Indonesia by proclaiming that the latter's occupation of East Timor was illegal. The judges, however, also seemed unwilling to explicitly approve this kind of illegal occupation. Thus, they admitted that the people of East Timor had the right to self-determination, and they relied on a jurisdictional rule to avoid answering the extremely difficult self-determination issue of how the people of East Timor were expected to exercise this right within the bounds of international law. The Court's ruling in this case coincides with the great powers' rule. In fact, the Indonesian occupation of East Timor was possible for more than two decades because of the great powers' rule; the world court judges seem to understand this situation and to implicitly approve thereof.

It should be noted that two judges of the world court issued dissenting opinions and seemed unaffected by the great powers' politics in East Timor. Judge Weeramantry, a native of Sri Lanka and somebody who had already provedn himself willing to oppose the great powers in other cases, disagreed with the majority.[23] Judge Weeramantry concluded that the rights of self-determination and permanent sovereignty over natural resources are rights *erga omnes* belonging to the people of East Timor.[24] These rights, because of their *erga omnes* nature, generate a corresponding duty on all states, including Australia, to recognize and respect those rights. Australia concluded a treaty recognizing that East Timor, which Australia itself admitted was a non-self-governing territory, has been incorporated in another state (Indonesia). The Australian act of entering into a treaty over East Timorese natural resources with Indonesia raised substantial doubts regarding the compatibility of this act with the rights of the people of East Timor and the obligations of Australia. Thus, according to Judge Weeramantry, the Court could have proceeded to determine whether a course of action had been made out against Australia on such actions, without the need for any adjudication concerning Indonesia.[25] Finally, Judge Weeramantry wrote that Portugal still had rights and duties as East Timorese official administrator, and that such rights and duties could not have been lost by Portugal because of its actual loss of control of the island, as the majority seemed to imply in its refusal to affirm Portuguese position as administrator.[26]

Judge Skubiszewski, a native of Poland, arrived at a similar conclusion in his dissenting opinion. Judge Skubiszewksi wrote that even if the Court had found itself without jurisdiction to adjudicate on any issue relating to the Timor Gap Treaty, the Court could have nonetheless dealt with issues regarding the status of East Timor, the applicability to that territory of the principle of

self-determination, and the position of Portugal as administering power.[27] This judge thought that Portugal had the power and capacity to act in this case because of its official status as administrator of East Timor, and that Australia's conduct of entering into the Gap Treaty with Indonesia could have been evaluated by the Court in light of relevant law.[28] This judge was also of the opinion that the issue of Indonesian annexation of East Timor was relevant, because it eroded the right of self-determination.[29] Thus, Judge Skubiszewski would have preferred that the Court rule directly on this issue, which, according to this judge, was within the Court's jurisdiction.

Only two ICJ justices out of 16 were in favor of directly addressing the issue of self-determination in the context of East Timor. It is possible that the nationality of these judges played a role in their dissenting voices: as natives of Sri Lanka and Poland, Judges Weeramantry and Skubiszewski may not have been bound by their own national politics and policies. Neither Sri Lanka nor Poland is a member of the great powers' club, and both nations have been able to maintain a somewhat independent stance on the world scene. It may be telling that judges from these two independent nations were willing to pronounce more affirmative proclamations on the right to self-determination, as well as to potentially disrespect the great powers' rule. The remainder of the ICJ judges, however, tacitly adopted the great powers' stance on the fate of this island—that the East Timorese question remained a question, and that Indonesian oppressive tactics remained silently approved.[30]

The ICJ ruling in the case of Kosovo also illustrates a formalistic, rigid approach by the most supreme international jurisdiction intent on respecting the territorial status quo imposed by the great powers, at the expense of failing to develop normative law on the issue of self-determination.

Kosovo (the legality of the Kosovar Unilateral Declaration of Independence)

In 2008 Serbia garnered sufficient support and votes in the General Assembly to request an advisory opinion from the ICJ on the legality of the Kosovar Unilateral Declaration of Independence. As described in detail in Chapter 9, on February 17, 2008, the Kosovar parliament voted a unanimous declaration of independence from Serbia.[31] The independence declaration had followed years of civil war and ethnic strife, a series of NATO-led air strikes on the Federal Republic of Yugoslavia in 1999, the Rambouillet Peace Agreements that followed, as well as a decade of international administration of Kosovo by United Nations' and European Union agencies.[32] Although many states, including most of the great powers, recognized Kosovo within days of its proclaimed independence, none of the recognizing states asserted any legal theories to support the case that Kosovo ought to be independent. Thus, none of the rhetoric about self-determination and statehood was present in the acts of recognition, and most recognizing entities either refrained from commenting on the legality of the Kosovar declaration of independence, or advanced theories that Kosovo

was *sui generis*, a unique case that warranted special recognition but which presumably had never happened before or will ever happen in the future.[33] In light of such legal uncertainty surrounding the Kosovar declaration of independence, Serbia was successful in lobbying the world court to get involved.

The ICJ was specifically asked in this case to issue an advisory opinion on the following issue: "[i]s the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[34] The world court answered this difficult question in the affirmative, in a majority opinion which is easy to understand in light of the politically charged context of this situation, but which nonetheless lacks in legal clarity. As other scholars have also lamented, the ICJ passed up on yet another opportunity to develop a normative framework on non-colonial self-determination under international law.[35]

The world court in the Kosovo case accepted to answer this question on the merits. The Court first rejected a jurisdictional complaint raised by some states: that unilateral declarations of independence are purely political acts and that, as such, they could not only be resolved through the application of domestic constitutional laws and not by international law standards.[36] The Court rejected this assertion and stated that it could resolve this issue by referring to only international law, and that it need not refer to domestic law.[37] The Court also reasoned that a political aspect of a given question does not deprive it of its legal character in its entirety. Thus, the Court held that it had jurisdiction to issue this advisory opinion on the merits.[38]

The ICJ also rejected the argument that it should exercise discretion not to hear this case, because of improper motivation by the sponsor state (Serbia) requesting this advisory opinion, or because no clear purpose had been indicated for which the General Assembly would need this opinion.[39] The ICJ was not persuaded either by the argument that its answer to the question asked would cause unwarranted political consequences.[40] Finally, the ICJ discarded the argument that because the Security Council had been seized of the situation in Kosovo, only that body, and not the General Assembly, could request the advisory opinion. According to the Court, "[t]he fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence."[41] The world court further reasoned that the fact that its judges would have to interpret a Security Council Resolution (1244) in answering a question posed by the General Assembly:

> does not constitute a compelling reason not to respond to that question because the interpretation and application of a decision of one of the political organ of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions.[42]

The ICJ then turned to the merits of the question. First, the ICJ specified that the question had been asked clearly and precisely by the General Assembly. The question as posed involved the legality of the Kosovar Unilateral Declaration of Independence but it did not involve issues of statehood or recognition.[43] Moreover, the Court distinguished between the Quebec secession case, in which the Court had been asked whether there were a specific right to effect secession under international law, and the present case, in which the Court was asked whether the declaration of independence was "in accordance with international law." Thus:

> [i]t follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act—such as a unilateral declaration of independence—not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.[44]

By formulating the question in such narrow terms, the world court avoided having to resolve whether international law conferred a specific right for states or other groups to issue declarations of independence. Instead, the Court resorted to the famous Lotus proposition that whatever is not prohibited under international law is legal.[45]

Second, the Court focused on the identity of the authors of the Kosovar declaration of independence. The Court noted that while the question posed by the General Assembly referred to the provisional institutions of self-government of Kosovo, Serbia when it sponsored the relevant General Assembly resolution asking the ICJ for an advisory opinion referred instead to "Kosovo". According to the Court, the identity of the authors of the declaration of independence matters for the resolution of the legal question involved.[46]

The Court described the relevant context surrounding the adoption of Security Council Resolution 1244 in 1999, as well as the relevant events between 1999 and 2008, including the Ahtisaari Plan as well as a description of rounds of failed negotiations between the Serbian and Kosovar leaderships.[47] Ultimately, the Court described events leading up to the adoption of the declaration of independence, as well as circumstances describing the day of the vote itself. And finally, at page 30 (out of 45), the Court turned to the discussion of the relevant legal issue: the legality of the declaration of independence under international law.

The Court first discussed the existence of states' declarations of independence throughout history, noting that many such declarations of independence

occurred within the decolonization paradigm during the second half of the 20th century, but that some also occurred outside this framework.[48] Based on this observation, the world court decided that "[t]he practice of States . . . does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases."[49] The Court rejected the argument advanced by some states that declarations of independence were prohibited under international law, because they were implicitly contrary to the principle of territorial integrity of states.[50] The Court noted that, in the past, it had condemned some declarations of independence (in southern Rhodesia, Northern Cyprus, and Republika Srpska).[51] However, the Court distinguished those situations from the present one.

> The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.[52]

In other words, the Court determined that in other instances where the Security Council had condemned declarations of independence, the act of condemnation was based on the particular circumstances of each situation, and, in each such situation, the Unilateral Declaration of Independence was linked to some unlawful use of force in violation of general international law. The world court thus concluded that there was nothing illegal in the declarations of independence per se—the only illegality could be found in instances where declarations of independence resulted or were linked to other illegal acts.

In an almost unbelievable twist of legal reasoning, the world court dispensed with self-determination and secession arguments, which had been advanced on behalf of Kosovo, in two paragraphs.[53] The Court noted how some proponents of Kosovar independence had claimed that Kosovar Albanians had the right to external self-determination, leading to remedial secession. The Court also noted how others had denied the existence of such a right outside a decolonization paradigm.[54] However, the Court declared that issues of self-determination went beyond the scope of its requested opinion, because those issues dealt with the right to separate from a state whereas in the present instance, the Court was merely asked to opine on the legality of the declaration of independence.[55] Through an incredibly narrow formulation of the legal issue before the world court, its judges escaped having to formulate normative rules

on self-determination in this non-colonial context. It is hard to accept the argument, however, that the (dis)approval of the Kosovar declaration of independence had nothing to do with the right of Kosovar Albanians to separate from an existing state (Serbia). The world court seemed to embrace a vision of declarations of independence as formalistic acts, or pieces of paper, completely separate from the act of separation. Under this approach, the act of declaring independence can be viewed as "nothing more than ink on parchment: a sheet of paper, signed by a group of people, and about which international law could not care less."[56] Yet, the effect of a declaration of independence is that its authors, representing a territorial entity, separate their entity from the bigger parent state. A successful declaration of independence leads to territorial separation and has to be viewed within a larger legal context. A declaration of independence in a vacuum is meaningless—as Salman Rushdie wrote recently, what if I were to draw a circle around my feet and call that "Selfistan?"[57] Such a self-proclamation of independence would clearly be meaningless. Similarly, when the Kosovar Albanians declared independence in 1990, no other state chose to support this proclamation and that declaration of independence failed to produce any effect.[58] And in instances cited by the Court, where the Security Council specifically condemned declarations of independence in Southern Rhodesia, Northern Cyprus and Republika Srpska, the condemnation caused these declarations of independence to fail to produce any other legal effect or any changes in territory. Thus, declarations of independence must be interpreted in a larger legal context, and international law can, does, and should contain normative rules about when such declarations are lawful.

Finally, the world court turned to an examination of the legality of the Kosovar declaration of independence within the context of *lex specialis*, and in particular, United Nations Security Council Resolution 1244, as well as United Nations Mission in Kosovo regulation 2001/9 of May 15, 2001, on a Constitutional Framework for Provisional Self-Government (hereinafter "Constitutional Framework"), "which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo."[59] The Court first interpreted Resolution 1244 as establishing "a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis."[60] Then, the Court asked whether Resolution 1244 and documents created thereunder formulated a prohibition on issuing a declaration of independence. For the Court, in order to answer this question, it had to first determine who had issued the declaration of independence.[61] The Court distinguished between the Assembly of Kosovo, and the authors of the declaration of independence, who, according to the Court, were acting in a different capacity. According to the world court, "the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo 'as an independent and sovereign state'."[62] Moreover, "the

authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order."[63]

After establishing the divergence of identity between those truly governed by Resolution 1244 and the Constitutional Framework, and the authors of the declaration of independence, the Court answered the ultimate issue of whether the latter acted in violation of Resolution 1244 and the Constitutional Framework. The Court noted that Resolution 1244 established an interim framework for the administration of Kosovo, and that this Resolution did not contemplate or preclude any final solutions for Kosovo.[64] "Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of February 17, 2008, because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo."[65] In addition, the world court noted that Resolution 1244 did not impose any specific obligations on any relevant actors in Kosovo.[66] The world court concluded, in light of this, that the language of Resolution 1244 was such that this document could not be read as imposing a prohibition on declarations of independence on the authors.[67] Conversely, the declaration of independence did not violate Resolution 1244.

The world court also decided that the declaration of independence did not violate the Constitutional Framework, because this Framework only applied to the Provisional Institutions of Self-Government of Kosovo, which are distinct from the authors of the declaration of independence.[68] In other words, the authors were not bound by the Constitutional Framework and accordingly could not have violated it by issuing the declaration of independence.

The majority opinion exemplifies the great powers' rule: the majority of the world's greatest powers had already recognized Kosovo as an independent state, and the world court's justices seem inhibited in their legal reasoning by this fact. As if they recognized that there would be no going back on the Kosovar independence, in light of support for such independence expressed by the United States and some other major Western great powers, the world court justices refrained from addressing most of the relevant legal issues raised by the Kosovar declaration of independence. One of such unaddressed issues was the one related to the right of self-determination, in this non-decolonization context, for the Kosovar Albanians, and the related discussion of how such exercise of self-determination would square against the Serbian claim for the preservation of its territorial integrity. Most great powers recognized Kosovo by claiming that it was *sui generis* and by refusing to issue any pronouncements on the legality of the Kosovar independence in light of relevant legal principles. Most great powers embraced Kosovo as a new sovereign partner for political reasons; sadly, the world court seemed to follow this path in its advisory opinion.

The separate declaration by Vice President Tomka similarly decried the majority's conclusion. With respect to the majority's distinction between those

allegedly governed by Resolution 1244 and the Constitutional Framework and the authors of the declaration of independence, Judge Tomka argued that "[t]his conclusion has no sound basis in the facts relating to the adoption of the declaration, and is nothing more than a post hoc intellectual construct."[69] Even more critically, Judge Tomka accused the majority of world court justices of being improperly influenced by the political situation in Kosovo.

> The Court, as the principal judicial organ of the United Nations (Article 92 of the Charter), is supposed to uphold the respect for the rules and mechanisms set in the Charter and the decisions adopted thereunder. The legal régime governing the international territorial administration of Kosovo by the United Nations remained, on 17 February 2008, unchanged. What certainly evolved were the political situation and realities in Kosovo. The majority deemed preferable to take into account these political developments and realities, rather than the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint.[70]

In addition to Judge Tomka (Slovakian national), three justices dissented from the majority opinion: Judge Koroma (national of Sierra Leone), Judge Bennouna (Moroccan national), and Judge Skotnikov (Russian national). The nationality of these judges indirectly confirms the existence of the great powers' rule within the ICJ. It is not surprising that Judge Skotnikov of Russia dissented from the majority opinion, in light of Russian historic allegiance with Serbia and the Russian refusal to support Kosovar independence. Judges Tomka, Koroma, and Bennouna are nationals of smaller, developing states that have not been directly induced into the great powers' rhetoric or geopolitical strategy vis-à-vis the Balkans; hence, these judges appeared willing to discuss true legal issues raised by the Kosovar declaration of independence.

Judge Skotnikov argued that the Court should have refused to exercise jurisdiction in this instance, because of the Security Council's involvement in the matter.[71] Judge Skotinkov most likely reached this result because of his nation's membership and veto power on the Security Council. In other words, why should world court justices possibly upset the political determination reached by the Security Council on any given issue by issuing legal proclamation that could go against Security Council decisions? It is telling that the only justice making this argument was a national of a veto-wielding member of the Security Council. In addition, Judge Skotnikov argued that the majority had misinterpreted Resolution 1244, which, according to him, could not have contemplated the possibility of its own termination through unilateral action (namely, the Kosovar Albanian Unilateral Declaration of Independence).[72] Finally, Judge Skotnikov considered that the issue of legality of the Unilateral Declaration of Independence could not be answered from the standpoint of general international law, because such law also required an examination of statehood and recognition, issues which were not raised in the present instance by the narrow question asked by the General Assembly.[73]

Judge Bennouna similarly thought that the Court should have declined to exercise jurisdiction because the only organ that could determine the legality of the Kosovar unilateral declaration of independence could have been the Security Council, in light of existing Security Council involvement in the matter, and particularly Resolution 1244.[74] Judge Bennouna distinguished the Kosovo case from the Wall case, discussed later. In the latter, the General Assembly had been involved in continuous discussions over the Palestinian issue over decades, whereas in the former, the Security Council alone had acted with respect to the Kosovar question.[75] In addition, Judge Bennouna criticized the majority opinion for its decision to discuss the identity of the authors of the Kosovar declaration of independence, when such identity had not been questioned by the General Assembly or by any state parties before the Court.[76] He was also critical of the majority's determination that general international law contained no prohibitions on declarations of independence. Judge Bennouna argued that the issue before the Court was not one in the abstract, but rather one which had to do with the specific context of the Kosovar declaration of independence. Furthermore, he argued that general international law rules of territorial integrity and self-determination should have been analyzed by the majority.[77] Judge Bennouna also opined that Kosovar Albanians were required to respect the framework of Resolution 1244 and the administration of Kosovo set up thereby, and that unilateral action by the authors of the declaration of independence could not have interrupted such legal regime established through Resolution 1244.[78] Finally, he disagreed with the majority opinion because, in his view, the declaration of independence was unlawful. According to Judge Koroma:

> International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that State's consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent. Indeed, it amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms. The Court's Opinion will serve as a guide and instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined.[79]

The dissenting opinions highlight gaps in the majority opinion's reasoning, both about the application of general law to the legality of declarations of independence, as well as to the application of *lex specialis*, to the same issue. Moreover, the dissenting opinions emphasize the inappropriateness of the majority's legal creativity in redrafting the question formulated by the General

Assembly, to be able to address the issue of the identity of the authors of the declaration of independence. In essence, the dissenting judges argue two things: that either the Court should have refused to exercise jurisdiction in light of the Security Council's exclusive handling of the Kosovo situation, or that the Court should have addressed the declaration of independence in its own context, by also analyzing issues of territorial integrity and self-determination. The dissenting opinions would have escaped the great powers' trap, by refusing to issue the advisory opinion because of the relevant legal precedent pointing toward the world court's refusal to exercise jurisdiction in these kinds of situation, or by accepting jurisdiction and by ruling on the difficult legal issues. Either of these results would have been preferable, as it would have more appropriately separated the legal realm of the highest judicial organ, the ICJ, from the political arena dominated by the great powers.

Georgia (Georgia v. Russia)

As discussed in detail in Chapter 8, in the summer of 2008 Russia intervened militarily in Georgia, in order to assist two Georgian breakaway provinces, South Ossetia and Abkhazia, in fighting against a Georgian military incursion.[80] In the days following the Russian military intervention in Georgia, Georgia filed a claim in the ICJ against Russia, alleging that Russia breached its obligations under the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) vis-à-vis Georgia.[81] Georgia alleged that Russian forces engaged in acts of "racial discrimination against persons, groups of persons or institutions" in South Ossetia and Abkhazia and that it attempted to "justify or promote racial hatred and discrimination in any form" in these two provinces.[82] Georgia thus requested that Russia cease all military activities on the territory of Georgia, namely in South Ossetia and Abkhazia.[83] Although Georgia filed this claim under the CERD, this case was truly about self-determination rights of the South Ossetians and the Abkhaz living within Georgia and seeking to establish their own "selfistans." Thus, this chapter will discuss the Georgian case briefly, because this case de facto fits into a narrative of self-determination outside the decolonization context.

The world court's original order in this case was a provisional one directed at halting the violence in Georgia. In a provisional measures order of October 15, 2008, the ICJ called on both parties to refrain from military action in one another's territory.[84] The ICJ then heard arguments by Georgia and Russia on the merits of this dispute.

Georgia accused Russia of engaging in ethnic cleansing of Georgians in South Ossetia and of preventing Georgians' return to their homes in South Ossetia and Abkhazia in violation of the provisional order (just discussed).[85] Russia did not defend against such claims on the merits; rather, it alleged four reasons because of which the world court did not have jurisdiction over this dispute.[86] Russia thus asked the world court to dismiss the case. The ICJ accepted one of Russia's four lack-of-jurisdiction arguments. In fact, the world

court held that Article 22 of the CERD required parties, in case of a dispute arising under this convention, to first engage in negotiation and other dispute settlement procedures contemplated under this convention before seizing the ICJ of the matter.[87] In other words, according to the world court judges, the parties had not exhausted other necessary remedies before asking the ICJ to weigh in. The parties had thus committed a procedural error under the CERD, because of which the ICJ could not exercise jurisdiction over this dispute under the CERD.[88]

This case did not have to do with issues of self-determination directly. After all, Georgia had sued Russia under the CERD, a convention that does not speak about the right of peoples to attain self-determination. However, implicitly, this case was about self-determination. As Chapter 8 discusses, South Ossetia and Abkhazia, although officially a part of Georgia, have been asserting rights to autonomy and self-determination for almost two decades. The nature and characterization of the military conflict in Georgia in 2008 play a distinctive role in assessing whether Russia engaged in unjustified military acts in Georgia, or whether it was Georgia that illegally intervened in South Ossetia and Abkhazia. If one accepts the argument that South Ossetia and Abkhazia are *de jure* provinces of Georgia, and that South Ossetians and Abkhaz peoples have no particular rights to self-determination, then one would have to conclude that Russian military had no right to assert its presence in these two provinces. Under this scenario, Georgia could be right in its assertions that Russian military forces committed violations of international law. If one concludes, however, that the people of South Ossetia and Abkhazia have specific self-determination rights, then possibly Georgia could be seen as the aggressor, preventing a justifiable exercise of self-determination from taking place. Under this scenario, Russia military forces could be viewed as acting in collective self-defense, helping the South Ossetians and the Abkhaz to fight off Georgian forces. To assess the validity of these scenarios, it would be necessary to examine issues of self-determination, which would have required the world court to engage in a complex and politically charged analysis of the situation in this Caucasus region.

Georgia rescued the world court from having to tackle self-determination issues. In its application to the ICJ, Georgia chose to accuse Russia of CERD violations, and not of broader violations such as the unlawful use of force against the territorial integrity of another state (Georgia). Presumably, Georgia chose the CERD because of jurisdictional issues—in other words, as both Georgia and Russia are members of the CERD, Georgia thought that it would be able to persuade the world court to rule over this dispute. Yet, like Serbia, Georgia could have asked the ICJ to issue an advisory opinion on the legality of the Russian use of force in Georgia, and presumably, Georgia could have garnered enough support in the General Assembly to be able to request such an advisory opinion. Most likely, Georgia chose not to engage on this path because of the danger that the ICJ would actually decide that South Ossetians and Abkhaz people had the right to self-determination. This kind of a

proclamation by the world court would have been unfavorable to Georgia, to say the least, and Georgia thus chose to accuse Russia of CERD violations instead. A deliberation by the ICJ over CERD violations did not require the world court to touch on self-determination issues. A prudent-as-ever panel of ICJ did not even rule on the merits of Georgia's CERD claims. Instead, as in the East Timor case described earlier, the world court chose to dismiss this claim on jurisdictional grounds. Possibly, the ICJ thought it more prudent to avoid ruling on the merits of this case because of the danger that this kind of ruling would require world court judges to address self-determination issues as related to CERD issues. This case, although *not directly about* self-determination because the dispute was brought under the CERD, was *actually all about* self-determination. Had the world court chosen to address issues on the merits in this case, it would have been interesting to see how judges would have handled a discussion of self-determination for the peoples of South Ossetia and Abkhazia. The Georgian case remains another missed opportunity to develop a normative framework on self-determination under international law.

Finally, the Georgian case may also confirm the influence of the great powers' rule on the world's highest judicial organ. This case involved the use of force by one of the most influential great powers, Russia. Any proclamation that Russia had illegally used force in Georgia would have run contrary to the great powers' rule itself, as it would have shed a negative light on one of the powerful great powers. By the same token, the world court judges would have most likely been uncomfortable condoning Russian military intervention in Georgia, for fear of unfavorable precedent setting and of developing a dangerous new rule of international law that would purport to authorize uses of force in questionable scenarios. Thus, as in the East Timor and the Kosovo cases, the world court justices chose not to address the most difficult legal issues, possibly because of the presence of the great powers' rule and its influence on the legal deliberations of the ICJ. Conversely, absent the great powers' rule, it is possible that the ICJ justice would have chosen to address Georgian claims on the merits, and that they would have developed normative legal rules on issues of self-determination within this context.

Other relevant ICJ jurisprudence: Western Sahara and the "Wall" case

Two additional ICJ cases are worthy of discussion.[89] First, the ICJ Advisory Opinion of October 16, 1975, on Western Sahara lays an important ground work on the question of self-determination in the decolonization context; this advisory opinion has been widely cited in other relevant discussions of self-determination and in subsequent ICJ cases, including the one on Kosovo just discussed.[90] Second, the ICJ Advisory Opinion of July 9, 2004, on the legality of the construction of the wall in the Occupied Palestinian Territory discusses the issue of self-determination in the context of Palestine and thus outside the paradigm of decolonization; in addition, this opinion highlights the world

court's willingness to issue a strong legal proclamation despite a politically charged context.[91] The Wall Advisory Opinion stands in stark contrast to the Kosovo case—in the latter, world court judges opted not to engage in the development of normative legal rules because of a politically charged situation. The Wall Advisory Opinion demonstrates that world court justices can and should take a firm legal stance on difficult issues, and that politics should not impede the development of legal norms in the most supreme judicial organ. The fact that most often world court justice seem to take global politics into account before issuing their opinions, however, underscores the profound importance of the great powers' rule in today's world: the great powers' interplay dominates highest judicial organ's deliberations on self-determination issues most of the time.

Western Sahara

In the Western Sahara Advisory Opinion, the world court was requested by the United Nations General Assembly to issue an opinion on two questions: whether the territory of Western Sahara was at the time of colonization by Spain *terra nullius*, a territory belonging to no one, and, if the answer to the first question was in the affirmative, what legal ties existed between Western Sahara, Morocco, and Mauritania.[92] At the time, in 1975, Spain was the official administering power of Western Sahara, and both Morocco and Mauritania laid territorial claims to this geographic region. In fact, Spain had colonized Western Sahara at the end of the 19th century, following the Berlin Congress.[93] Starting in the 1960s, however, Spain faced increased pressure by the United Nations to decolonize this area. In 1975 Spain began to indicate that it would allow for independence referendum to take place in Western Sahara, but two neighboring states, Morocco and Mauritania, advanced territorial stakes of their own to this strip of desert land.[94] In order to attempt to halt the spread of violence and a possible territorial war over Western Sahara, the world court issued its advisory opinion in the fall of 1975.

The ICJ engaged in a relevant discussion of self-determination principles in the Western Sahara opinion; however, it should be noted that any such discussion was framed by the decolonization paradigm, as the Court focused on the issue of whether the people of Western Sahara had the right to rid themselves of colonial domination, through the exercise of self-determination. The issue discussed in this opinion was thus vastly different from present-day discussions of self-determination in the non-colonial context, such as in the cases of Kosovo or the Georgian provinces.

In their submissions to the world court, Morocco and Mauritania recognized the principle of self-determination, but argued that this principle could not be dissociated from the principle of national unity and territorial integrity of countries.[95] Thus, both Morocco and Mauritania maintained that while the people of Western Sahara may have the self-determination right to separate from Spain through decolonization, the territory of Western Sahara should be

reintegrated with the mother state from which this territory had been taken by Spain. Thus, Morocco and Mauritania advanced a theory of self-determination that would lead to decolonization and an immediate absorption of the decolonized territory into its historical mother state, Morocco or Mauritania. Spain objected to the jurisdiction of the world court and argued that because it had not consented to the adjudication of the Western Saharan question, the world court should refrain from issuing any kind of an opinion on this matter.[96]

The world court reaffirmed the existence of the principle of self-determination by specifically relying on General Assembly Resolution 1514, according to which "[a]ll peoples have the right to self-determination."[97] Moreover, the world court quoted the Friendly Relations Declaration for the same proposition.[98] Finally, the world court highlighted that Resolution 2229 had specifically urged Spain, the official administrator of Western Sahara, to allow the people of Western Sahara to hold referendum and exercise their right of self-determination, pursuant to Resolution 1514.[99] Similarly, the Court reminded Spain that Resolution 3162 of 1973 reiterated the need to allow inhabitants of Western Sahara to seek self-determination.[100] Thus, in light of these General Assembly resolutions, the world court reaffirmed the right of self-determination for the colonized people of Western Sahara.

Before reaching its final conclusion, the world court first determined that Western Sahara was not *terra nullius* at the time of Spain's colonization thereof.[101] The Court, however, declined to rule on the legality of Morocco's or Mauritania's territorial claims to Western Sahara, exhibiting some of the reluctant attitude that the Court will later display in the Kosovo case. In other words, the Court satisfied itself by answering that Western Sahara was *not*, in fact, *terra nullius*, without answering the more pressing question of who Western Sahara belonged to territorially before the Spanish colonization.[102] The Court then answered the second question, which requested the Court to determine what legal ties have existed between Western Sahara, Morocco, and Mauritania.[103] Unsurprisingly, Morocco had claimed that its tie to Western Sahara was one of sovereignty, based on its alleged possession of the territory prior to the Spanish colonization.[104] Mauritania, by way of contrast, did not oppose Morocco's claim to sovereignty over some northern areas of Western Saharan territory; however, Mauritania claimed that some of the Western Saharan tribes in some areas displayed allegiance to Mauritania.[105] Spain disputed Moroccan claims of sovereignty over the entire Western Saharan region.[106] The court ultimately concluded that while historic ties have existed between Western Sahara and Morocco, Mauritania and Spain have presented enough evidence before the Court to question the validity of the Moroccan sovereignty claim over the entire Western Saharan territory.[107] Moreover, the Court concluded that while some legal ties may have existed between Western Sahara and Mauritania, there was not sufficient evidence to conclude that any tie of sovereignty existed between the two entities at the time of Spanish colonization.[108] Thus, the Court concluded that the people of Western Sahara had the right to self-determination, which had not been affected by any

territorial claims to this region by Morocco or Mauritania. In other words, although some historical ties have existed between Western Sahara, Morocco, and Mauritania, such ties were not ones of territorial sovereignty that would be sufficient to trump the principle of self-determination.[109] The world court justices thus implied that the principle of territorial integrity could prevail over the self-determination rights of a people, in instances where there is solid evidence of the existence of a territorial claim over a particular region, despite the fact that the people of that region do not wish to be governed by the entity asserting such a territorial claim. The Western Sahara case is significant for this proposition, and for its willingness to address issues raised by the intersection of the principle of territorial integrity and the norm on self-determination. As demonstrated by the discussion of the East Timor and Kosovo cases in this chapter, it is rare that world court justices engage in such ambitious legal reasoning. However, even in the Western Sahara case, the majority of judges stopped short of applying their theoretical legal reasoning on the potential conflict between territoriality and self-determination to the particular context at hand. Several judges issuing concurring and/or dissenting opinions criticized the majority for this shortcoming.

Several justices issued concurring opinions agreeing with the premise that the people of Western Sahara possessed the legal right to self-determination, but pushing for more precise legal reasoning and a potential ruling on the territorial claims of Morocco and Mauritania. Justice Petren (Swedish national) wrote that:

> [t]he decolonization of a territory may raise the question of the balance which has to be struck between the right of its population to self-determination and the territorial integrity of one or even of several States. The question may be raised, for example, whether the face that the territory belonged, at the time of its colonization, to a State which still exists today justifies that State in claiming it on the basis of its territorial integrity.[110]

Judge Boni, an ad hoc judge appointed by Morocco in this dispute, concluded that the people of Western Sahara should have been consulted in referendum over issues of decolonization, thereby implying that the people of Western Sahara themselves could have proclaimed an allegiance to Morocco or Mauritania.[111] And Judge Dillard (American national) questioned the soundness of the majority's conclusion that no ties between Western Sahara and Morocco or Mauritania were sufficient to affect the principle of self-determination.[112] Leading scholars and commentators have agreed with the view of Judge Boni—that it would have been relatively easy to hold referendum in Western Sahara and to determine what the free will of its inhabitants demonstrated. Thus, Antonio Cassese wrote that "[i]t would therefore have been logical to allow the inhabitants of Western Sahara to make such a choice, by means of a referendum under UN supervision."[113] And T.M. Franck opined in 1976 that "the disposition of the Sahara case by the United Nations has been

monumentally mishandled, creating a precedent with a potential for future mischief out of all proportion to the importance of the territory."[114]

It is possible that the nationality of justices who wrote separate opinions in the Western Sahara case influenced their legal reasoning. Judge Petren, a national of a strong, independent nation (Sweden) seemed willing to tackle difficult legal issues despite the intensely political context of the situation in Western Sahara. Judge Boni of Morocco, a country directly involved in this dispute, similarly expressed the desire to resolve this conflict through the exercise of referendum. Presumably, for Judge Boni the majority's opinion stopped short of resolving this conflict, for its failure to rule on the legality of Morocco and Mauritania's territorial claims to Western Sahara. These two judges seemed unaffected by the politics of the great powers' rule, whose influence may have prevented the majority from formulating precise rules on the intersection of territoriality and self-determination within the context of a people's decolonization and self-determination struggle. Judge Dillard of the United States, a national of a great power itself, displayed a willingness to support the application of difficult legal rules to the specific context of Western Sahara. Judge Dillard's stance may stem from his personal moral and legal courage, which may not have been influenced by American foreign policy. Or, a more cynical view of Judge Dillard's view, may be that American foreign policy was simply indifferent to the situation in Western Sahara, so that the American judge on the world court had no directive as to the American position on legal issues regarding this area of the world.

Following the ICJ opinion, Spain relinquished its claims to Western Sahara as a colonized territory, and Morocco and Mauritania moved in their troops.[115] After years of fighting, in 1979, Mauritania gave up its claim to Western Sahara and ceased military operations in this area. Morocco, however, remained.[116] As of today, the political situation of Western Sahara remains unsettled. Morocco effectively controls most of Western Saharan territory, but the self-proclaimed government of Western Sahara, Polisario Front, has been recognized as the official governing entity of Western Sahara by more than 80 states.[117] The United Nations has been involved in various peace-keeping efforts in Western Sahara, but as of today, no major progress on the issue of self-determination for the people of Western Sahara has been made. As Antonio Cassesse has observed, "[t]he case of Western Sahara proves, however, that it is precisely when the conflicting political interests of the various international actors are at stake that the principle of self-determination and the consequent freedom of choice of the population concerned . . . could offer a solution."[118] Thus, it is a shame that the world court did not push its legal reasoning further in the Western Saharan advisory opinion, in order to develop a normative framework on the intersection of self-determination with territorial integrity. It is possible that the great powers' rule played a role in the world court justices' reluctance to delve into difficult issues over self-determination and its potential impact on the principle of territorial integrity. Like in the Kosovo case, the world court justices missed an important opportunity to develop legal rules in

a complex area of international law. Instead, they succumbed to political pressure and simply reaffirmed the existing principle of self-determination with respect to colonized peoples, without seeking to clarify the contours of the principle and its meaning in light of the existing territorial integrity norms. The Western Sahara case may remain in the history of the ICJ jurisprudence as another example of the Court's justices' unwillingness to pronounce new normative rules in the context of a politically charged dispute. The Wall Case, however, stands for the opposite proposition: it is a case where the world court justice bravely pushed legal reasoning beyond politically predetermined parameters and beyond the confines of the great powers' rule.

The "Wall" case

On December 8, 2003, the United Nations General Assembly requested an advisory opinion from the ICJ on the following issue: "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem . . . considering the rules and principles of international law?"[119] For security reasons, Israel had chosen to construct a wall around certain Palestinian territories on the West Bank. Israel described the wall as a "security fence," 80 kilometers long, in order to "halt infiltration into Israel from the central and northern West Bank."[120] Palestinians complained that the construction of the wall was illegal for numerous reasons, including the fact that it would prevent the exercise of self-determination for the Palestinians because of its chosen route, which divided some Palestinian communities.[121] Palestinians garnered enough support in the General Assembly to vote a resolution requesting the stated advisory opinion from the world court.

Israel urged the world court to decline the exercise of jurisdiction, because the Security Council had already been seized of this matter and the General Assembly thus acted *ultra vires* when it decided to seek this advisory opinion from the ICJ.[122] The court rejected this argument by pointing out the recent historical practice of the General Assembly, which has consisted of acting on issues of which the Security Council had also been seized. The court remarked that "while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects."[123] In addition, Israel also argued that the exercise of jurisdiction was not proper for the ICJ in this instance, because the question asked of the world court justices was not legal, as it would be impossible for justices to "determine with reasonable certainly the legal meaning of the question asked."[124] The world court justices rejected this argument as well. Citing the Western Sahara case, ICJ judges determined that the question asked of the Court in this instance was "susceptible of a reply based on law" because the question has "been framed in terms of law and raise[s] problems of international law."[125] Thus, the world court justices accepted jurisdiction over the issue of legality

of the Israeli-built wall around the Palestinian territories, despite the heightened politically charged context of this situation. In the Wall case, unlike in other cases, the politics of the Middle East did not stop ICJ judges from developing legal, normative rules.

After dispensing with jurisdictional objections, the world court delved into the legal issues in a direct manner. The Court, in discussing relevant international law rules applicable to Palestine, reaffirmed the principle of self-determination.[126] The world court cited the Friendly Relations declaration, as well as common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; moreover, the Court cited some of its previous case law on self-determination, including the East Timor (Portugal v. Australia) case discussed earlier.[127] The latter case was cited for the proposition that the principle of self-determination has become a right *erga omnes*.[128] Thus, the principle of self-determination applied to the Palestinians because they are a people with "legitimate rights."[129] The Israeli wall has been constructed in an improper way, because its chosen route:

> gives expression in loco to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council . . . There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing . . . to the departure of Palestinian populations from certain areas.[130]

The construction of the wall, according to the Court, "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right."[131] The world court thus decided that the construction of the wall was contrary to Israel's international legal obligations, and that Israel was bound to respect the right of the Palestinian people to self-determination.[132] The court reiterated the *erga omnes* character of the obligation by Israel to respect Palestinian self-determination rights, and urged other states in the international community not to recognize Israeli actions in choosing the site of the constructed wall.[133]

The Wall case thus represents a legal proclamation by the world court about the existence of the right to self-determination in the non-colonial context. The opinion is tremendously significant as it demonstrated the judges' willingness to develop a legal rule for the first time (the existence of a non-colonial right of self-determination), and to apply it in a politically charged context. As already discussed, the world court judges were not willing to utilize similar audacious legal reasoning in the Kosovo case. In the Georgia case, the judges stayed as far away as possible from any notion of self-determination. Conversely, in the East Timor and Western Sahara cases, the world court discussed self-determination rights in the classical decolonization

paradigm. What is significant as well is that most justices who wrote separate opinions seemed to embrace the majority's premise that the right to self-determination applied to Palestinians, despite the non-colonial context of this situation.

Judge Higgins, in her separate opinion, highlighted the fact that the majority opinion adopted a position on "self-determination beyond colonialism," for the very first time.[134] Judge Higgins, however, remained skeptical about the applicability of non-colonial self-determination to the wall issue. She pointed out that the Palestinian rights to self-determination would have most likely remained impeded even had the wall never been built.[135] In addition, Judge Higgins was not persuaded that the construction of the wall constituted per se annexation, because Israel occupied Palestinian territory with or without the existence of the wall.[136] Similarly, Judge Kooijmans questioned the applicability of the self-determination regime to the Palestinian situation, by arguing that issues of self-determination in the present non-decolonization paradigm would have been better left off to the political process.[137] Judge Buergenthal (American national), the sole dissenting judge on most of the conclusions of the world court, recognized that Palestinians had the right to self-determination, but expressed doubts as to that right's applicability in this context because of Israel's inherent right to self-defense, which would preclude the exercise of self-determination. Judge Buergenthal argued that "the Palestinian people have the right to self-determination," but that "Israel's right to self-defence, if applicable and legitimately invoked, would nevertheless have to preclude any wrongfulness in this regard."[138] It is telling that the nationality of the sole dissenting judge on the world's court Wall case was American, and that this judge seemingly followed his own national state's foreign policy of support for Israel and its territorial integrity over the potential encroachment of Palestinian rights. Judge Buergenthal acceded to the great powers' rule by adopting essentially the Western great powers' stance on Israel and by refusing to delve into the application of legal rules on self-determination to the politically intricate climate in the Palestinian Occupied Territories.

The Wall case stands in contrast to most other case law by the ICJ on the subject of self-determination, because of a particular display of judicial audacity and a willingness to tackle controversial legal issues in a difficult political climate. Except for the sole dissenting opinion of Judge Buergenthal, the great powers' rule apparently did not influence judicial reasoning on the world court in the Wall case. The world court justices demonstrated the ability to develop *lex ferenda* despite a controversial and unsettled geopolitical climate in a given region. These justices should continue doing so in other cases before them, and it is regrettable that they chose not to do so in the Kosovo case.

Notes

1 *See* Chapter 6.
2 Ibid.

3 Case Concerning East Timor (Port. v. Austl.), 1995 ICJ 90 at para. 18 (describing the negotiation between Australia and Indonesia over the Timorese continental shelf, which ultimately resulted in the conclusion of the Timor Gap Treaty in 1989).
4 As early as 1979, when Australia and Indonesia commenced negotiation over the delimitation of the Timorese continental shelf, the Australian Minister for Foreign Affairs proclaimed that "when they [the treaty negotiations] start, they will signify de jure recognition by Australia of the Indonesian incorporation of East Timor." The Foreign Affairs Minister added, however, that Australia, while recognizing Indonesia as a *de jure* sovereign of East Timor, did not condone the *manner* in which East Timor was incorporated into Indonesia. Portugal v. Australia, opt. cit., para. 17.
5 Ibid., para. 10.
6 Ibid.
7 Ibid.
8 Ibid., para. 33–34.
9 Ibid., para. 37.
10 Ibid., para. 30.
11 *See* Chapter 1 for a detailed discussion of the principle of self-determination in the decolonization paradigm.
12 Portugal v. Australia, opt. cit., para. 17.
13 Ibid., para. 31.
14 Ibid.
15 Ibid., para. 32.
16 Ibid., para. 33.
17 Ibid., para. 35.
18 B. Lu, "The Case Concerning East Timor and Self-determination," *Murdoch University Electronic Journal of Law*, 2004, Vol. 11, No. 2, para. 20.
19 Ibid., para. 21.
20 Ibid.
21 Ibid.
22 *See* Chapter 6 for a detailed discussion of the great powers' rule in East Timor.
23 Another case in which Judge Weeramantry seemed willing to oppose the great powers' rule was the infamous Nuclear Weapons case. Legality of the Threat or Use of Nuclear Weapons, 1996, ICJ 226 (July 8). In that case, the majority of ICJ judges avoided a proclamation of legality or illegality of the use of nuclear weapons, and, as in the East Timor case, failed to develop a normative framework for the use of nuclear weapons. It is very likely that the majority of judges in that case were driven by politics and, implicitly, the great powers' rule, which dictated such an ambiguous outcome. However, Judge Weeramantry wrote a separate dissenting opinion arguing that the use of nuclear weapons could never be legal under international law, because such use could never respect the principles of proportionality and necessity. Thus, Judge Weeramantry proved himself willing to sidestep international politics and to argue in favor of a clear prohibition under international law.
24 *East Timor (Portugal v. Australia), Diss. Op. Weeramantry, ICJ Reports 1995*, p. 142.
25 Ibid., p. 153.
26 Ibid., pp. 180–181.

27 *East Timor (Portugal v. Australia), Diss. Op. Skubiszewski, ICJ Reports 1995*, p. 226, para. 43.
28 Ibid., para. 55.
29 Ibid., paras 141–142.
30 It should be noted that four judges of the ICJ wrote separate concurring opinions in this case. However, these judges voted with the majority in its decision not to rule on the merits of this case because of the indispensable third-party doctrine.
31 *See* Chapter 9.
32 Ibid.
33 Ibid.
34 G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008).
35 *See*, for example, M.G. Kohen and K. Del Mar, "The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of 'Independence from International Law'?," *Leiden Journal of International Law*, 2011, Vol. 24, No. 1, 109–126; T. Christakis, "The ICJ Advisory Opinion on Kosovo: Has International Law something to say about Secession?," *Leiden Journal of International Law*, 2011, Vol. 24, No. 1, 73–86.
36 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, ICJ Advisory Opinion, Jul. 22, 2010, paras 26–28 [hereinafter "Kosovo Advisory Opinion"].
37 Ibid.
38 Ibid., paras 26–27.
39 Ibid., para. 32.
40 Ibid., para. 35.
41 Ibid., para. 40.
42 Ibid., para. 46.
43 Ibid., para. 51.
44 Ibid., para. 56.
45 For a more detailed discussion of the Lotus proposition in the context of the Kosovo ICJ case, *see* A. Peters, "Does Kosovo lie in the Lotus-land of Freedom?," *Leiden Journal of International Law*, 2011, Vol. 24, No. 1, 95–108.
46 Kosovo Advisory Opinion, op. cit., para. 52.
47 Ibid., paras 57–77.
48 Ibid., para. 79.
49 Ibid., para. 81.
50 Ibid., para. 80.
51 Ibid., para. 81.
52 Ibid.
53 Ibid., paras 82–83.
54 Ibid., para. 82.
55 Ibid., para. 83.
56 Kohen, op. cit., 109.
57 S. Rushide, *Shalimar the Clown*, Jonathan Cape, 2005, p. 102 ("Why not just stand still and draw a circle round your feet and name that Selfistan?").
58 I. King and W. Mason, *Peace at Any Price: How the World Failed Kosovo*, C. Hurst & Co., 2006, pp. 36–38 (describing the circumstances leading up to the 1990 Kosovar Albanian Unilateral Declaration of Independence, and the lack of any significant effect in the world community of this first attempt at independence by the Kosovar Albanians).

59 Kosovo Advisory Opinion, op. cit., para. 62.
60 Ibid., para. 100.
61 Ibid., para. 101.
62 Ibid., para. 105.
63 Ibid.
64 Ibid., para. 114.
65 Ibid.
66 Ibid., para. 115.
67 Ibid., para. 119.
68 Ibid., para. 121.
69 Declaration of Vice-President Tomka, 2010, para. 12.
70 Ibid., para. 35.
71 Dissenting Opinion of Judge Skotnikov, paras 1–11.
72 Ibid., para. 14.
73 Ibid., para. 17.
74 Dissenting Opinion of Judge Bennouna, paras 7–13.
75 Ibid., para. 17.
76 Ibid., paras 27–29.
77 Ibid., paras 36–40.
78 Ibid., para. 62.
79 Dissenting Opinion of Judge Koroma, para. 4.
80 *See* Chapter 8.
81 Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia), Judgment, ICJ, Apr. 1, 2011 [hereinafter "Georgia v. Russia"].
82 Ibid., para. 16.
83 Ibid.
84 Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of Oct. 15, 2008, I.C.J. Reports 2008, p. 35.
85 Georgia v. Russia, opt. cit., para. 16.
86 Ibid., para. 22. Russia raised four preliminary objections to the Court's jurisdiction. First, Russia argued that there was no dispute between the parties regarding the interpretation or application of the Convention as of the date that Georgia filed its application. Second, Russia argued that the procedural requirements under Article 22 of the Convention had not been met. Third, Russia argued that the alleged wrongful conduct took place outside its territory and the Court thus lack territorial jurisdiction to hear this dispute. Fourth, Russia argued that the Court's jurisdiction was limited temporally to the events which occurred after the Convention's entry into force between the parties, on Jul. 2, 1999. Ibid.
87 Ibid., para. 148.
88 Ibid., para. 184.
89 In fact, another ICJ case would have been relevant for the purposes of this discussion on self-determination. *See* Advisory Opinion of Jun. 21, 1971, on the Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa), where the world court held that developments in international law throughout the 20th century "leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned." *Id.* at p. 31. This case also discusses the issue of self-

determination in the decolonization paradigm. As the Western Sahara case discussed the same issue subsequently, this chapter discusses the Western Sahara case as the last world court jurisprudence on self-determination in the classical decolonization paradigm. It may be argued that the East Timor case, also discussed in this chapter, represents another instance of self-determination through decolonization. However, because of the involvement of Indonesia as the occupying power in East Timor, it can also be argued that East Timor does not entail a pure case of self-determination through decolonization. At best, East Timor may represent a case of delayed decolonization.

90 Western Sahara, Advisory Opinion, ICJ Reports 1975, p. 12 [hereinafter "Western Sahara"].
91 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136 [hereinafter "Wall Opinion"].
92 G.A. Res., U.N. Doc. A/RES/3292, Dec. 13, 1974.
93 A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995, p.214.
94 Ibid., p. 215.
95 Western Sahara, opt. cit., paras 49–50.
96 Ibid., para. 27.
97 G.A. Res. 1514, U.N. Doc. A/RES/1514, Dec. 14, 1960.
98 G.A. Res. 2625, U.N. Doc. A/RES/2625, Oct. 14, 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations [hereinafter "Friendly Relations Declaration"].
99 Western Sahara, opt. cit., para. 62.
100 Ibid., para. 64.
101 Ibid., para. 82.
102 Ibid. ("the court does not find it necessary first to pronounce upon the correctness or otherwise of Morocco's view that the territory was not *terra nullius* at that time because the local tribes, so it maintains, were then subject to the sovereignty of the Sultan of Morocco; nor upon Mauritania's corresponding proposition that the territory was not *terra nullius* because the local tribes, in its view, then formed part of the "Bilad Shinguitti" or Mauritanian entity").
103 Ibid., para. 1.
104 Ibid., para. 90.
105 Ibid., para. 102.
106 Ibid., para. 100.
107 Ibid., para. 128 (concluding that "[e]xamination of the various elements adduced by Morocco in the present proceedings does not, therefore, appear to the Court to establish the international recognition by other States of Moroccan territorial sovereignty in Western Sahara at the time of the Spanish colonization").
108 Ibid.
109 Ibid., paras 161–162.
110 Separate Opinion of Judge Petren, p. 110.
111 Separate Opinion of Judge Boni, pp. 173–74.
112 Separate Opinion of Judge Dillard, pp. 119–120.
113 Cassese, opt. cit., p. 218.

114 T. M. Franck, "The Stealing of the Sahara," *American Journal of International Law*, 1976, Vol. 70, 694.
115 Cassese, opt. cit., p. 216.
116 Ibid.
117 Legal Status of Western Sahara. Available at: http://en.wikipedia.org/wiki/Legal_status_of_Western_Sahara#States_recognizing_the_Sahrawi_Arab_Democratic_Republic_as_a_sovereign_state_controlling_Western_Sahara (accessed Mar. 31, 2012).
118 Cassese, opt. cit., p. 218.
119 G.A. Res. ES-10/13, U.N. Doc. A/RES/ES-10/13, Oct. 21, 2003.
120 Wall Opinion, opt. cit., para. 80.
121 Ibid., para. 115.
122 Ibid., para. 24.
123 Ibid., para. 27.
124 Ibid., para. 36.
125 Ibid., para. 37.
126 Ibid., para. 88.
127 Ibid.
128 Ibid.
129 Ibid., para. 118.
130 Ibid., para. 122.
131 Ibid.
132 Ibid., para. 149.
133 Ibid., para. 163.
134 Separate Opinion of Judge Higgins, para. 29.
135 Ibid., para. 30.
136 Ibid., para. 31.
137 Separate Opinion of Judge Kooijmans, paras 30–31.
138 Declaration of Judge Buergenthal, para. 4.

Part II

Case studies

Part II will explore issues of self-determination within the context of several case studies. Thus, Chapter 6 will discuss self-determination issues in East Timor; Chapter 7 will do so in the context of Kosovo; Chapter 8 will focus on Chechnya; Chapter 9 will highlight self-determination issues in Georgia; and Chapter 10 will discuss the latest case of self-determination on the planet, that of South Sudan.

Numerous other case studies could have been included in this part. Self-determination struggles of various groups and peoples across the globe have been present across the globe throughout the latter half of the 20th century and the start of the new millennium. For the sake of conciseness, this part will not address every single one of these struggles. Instead, it will focus on struggles that have been representative of the phenomenon of the great powers rule. In other words, this part will discuss self-determination conflicts in those instances in which the great powers' rule has been the most prevalent; where the interplay of great powers' politics and other geopolitical and strategic interests has colored a self-determination struggle and has directly influenced its outcome. Moreover, this part will focus on case studies where self-determination issues have been the most legally challenging and where the politically charged context of the region has rendered the application of self-determination norms difficult. Thus, the case of East Timor has been included because the issue of self-determination in this region of the world required an examination of decolonization, of the law of occupation, as well as of a formerly colonized people's desire for autonomy. The case of Kosovo has been chosen as a perfect instance of the great powers' rule and their unwillingness to come forward with new normative rules on external self-determination, despite their willingness to recognize Kosovo as a new sovereign partner. An examination of self-determination within the parameters of international law in the context of Kosovo is thus a very useful exercise and one that the great powers should have engaged in before their decision to recognize Kosovar independence. The cases of Chechnya and Georgia have been chosen because they require an examination of self-determination rights in the backyard of one of the most potent great powers, Russia. These cases provide more support for the great powers' rule, as they illustrate how the role of a super-great power can influence

self-determination struggles and outcomes. Finally, the case of South Sudan was chosen because it represents the most recent instance of the exercise of self-determination in the new millennium. This case, like that of East Timor, requires us to examine self-determination through decolonization, as well as through a later denial of autonomy by an oppressive mother state.

Perhaps regrettably, other cases of successful or unsuccessful self-determination struggles have been omitted, including those of Tibet, Eritrea, West Papua, or Namibia. I believe that those cases do not detract from the great powers' rule and that instead, every single one of them can be analyzed through the great powers' prism. I also believe that the discussion of East Timor, Kosovo, Chechnya, Georgia, and South Sudan, in Chapters 6 through 10, is sufficient to illustrate the great powers' rule and to prove the presence of the new criteria of external self-determination, developed in Chapter 4.

6 East Timor

This chapter will explore issues of self-determination within the context of East Timor, first, exploring East Timor's colonial and post-colonial history, and then turning to a discussion of self-determination within the context of East Timor. The chapter will conclude that East Timor, although oppressed for many decades by its colonizer, Portugal, and later by its neo-colonizer, Indonesia, only achieved independence in the 1990s with significant support from the great powers (the United States, in this instance). In the post-Cold War political scene, Indonesia was no longer needed as an ally against the communist evils of Vietnam, and thus East Timor garnered the great powers' support to separate from Indonesia, which no longer enjoyed the great powers' unconditional allegiance. The case of East Timor exemplifies perfectly the development of the great powers' rule in the post-Cold War world.

History of East Timor

The island of Timor was included in Chinese and Indian trade routes; European explorers reported in the early 16th century that the island had a number of small chiefdoms and princedoms. Timor was eventually colonized by two European powers: Portugal and the Netherlands. The western part of the island, West Timor, was colonized by the Dutch and eventually gained independence from the Netherlands as part of Indonesia in 1949.[1] West Timor is still today a part of Indonesia. The Portuguese established outposts in East Timor, and in 1769, the city of Dili was founded in the Portuguese colony of Timor.[2] For the Portuguese colonizers, however, East Timor remained a neglected trading spot, with minimal investment into the island's economy, infrastructure, or other forms of development. The Portuguese attitude toward its colonies changed at the beginning of the 20th century, when a faltering economy in its mainland prompted Portugal to expect greater wealth from its colonies. These efforts by the Portuguese were met with resistance by the Timorese, which only served to continue the cycle of colonial violence and exploitation.[3] During World War II, the Japanese occupied East Timor, but at the end of the war Portuguese control of the island was reinstated.[4] In 1974, after the Portuguese revolution, Portugal effectively abandoned its colony in

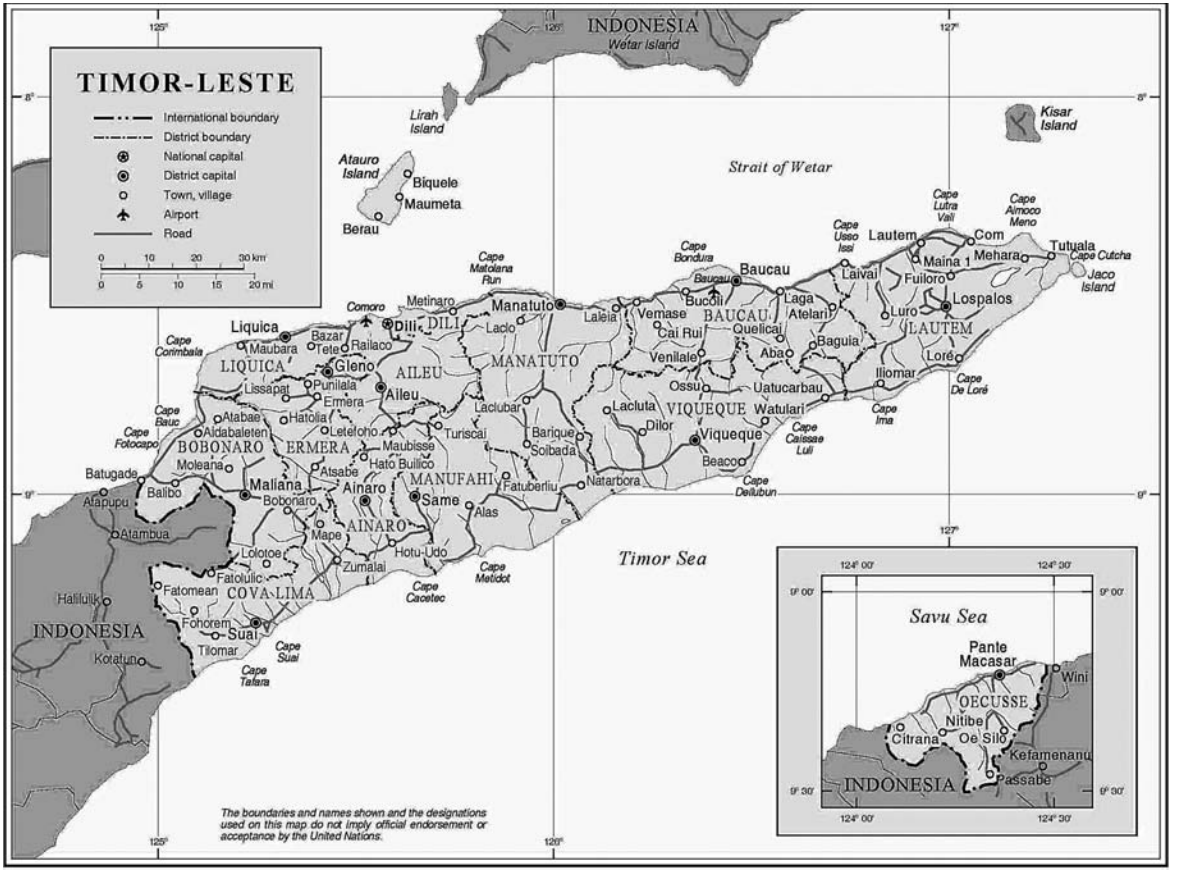

Figure 6.1 Map of East Timor

East Timor, thus starting the decolonization process.[5] After a brief civil war in East Timor, opposing several Timorese political and military factions, the island declared independence on November 28, 1975.[6]

Indonesia, East Timor's powerful neighboring state, alleged that the East Timorese winning party, FRETILIN, was communist as it received support from China.[7] As the East Timorese declaration of independence took place at the height of the Cold War, Indonesia, a powerful neighboring state, feared the creation of a new communist state of East Timor within the Indonesian archipelago. Western great powers supported Indonesia, and the Indonesian military launched a full-scale invasion of the island in December 1975.[8] As a consequence, East Timor forcibly became a part of Indonesia in 1976, when Indonesia claimed East Timor as its 27th Province.[9] Thus, "East Timor's right to self-determination was sacrificed to Cold War politics."[10]

The international community was swift in its condemnation of Indonesia following the 1976 takeover, and the United Nations continued to recognize Portugal as East Timor's official administrator.[11] In fact, since 1960, East Timor had been designated within the United Nations system as a non-self-governing territory administered by Portugal;[12] this designation would remain in place throughout the Indonesian occupation of East Timor, thus labeling Portugal as the *de jure* administrator of East Timor and denying the extension of any legal rights to Indonesia, East Timor's de facto ruler from 1976 until 1999. However, without the support of the great powers, any further international action or redress of the Indonesian invasion of East Timor was impossible.[13] Thus, the Security Council, *not* acting under Chapter VII powers, passed a resolution in 1975, stressing the "inalienable right of the people of East Timor to self-determination and independence" and demanding the withdrawal of Indonesian troops from East Timor.[14] A year later, the Security Council again called for the withdrawal of Indonesian troops, not acting under Chapter VII powers.[15] In both instances, the Security Council was powerless to authorize any military intervention in East Timor, as it was not acting under Chapter VII powers, and as any attempt to do so would have been vetoed by the great powers on the Council, namely the United States and the United Kingdom. Unbelievably, after 1976, the Security Council did not deal with the issue of East Timor until 1999![16] In essence, the world turned a blind eye to Indonesian oppression in East Timor. In fact, the Indonesian rule over East Timor "imposed a military force that viciously led to human rights and humanity violations"[17] and was often marked by extreme violence and brutality. Estimates of the number of East Timorese who died during the occupation vary from 60,000 to 200,000.[18]

It was not until the 1990s that the East Timorese question was revisited in the global arena, due to a series of events. First, in 1991, Indonesian military opened fire at East Timorese protesters in Dili, the capital of East Timor; more than 270 people were killed.[19] The so-called Dili Massacre caught the world's attention, and the global opinion turned against Indonesia and in favor of East Timorese independence. Additionally, the Asian financial

crisis of 1997 contributed toward Indonesia's urgent need for international financial assistance, thus enabling the international community to exercise pressure on Indonesia over the question of East Timor.[20] Finally, longstanding Indonesian President Suharto was replaced in 1998 by Bacharuddin J. Habibie; the latter signaled his willingness to discuss the future status of East Timor.[21]

Following these events, in May 1999, Indonesia, Portugal, and the United Nations negotiated and signed agreements authorizing the people of East Timor to choose between autonomy within Indonesia and independence, via popular referendum.[22] In order to organize referendum and supervise voting modalities, the United Nations Security Council established the United Nations Mission in East Timor (UNAMET).[23] Surprisingly, the United Nations delegated the handling of security over referendum to Indonesian forces, and no international peace-keeping forces were actually deployed in East Timor until violence escalated after referendum.[24]

According to the results of the United Nations-organized referendum, 78.5% of the East Timorese people voted against autonomy within Indonesia, and thus in favor of independence from Indonesia.[25] Indonesia protested the results and backed violent militias to attack and intimidate the East Timorese populations. "In fact, the Indonesian Military has been accused of arming, funding and preparing local militias for a guerrilla movement in case of a pro-independence group should emerge as a winner of the conflict."[26] In order to prevent any escalation of violence, the United Nations Security Council, in Resolution 1264, established a peace-keeping force, the International Force for East Timor ("INTERFET"), to safeguard East Timor.[27] INTERFET forces deployed in September 1999 successfully put an end to Indonesian military assaults on East Timor. INTERFET ended its mandate in February 2000 when it transferred military command of the island to the United Nations.[28] In October 1999 United Nations established the United Nations Transitional Administration in East Timor ("UNTAET"). UNTAET's mission was "to administer East Timor during its transition to independence, with a mandate to exercise all legislative and executive powers in East Timor, including the administration of justice."[29]

In 2001 the first Constituent Assembly of East Timor was elected, and, in April 2002, Xanana Gusmao was elected first president.[30] East Timor became the first new sovereign state of the 21st century, by obtaining independence on May 20, 2002, when United Nations Secretary-General Kofi Annan handed over authority of the country to the new government.[31] A few months later, East Timor joined the United Nations as a new, independent state.[32] The United Nations ended its UNTAET mandate, but immediately established the United Nations Mission of Support in East Timor ("UNMISET"), to continue any necessary capacity building in East Timor.[33] After three years, UNMISET was reduced and renamed the United Nations Office in Timor Leste ("UNOTIL"), which was tasked with carrying out peace-building activities until 2006. [34] In 2006, after clashes between opposing factions from the eastern

part of the island against those hailing from the west, as well as between soldiers from anti-Indonesia guerrillas and ex-Indonesian police officers, the East Timorese government called in an Australian peace-keeping force.[35] Such sporadic outbreaks of violence have plagued East Timor since its independence, but the constant military involvement by the international community in East Timor has managed to halt a wider spread of violence.[36] East Timor has been relatively stable and violence-free over the last decade. Moreover, East Timor has established itself as a new sovereign partner and has established its statehood beyond any doubt, by gaining admission to all major international organizations and by fully engaging in international relations with other states. East Timor can thus be cited as an instance of successful self-determination.

The legal case for self-determination in East Timor

By separating from Indonesia and becoming an independent nation, the East Timorese exercised their right to self-determination. The following section will analyze self-determination rights in the context of East Timor. In other words, did the East Timorese's rights to external self-determination accrue in the legal sense, as of 1999 when they chose to exercise such rights via popular referendum? Or, did the East Timorese right to self-determination exist since the decolonization movement in the 1960s, and did the East Timorese actually separate from Portugal, their legal administrator, albeit with a 25-year delay?

As discussed earlier, any group seeking self-determination must first prove that it qualifies as a "people" in the subjective as well as the objective sense of this term. The East Timorese constituted a people objectively as of 1999: they were ethnically, religiously, culturally, and linguistically distinct from both their colonizer (Portugal), as well as their post-colonial invader (Indonesia).[37] Moreover, the East Timorese constituted a people subjectively as well at the same time: they had sought independence at the time that Portugal sought to abandon its colony, in 1975, when they chose to become an independent nation.[38] They then actively resisted Indonesian rule, through prolonged dissent and the ultimate vote to secede from Indonesia. In fact, the United Nations had recognized East Timor as a non-self-governing territory with the right to self-determination as early as 1960.[39] The United Nations subsequently affirmed its recognition of East Timor's right to self-determination after Indonesia's invasion of the island in 1975.[40] This United Nations' attitude clearly demonstrates the organization's views that the East Timorese were a people, and thus a candidate for self-determination. Despite reservations that some scholars have expressed over the unity of the East Timorese expression of "self,"[41] it can be safely concluded that the East Timorese constituted a people for purposes of self-determination, and that the East Timorese people encompassed all ethnic inhabitants of this region.

Second, the right of self-determination exists in two different contexts: in the decolonization paradigm, where this right undoubtedly exists and has

attained the status of an *erga omnes* obligation,[42] and in the non-colonial context, where this right exists but where questions have been raised about the precise content of this right. The question of East Timorese self-determination will be analyzed in both of these contexts, although most scholars agree that East Timor represents a case of delayed decolonization, and that only self-determination rights in the first context (decolonization) should be analyzed.[43]

The right to self-determination firmly exists in the decolonization context, as documented in numerous international documents, case law and doctrine.[44] Colonized peoples have the right to freely determine the destiny and political fate of their territory; this right entails the right to exist as a sovereign nation, the right to territorial integrity, the right to permanent sovereignty over natural resources, the right to cultural integrity and development, and the right to economic and social development.[45] In the case of East Timor, the argument goes as follows: East Timor was a Portuguese colony and thus entitled to self-determination; the 1975 Indonesian annexation of the island was illegal and did not alter the status of East Timor as a non-self-governing territory.[46] Thus, the correct normative framework in assessing the East Timorese separation from Indonesia in 1999 is the decolonization paradigm, because East Timor rightfully belonged to Portugal, and not Indonesia in 1999. East Timor was not a case of remedial secession from Indonesia; rather, it was a case of self-determination exercised through *delayed* decolonization and independence from Portugal.

The International Court of Justice was faced with the issue of self-determination for East Timor in the decolonization paradigm, in the infamous Case Concerning East Timor, which pitted Portugal against Australia.[47] In 1989, Australia entered into the Timor Gap Treaty with Indonesia, in order to jointly explore and exploit hydrocarbon resources in the area constituting the East Timorese continental shelf (the Timor Gap).[48] Portugal, in its capacity as East Timor's official administrator, brought an action against Australia, alleging a breach of its own rights as the official administrator, and the rights of the East Timorese people to self-determination and permanent sovereignty over their natural resources.[49] Portugal was unable to bring an action against Indonesia, as Indonesia had not accepted the compulsory jurisdiction of the International Court of Justice.[50] The world court regrettably, but perhaps unsurprisingly, dismissed the case on jurisdictional grounds. The world court concluded that it could not hear the case "in the absence of the consent of Indonesia," because any determination about the legality of Australian actions would require a determination about the conduct of a third party not present before the Court (Indonesia).[51] However, although refusing to issue its own conclusions on the rights of self-determination for the people of East Timor vis-à-vis Indonesia, the world court did affirm that the territory of East Timor was a non-self-governing territory and that its people had the right to self-determination.[52] Thus, the world court seemed to conceive of the East Timor question as one of self-determination in the decolonization context, confirming the view of many academics who had already expressed this view.

This argument is useful, as it distinguishes East Timor from other secessionist entities, such as Kosovo or South Ossetia and Abkhazia, which did not assert self-determination claims in the decolonization context. However, this argument, while theoretically correct, fails to account for almost 25 years of Indonesian rule over East Timor. Practically speaking, East Timor separated from Indonesia, not from Portugal. Portugal, despite world court litigation over East Timor, had not exercised any real control or influence over this region. Indonesia, on the contrary, had ruled over this territory for over two decades, with virtually no international opposition. Thus, the issue of self-determination in East Timor should also be discussed in the non-colonial, secessionist context.

A people seeking to exercise its right to self-determination in a non-colonial context should first demand autonomy within its mother state in the form of internal self-determination; only in cases where the mother state chooses not to honor the people's rights to autonomy *may* such a group accrue the right to seek independence through secession. International law does not positively declare that peoples have a right to external self-determination through remedial secession. Although some scholars have argued that such a right exists, others have disputed it in the non-decolonization paradigm. At best, it can be argued that international law is silent on the issue of external self-determination through secession for non-colonized peoples. For the people of East Timor, the first argument of delayed colonization is more legally solid. However, the second argument of remedial secession from Indonesia is plausible and will be addressed later.

The East Timorese first declared independence in 1975, after their colonizer, Portugal, chose to withdraw and effectively abandon this colony.[53] Such a declaration of independence squarely fits within the decolonization paradigm of self-determination and did not necessitate drawing any distinctions between internal and external self-determination, as this distinction only applies to non-decolonization cases. The East Timorese then chose to exercise self-determination rights through the 1999 popular referendum, organized and conducted by the United Nations.[54] In referendum, the East Timorese were asked to choose between an internal mode of self-determination (autonomy within the Indonesian state), or an external mode of self-determination (independence). Precisely, the question put before the East Timorese voters on August 30, 1999 was:

> Do you accept the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia? ACCEPT
> OR
> Do you reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia? REJECT[55]

Referendum was criticized by some as a poor self-determination device: the popular consultation was organized by an alien, international organization in a very short timeframe, in a largely illiterate society with no democratic

legacy.[56] This effectively precluded any negotiations and discussions between East Timor and Indonesia over any possible autonomy options, which would have explored modes of internal self-determination for the people of East Timor.[57] Thus, an argument can be construed that the East Timorese people did not properly exercise any rights to internal self-determination, before resorting to the more drastic external self-determination option of secession. In other words, the East Timorese rights to external self-determination did not properly accrue because they did not fully explore any internal self-determination options within their mother state of Indonesia.

However, it can be more persuasively argued that in light of Indonesia's illegal annexation of East Timor in 1975, as well as Indonesia's brutal rule over East Timor under General Suharto, any internal self-determination options were impossible to implement. It would have been unfair and perhaps unrealistic to ask the East Timorese to continue their existence within their oppressor. Moreover, this argument notwithstanding, the East Timorese were given the internal self-determination option in the 1999 referendum, which they rejected through a popular vote. In light of abuses suffered by the East Timorese at the hands of their mother state, Indonesia, it was more than understandable why the people of East Timor chose independence over autonomy. The international community was certainly correct in respecting the choice of external self-determination by an oppressed people, such as the East Timorese. The legal theory of self-determination only requires the exercise of internal self-determination as a prerequisite to remedial secession in instances where the mother state is willing to grant autonomy to a struggling people—Indonesia demonstrated through several decades that it did not wish to grant any such rights to the people of East Timor. Thus, it can be persuasively argued that the East Timorese constituted a people, which properly exercised its rights to external self-determination in the 1999 popular referendum. Assuming that non-colonized peoples may accrue rights to external self-determination, East Timor had the legal right to secede from Indonesia.

Legally, it can be argued that the people of East Timor had the right to self-determination in both the colonial and non-colonial contexts. However, this legal right may have remained purely theoretical had it not been for the great powers' support of East Timor in the late 1990s. As will be argued later, it is only with the great powers' blessing that the people of East Timor were finally able to realize their rights to self-determination.

East Timor and the great powers' rule

Despite the fact that the East Timorese had the legal and theoretical right to external self-determination, it can be observed that this people would have never been able to achieve such rights without the support and intervention of the great powers. Therefore, the East Timorese struggle for independence illustrates perfectly the paradigm of the great powers' rule, and its influence on self-determination struggles.

The East Timorese people fought for independence during several decades. During the Cold War era, however, their struggle was unsupported by some of the great powers, who viewed Indonesia as an important ally in the Far East and thus supported Indonesia in its annexation and control of East Timor. "As long as General Suharto [the Indonesian leader] was necessary for the West's Cold War agenda, the United States, Britain, and Australia helped Indonesia to annex and control East Timor."[58] Moreover, "[t]he reasons for the waning of interest of the international community in the future of East Timor may be found in the strategic importance of Indonesia."[59] The East Timorese were not able to assert independence from Indonesia on their own, as they lacked the political, economic, and military capability to do so. During the Cold War, two veto-wielding great powers on the Security Council, the United States and the United Kingdom, would have blocked any military interventions into Indonesia to "liberate" East Timor or to halt abuses committed by the Suharto regime against East Timor. The Western great powers were also unwilling to provide any capacity-building aid to East Timor, and this region remained effectively "colonized" by Indonesia until the late 1990s.

After the end of the Cold War, Indonesia lost the support of the great powers, which no longer feared the expansion of communism in the Far East and no longer needed a military ally in this part of the world. Thus, "these same states [United States, United Kingdom, and Australia] ganged up to recognize East Timor's right to self-determination and acted as midwives for its birth as an independent state."[60] The great powers began supporting the East Timorese in the 1990s, which was reflected in the Security Council decision-making process, when virtually all Security Council members agreed that the East Timorese should no longer remain governed by Indonesia.

As mentioned earlier, the United Nations, with the support of the great powers, was instrumental in orchestrating East Timorese independence. First, the United Nations deployed peace-keepers to East Timor, in order to halt intimidation and violence imposed by pro-Indonesian forces on the population of East Timor in 1999, after referendum results showed the East Timorese willingness to separate from Indonesia.[61] Without such international military assistance, the people of East Timor would have never been able to liberate themselves of Indonesian oppression. It is ironic that the same Security Council members who voted to authorize the deployment of peace-keepers in 1999 had refused to deploy troops in East Timor in 1975, when Indonesia forcibly invaded the island, or in the subsequent decades, when Indonesian military routinely abused the people of East Timor. It is also ironic that Australia volunteered to lead the peace-keeping forces in 1999, when Australia was the only state that had actually recognized Indonesia's legal claim to East Timor.[62] Australia had been squarely in the camp of great powers that supported Indonesia during the Cold War, because Australia had feared any communist expansion in the neighboring Indonesian archipelago. Thus, the incredible shift in Security Council and Australian foreign policy in 1999 demonstrates the importance of the great powers in global affairs. Once the great powers

decided to drop their support of Indonesia, East Timor secured the necessary military assistance to succeed in its quest for independence.

Second, the United Nations organized the 1999 popular referendum,[63] and subsequently set up three different administrations (UNTAET, UNMISET, and UNOTIL), tasked with capacity- and nation-building in East Timor.[64] The East Timorese Constitution was adopted under United Nations administration, and all United Nations administrations in East Timor were charged with preparing this region for some form of independent democratic self-government in the near future.[65] The United Nations administration of East Timor was a means to achieve East Timorese independence and self-government. Without such nation-building assistance, the undeveloped, rural, and largely illiterate people of East Timor would have never been able to establish political and judicial institutions necessary for any form of nationhood. Finally, East Timor's economic viability as an independent nation would have been more than questionable, had it not been for the international community's support in the form of financial and trade assistance.[66] Simply stated, East Timor is an example of an artificially created state, through the support of the great powers. Absent the global, and the great powers' support, it is doubtful that East Timor would have gained independence from Indonesia.

Despite a solid legal case for external self-determination, East Timor also exemplifies the great powers' rule: without the actual support of the great powers, East Timorese people would have never been able to exercise their theoretical right to self-determination. From 1975 until 1999 the East Timorese were unsupported in their self-determination plight by the great powers. Although the world community agreed that Indonesian annexation of East Timor was illegal, and that East Timor had the right to self-determination, nothing was done to help this struggling people. In 1977 an American official clearly admitted that the United States did not do anything to ensure the withdrawal of Indonesian troops from East Timor because of geopolitical reasons. George H. Aldrich, then US Deputy Legal Adviser, stated in the US House of Representatives that although the United States was committed to respecting the right to self-determination of peoples under the United Nations Charter, the United States government:

> did not question the incorporation of East Timor into Indonesia at the time . . . This did not represent a legal judgment or endorsement of what took place. It was, simply, the judgment of those responsible for our policy I the area that the integration was an accomplished fact, that the realities of the situation would not be changed by our opposition of what had occurred, and that such a policy would not serve our best interests in light of the importance of our relations with Indonesia.[67]

Member states of the European Community between 1975 and the end of the Cold War espoused a similar attitude: they issued vague statements on the East Timorese right to self-determination, but pointed out that the matter was

of bilateral Portuguese–Indonesian concern.[68] It was only in 1999, after the end of the Cold War politics, that the great powers chose to support East Timor and to help this people realize their self-determination rights. Thus, East Timorese independence was achieved in 2002. The great powers were instrumental in realizing the East Timorese dream of separation and independence from Indonesia.

Notes

1 Gerry J. Simpson, "Judging the East Timor Dispute: Self-Determination at the International Court of Justice," *Hastings International and Comparative Law Review*, 1993–1994, Vol. 17, 323–324.
2 Government of Timor-Leste, Brief History of Timor-Leste. Available at: http://timor-leste.gov.tl/?p=29&lang=en (accessed Apr. 7, 2012).
3 Ibid.
4 Department of Defence (Australia) (2002) A Short History of East Timor. Available at: http://web.archive.org/web/20060103133824/http://www.defence.gov.au/army/asnce/history.htm (accessed Apr. 7, 2012).
5 M.C. Ricklefs, *A History of Modern Indonesia Since c. 1300*, Stanford University Press, 2nd edn, 1993, p. 301.
6 H. Fan, "The Missing Link between Self-Determination and Democracy: The Case of East Timor," *Northwestern Journal of International Human Rights*, 2007, Vol. 6, 176 (noting that in 1975, civil war erupted between pro-Portuguese, pro-Indonesia, and pro-independence forces, and that the last won the war).
7 J. Robinson, "Self-Determination and the Limits of Justice: West Papua and East Timor," *Future Justice*, 2010, 175.
8 A. Shah (2001), Crisis in East Timor. Available at: www.globalissues.org/article/92/crisis-in-east-timor (accessed Apr. 7, 2012) (noting that United States President Gerald Ford gave Indonesia the green light to invade East Timor in 1975; noting also that the United States, the United Kingdom, and Australia supported Indonesia).
9 J. Purnawanty, "Various Perspectives in Understanding the East Timor Crisis," *Temple International and Comparative Law Journal*, 2000, Vol. 14, 61–65.
10 Robinson, op. cit., p. 174.
11 J.I. Charney, "Self-Determination: Chechnya, Kosovo and East Timor," *Vanderbilt Journal of Transnational Law*, 2001, Vol. 34, p. 455–465 and note 36.
12 See General Assembly Resolution 1542 Dec. 15, 1960; see also C. Drew, "The East Timor Story: International Law on Trial," *European Journal of International Law*, 2001, Vol. 12, 651–656. Note that East Timor's status of a non-self-governing territory was reiterated in Resolution 3485 of Dec. 12, 1975. See M. Benzing, "Midwifing a New State: The United Nations in East Timor," *Max Planck Yearbook of United Nations Law*, 2005, Vol. 9, 295–300.
13 Robinson, op. cit., p. 174.
14 S/RES/384 (1975) of Dec. 22, 1975. For a discussion of Security Council powers when acting under Chapter VII of the United Nations Charter, see W. Weiss, "Security Council Powers and the Exigencies of Justice after War," *Max Planck Yearbook of United Nations Law*, 2008, Vol. 12, 45–111 (noting that the Security Council has always enjoyed broad discretion in its Chapter VII powers, which are

constitutive in nature, to terminate armed conflicts). Further, Weiss concludes that "the prime objective of conflict termination and peace restoration which is decisive for the interpretation of the Security Council powers both expands and limits the Chapter VII powers." Ibid., p. 109.

15 S.C. Res 389 (1976) of Apr. 22, 1976.
16 Benzing, op. cit., p. 302 (noting, however, that the question of East Timor was included on the agenda of the General Assembly at every session).
17 Purnawanty, op. cit., pp. 68–69.
18 J. Nunes (1999) *East Timor: Acceptable Slaughters*. Available at: http://chss.montclair.edu/english/furr/ nunestimor.html (accessed Apr. 7, 2012).
19 Benzing, op. cit., p. 303.
20 Ibid.
21 Ibid.
22 Fan, op. cit., p. 179.
23 S.C. Res 1246 (1999) of Jun. 11, 1999.
24 Drew, op. cit., p. 673 (questioning the United Nations' choice of delegating security to Indonesian forces, in light of the latter's "penchant for human rights abuses against the East Timorese").
25 Purnawanty, op. cit., p. 67; Fan, op. cit., p. 179.
26 Ibid.
27 Resolution 1264, op. cit.
28 Benzing, op. cit., p. 305.
29 Fan, op. cit., p. 180.
30 Benzing, op. cit., p. 305.
31 BBC News World Edition (2002) East Timor: Birth of a Nation. Available at: http://news.bbc.co.uk/2/hi/asia-pacific/1996673.stm (accessed Apr. 7, 2012); see also UN News Centre (2002) Timor-Leste: UN Admits Newest Member State. Available at : www.un.org/apps/news/infocusRel.asp?infocusID=27 (accessed Apr. 7, 2012) (declaring East Timor the first new country of the millennium).
32 UN News Centre, op. cit.
33 Fan, op. cit., p. 180.
34 Ibid.
35 Ibid.
36 BBC News World Edition, op. cit.
37 Fan, op. cit., pp. 184–185.
38 Ibid.
39 R.S. Clark, "East Timor, Indonesia, and the International Community," *Temple International and Comparative Law Journal*, 2000, Vol. 14, 75–78 .
40 Ibid., pp. 78, 81.
41 *See*, for example, Fan, op. cit., p. 185 (arguing that the East Timorese "people" who received the United Nations' blessing for self-determination as of 1960 were not the same "people" who sought to separate from Indonesia in 1999; arguing also that the identification of the East Timorese people in 1960 as the same ones in 1999 precluded the right of any subgroups in East Timor to also seek self-determination).
42 Case Concerning East Timor (Portugal v. Australia), ICJ Reports, 1995, p. 103, para. 29; see also Drew, op. cit., pp. 667–668 (noting that the right of self-determination is also "a candidate for the elusive jus cogens status").
43 Drew, op. cit., pp. 656–657.

44 *See*, for example, G.A. Res. 2625, UN GAOR, 25th sess., Supp. No. 28, 121, UN Doc. A/8018, 1970; Case Concerning East Timor, op. cit., p. 103, para. 29; Western Sahara Advisory Opinion, ICJ Reports, 1975, p. 12, para. 57; Commission on Human Rights, Resolution E/CN.4/RES/2000/4, Apr. 7, 2000; Drew, op. cit., p. 658.
45 Drew, op. cit., p. 663.
46 As already mentioned, the United Nations designated East Timor as a non-self-governing territory administered by Portugal; this status did not change after Indonesia occupied the island. *See supra* note.
47 Case Concerning East Timor (Portugal v. Australia), op. cit., p. 103.
48 Drew, op. cit., p. 664.
49 Ibid.
50 Ibid., note 76.
51 Case Concerning East Timor, op. cit., para. 28.
52 Ibid., paras 31 and 37 (note that the Court affirmed that "for both parties" East Timor remained a non-self-governing entity with the right to self-determination; the Court did not itself make any such independent finding).
53 Fan, op. cit., p. 179.
54 Ibid.
55 Drew, op. cit., p. 674.
56 Ibid., p. 684 (concluding that "East Timorese rights were not implemented due to a failure to comply with law—the international legal rules on self-determination as process").
57 Ibid. (arguing that the East Timorese did not properly participate in the referendum process because "[t]hey hardly had time to have orderly debate about the pros and cons of either choice and to persuade each other," and because the short timeframe "ruled out any give-and-take between Indonesia and East Timor on the condition of the autonomy").
58 S. Chaulia (2008) *A World of Selfistans?* Global Policy Forum, Mar 13, 2008. Available at: www.globalpolicy.org/ component/content/article/171-emerging/ 29875.html (accessed Apr. 7, 2012).
59 Benzing, op. cit., p. 302.
60 Ibid.
61 H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Material*, Oxford University Press, 2nd edn, 2000, p. 2674.
62 Benzing, op. cit., p. 308.
63 *See*, for example, J. d'Aspremont, "Post-Conflict Administation as Democracy-Building Instruments," *Chicago Journal of International Law*, 2008, Vol. 9, 8–10 (noting the support of the United Nations for the East Timorese quest for independence).
64 Fan, op. cit., p. 180.
65 Ibid.
66 In fact, such tremendous international assistance to East Timor has caused some scholars to assert that the United Nations had "midwifed" the state of East Timor. See Benzing, op. cit., p. 297.
67 Dept. St. Bul, Sept. 5, 1977, 326.
68 A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995, note 33.

7 Kosovo

This chapter will study self-determination by focusing on the recent Kosovar secession from Serbia and concludes that Kosovo garnered the great powers' support (in this case, the United States, and some European countries, such as the United Kingdom) necessary for its separation from Serbia throughout the 1990s, when Serbia was ruled by a rogue Milosevic regime and was widely portrayed as the culprit for the Yugoslav civil war. It was the great powers' opposition to Serbia which contributed to their support of Kosovo. In fact, the 1999 NATO intervention on the territory of the Federal Republic of Yugoslavia was carried out by the great powers, which had politically opposed the Milosevic regime, and which had begun to support the Kosovar independence. Without such great powers' support, Kosovo would have never been able to secede or to survive as an independent state. This chapter briefly reviews the history of Kosovo, before focusing on the more recent declaration of independence by the Kosovar parliament. Then, we analyze Kosovo's legal right to self-determination. Finally, this chapter will focus on the great powers' influence in enabling the Kosovar Albanians' achievement of independence in 2008, as this case exemplifies the importance of the great powers' rule in issues of self-determination.

History of Kosovo

Kosovo had been an autonomous province of Serbia, one of the six republics within the Socialist Federal Republic of Yugoslavia ("SFRY").[1] When the SFRY dissolved in the early 1990s, Kosovo remained a part of the SFRY successor, the Federal Republic of Yugoslavia ("FRY"). When the FRY ceased to exist in 2003, Kosovo became a part of Serbia and Montenegro, and when Montenegro broke away from Serbia in 2006, Kosovo remained a part of the sole Serbian state.[2]

Until the late 1980s, Kosovo had the status of an autonomous province within the SFRY and exercised important regional self-governance functions. In fact, the 1974 SFRY Constitution granted Kosovo the status of an autonomous province within the country's federal structure.[3] Under the terms of the 1974 Constitution, Kosovo had the following rights: the right to adopt and change

Figure 7.1 Map of Kosovo

its Constitution; the right to adopt laws; the right to exercise constitutional judicial functions and to have a constitutional court; judicial autonomy and the right to a Supreme Court; the right to decide on changes of its territory; the right to ratify treaties that were concluded with foreign states and international bodies; and the right to have independent organs and ministries within the local

government.[4] Moreover, Kosovo's predominantly ethnic Albanian population enjoyed multiple rights, such as the right to education in the Albanian language, the right to Albanian language media, the right to celebrate cultural holidays and to generally preserve its ethnic structure and belonging.[5]

Throughout the 1980s, ethnic Albanians in Kosovo began to more openly protest against the Yugoslav central government. In 1981, a student protest erupted at the University of Pristina, sparking off "the worst violence in Yugoslavia since the Second World War."[6] In fact, the student protest spread into a general revolt throughout Kosovo over poor economic conditions existing in this province; the protesters demanded "a Kosovo Republic, improved conditions for workers and students, freedom for political prisoners, and unification with Albania."[7] The protest was quashed by the Yugoslav army, but throughout the 1980s, Kosovar Albanians continued on their path of opposition directed against the Yugoslav, and more particularly the Serbian rule. Kosovar Serbs began to frequently complain about harassment and attacks directed at them by the Kosovar Albanians.[8] In response to such ethnic Albanian uprising throughout Kosovo, Serbian leadership under Slobodan Milosevic undertook draconian measures in the late 1980s to curb the upheaval.[9] Thus, through constitutional amendments, Kosovo's autonomous province status was removed, and the Albanian population was deprived of important civil and political rights.[10] Moreover, thousands of Albanian police officers, hospital workers, schoolteachers, and state enterprise employees were fired and virtually all Albanian-language media suppressed. Any Albanian gatherings were broken up, protesters arrested and detained as political prisoners, and protests quashed with military tanks and tear gas.[11]

In the 1990s, a group of Kosovar Albanian leaders formed a paramilitary group named the Kosovo Liberation Army ("KLA"), whose goal was to fight for Kosovo's independence, and "which murdered members of the Serbian police and military forces and perceived Kosovar Albanian collaborators."[12] Furthermore, Kosovar Albanians refused to participate in Serbian society and established a set of parallel institutions: schools, hospitals, churches, and commercial enterprises. Albanians and Serbs inhabited parallel worlds, and their children "no longer played together."[13] Following the Dayton Accords, which ended the civil war in Bosnia and Herzegovina and in Croatia, but which left the Kosovar question largely unanswered, the KLA increasingly began engaging in violent tactics against the Serbian rule. Kosovo descended into chaos: Albanian militants began buying weapons and armed Albanian militias appeared almost overnight, staging attacks on the Serbian police and engaging in skirmishes with the Serbian population.[14]

In 1999 Serbian president Slobodan Milosevic engaged in a brutal tactic of oppression: Yugoslav army units were sent to Kosovo to support police and other paramilitary units in large-scale operations:

> International observers recorded a pattern of the Yugoslav forces using excessive force and committing extra-judicial executions and

> abductions . . . Yugoslav forces bombed villages . . . and killed many KLA members with ambushes along the borders . . . The Yugoslav forces continued to shell villages and towns, driving civilians from their homes.[15]

The international community viewed these events with growing concern. After months of negotiations between the Serbian and Kosovar leadership failed to persuade Milosevic to withdraw security forces from Kosovo, the international community responded with force.[16] North Atlantic Treaty Organization ("NATO") countries launched a series of air strikes on the territory of Serbia, which ultimately forced Milosevic to sign a peace agreement with the Kosovars at Rambouillet, France, in June 1999.[17] Under the terms of the Rambouillet Peace Agreement and subsequently, Security Council Resolution 1244, Kosovo was to be administered by a United Nations ("UN") provisional authority, the United Nations Mission in Kosovo ("UNMIK").[18] The safety of Kosovo was to be guarded by a NATO-led multilateral military force, the KFOR (Kosovo Force). In fact, Security Council Resolution 1244 passed in June 1999 laid out the legal foundation on which "the civilian and military branches of the international administration in Kosovo [were] based."[19] Finally, the Rambouillet Peace Agreement contemplated that subsequent negotiations would take place in the near future, to decide the true political fate of Kosovo.[20]

Once Milosevic stepped down as Serbia's president and leader, the Serbian outlook and its position toward the West changed. Under the Milosevic rule, Serbia largely ignored the West and leaned on its historical ally, Russia, for support. After Milosevic was ousted from power, Serbia turned toward the West.[21] It became clear that in order to join Western Europe—and possibly become a member of the European Union ("EU")—Serbia had to sacrifice Kosovo, or at least refrain from using force in order to prevent its breaking off. In early 2008 peaceful political protests took place in some Serbian cities. Protesters carried banners with slogans reading "We have a right to a European future" and "Don't let Kosovo slow us down." Such protests demonstrated an awareness by a portion of the Serbian population that Serbia needed to let go of Kosovo in order to have access to Europe and, particularly, to the European Union.[22]

The relevant players, including the Serbian leadership, the Kosovar representatives, and UN and EU representatives, negotiated several times, but because of strong differences about the future of Kosovo, they were never able to reach consensus.[23] In fact, Serbia, while pragmatically recognizing the need to accommodate Western demands, maintained its position that Kosovo remained a territorial part of Serbia with strong regional autonomy.[24] Kosovo, by way of contrast, insisted that it deserved independence.[25]

On February 17, 2008, backed by powerful world countries including the United States, the United Kingdom and France, the Kosovar parliament voted for a declaration of independence.[26] In the few days following the Kosovar Declaration of Independence, the United States, as well as about 20 EU countries, formally recognized Kosovo as a new state. [27] As of today, 85 UN member

countries have recognized Kosovo as a sovereign state, including three out of five permanent Security Council members, and 22 out of 27 EU countries.[28]

The legal case for self-determination in Kosovo

The Kosovar parliament essentially exercised the Kosovar right to external self-determination, by voting to secede from Serbia in February 2008. The following section will analyze Kosovo's legal case for self-determination. Despite some of the world's super powers' political willingness to recognize an independent Kosovo, did this province have the legal right to self-determination as of 2008?

The first issue regarding Kosovo's right to self-determination is whether ethnic Albanians in Kosovo constituted a people. As discussed earlier, in order for a minority group to qualify as a people, it must demonstrate that it fulfills both the subjective and objective criteria of "peoplehood."[29] Subjective criteria include a belief in the unity of the group and in the uniqueness of its members vis-à-vis the dominant ethnic group of the mother state. Objective criteria include a common language, religion, culture, and ethnic belonging.[30] The Kosovar Albanians satisfied both sets of criteria. First, they shared a belief of unity and separateness from the rest of the Slavic peoples of the former Yugoslavia, as well as from the ethnic Serbs. They expressed such feelings of ethnic difference through various political and military protests throughout the 1980s and 1990s.[31] Thus, the Kosovar Albanians were subjectively a people for the purposes of self-determination. Second, Kosovar Albanians shared a common language, culture, religion, and mode of life and thus qualified objectively as a people for purposes of self-determination.[32] In fact, in political, legal, and jurisprudential discourse discussing the Kosovar Declaration of Independence, no authorities have ever questioned the issue of peoplehood for Kosovar Albanians.

The second issue in the legal analysis of self-determination for Kosovo is a normative one: which paradigm of self-determination, and consequently, which norms and rules, apply to the case of Kosovo? Unlike East Timor, Kosovo does not entail a case of decolonization. Serbia was never Kosovo's colonizer; Kosovo was never Serbia's colony. Rather, Kosovo was an autonomous province within a larger federal state (SFRY), and later a province within a smaller non-federal state (Serbia).[33] Thus, Kosovo's right to self-determination will be analyzed under the non-decolonization paradigm, requiring a distinction between the exercise of internal self-determination and external self-determination.

Under the 1974 SFRY Constitution, Kosovar Albanians acquired the right to internal self-determination, parallel to such rights existing for peoples living within other larger federal states. Thus, Kosovar Albanians had political rights, such as the right to participate in the Yugoslav federal government and the right to form their own provincial parliament, linguistic rights, such as the right to have Albanian-language schools, university, and media, religious

rights to freely exercise their religion, and general rights to preserve their Albanian culture and ethnicity.[34] All these rights were constrained by the central government of communist Yugoslavia led by its longstanding leader, Tito. In other words, provincial rights in the SFRY were granted by the 1974 Constitution, but any such rights had to exist within the larger federal framework of Yugoslavia, where any dissent would be harshly repressed and any political opposition quashed.[35] Thus, the exercise of internal self-determination for the ethnic Kosovar Albanians was less free than such exercise would have been in a truly democratic society. At the same time, Kosovar Albanians had significant minority rights within the former Yugoslavia that equaled, if not surpassed, those of other ethnic minorities. Moreover, Kosovar Albanians were able to effectively exercise their internal self-determination rights in a way that paralleled the exercise of such rights by other peoples living in other countries. Finally, Kosovar Albanians had greater rights than any peoples and minority groups living within stricter communist regimes, such as those in the USSR and China.[36] Albanian political leaders themselves acknowledged that Kosovo under the 1974 Constitution "was a republic in all but name."[37] A true curtailing of the Kosovars' right to internal self-determination did not start occurring until the late 1980s, when the former Yugoslavia began its descent toward decomposition and when nationalist leaders like Slobodan Milosevic gained particular prominence.

Slobodan Milosevic, who had been elected president of the Communist Party of Serbia, was sent to Kosovo on April 24, 1987, to meet with a group of angry Kosovar Serbs, complaining about harassment and intimidation perpetrated against them by ethnic Albanians. Milosevic met with this group in Kosovo Polje, a suburb of Pristina and the site of a famous medieval battle in which the Serbian Empire was defeated by the Ottoman forces; this site thus held particular symbolic value to the Serbs.[38] Milosevic famously declared "No one should dare to beat you!"[39] and urged Kosovar Serbs to stay in their homes, because Yugoslavia and Serbia would not give up Kosovo. Milosevic thus "managed to change the focus of political debate in Serbia from socialist ideology to nationalism."[40] He "tapped into ancient myth and contemporary grievances to complete his transformation from faceless Yugoslav apparatchik to Serbian nationalist hero."[41] In 1989 Serbia celebrated six centuries from the Battle of Kosovo by gloating over its re-conquest of the province. It is in this political climate that Kosovar Albanians lost any formal rights to internal self-determination. The status of Kosovar Albanians was thus drastically different under the 1974 Constitution, when they enjoyed important self-determination rights, from the lack of status that they suffered under the Milosevic rule. It is important to note, however, that the oppression of Kosovar Albanians resulted from two factors: the increasingly nationalist politics of Milosevic existing at a time of the Yugoslav collapse, and the Albanian longstanding unwillingness to exist within a Slavic society. The Albanians themselves acknowledged that even their status under the 1974 Constitution, when Kosovo was an autonomous province with important political rights, was simply not enough. In 1990 a majority of

Kosovo's local assembly approved a declaration of self-determination, and two months later they approved a constitution which proclaimed that "[t]he Republic of Kosova is a democratic state of the Albanian people and of members of other nations and national minorities."[42] Thus, as early as 1990, Kosovar Albanians believed that they had the right to external self-determination.

Under international law, a people accrues the right to exercise external self-determination if its rights to internal self-determination are not respected by its mother state. In other words, international law may recognize an exceptional case of remedial self-determination in the non-colonial context only when the mother state engages in such oppressive behavior that the minority people no longer can coexist within the larger society of the mother state.[43] Had this happened in Kosovo? Certainly not within the former Yugoslavia, under the 1974 Constitution, when Kosovar Albanians effectively exercised regional autonomy and enjoyed the respect of their Albanian ethnicity. Certainly yes under the Milosevic regime when Kosovar provincial autonomy was stripped off—although one could make the argument that Milosevic was simply responding (albeit brutally) to an ethnic and civil uprising in Kosovo. In other words, Milosevic quashed a rebellion by a minority group (people) in order to preserve the territorial integrity of the larger mother state, a political and military tactic that numerous other world leaders have employed throughout history.[44] It is the brutality of Milosevic's regime and his unwillingness to engage in compromise that possibly differentiate Kosovo from other regional conflicts. These same factors also contributed toward raising the international community's interest and growing concern for the fate of Kosovar Albanians. In 1990, when the Kosovar Albanians exercised their rights to external self-determination for the first time, they arguably had a better case for it than when they opted for such self-determination the second time, in 2008. In 1990 Milosevic was in power and there was no indication that he would be willing to restore Kosovar Albanians' rights to internal self-determination, even if they reneged on their battle for Kosovo's independence. By 2008, however, the situation had changed. Milosevic had been ousted from power and had passed away while awaiting trial at the International Tribunal for the former Yugoslavia at the Hague. The Serbian leadership was more moderate and prepared to grant full autonomy to Kosovo. In fact, the Rambouillet Accords stipulate such a possibility by providing for Kosovar autonomy parallel with the respect of the Serbian territorial integrity.[45] In 2008 Serbian leadership promised full internal self-determination rights to Kosovo, and, because Serbia was increasingly turning toward the West and knocking on the doors of the European Union, it was plausible that such promises would be fulfilled.[46] Arguably, in 2008 Kosovar Albanians no longer enjoyed external self-determination rights because their rights to internal self-determination were going to be fulfilled by their mother state. While this argument can certainly be criticized and the opposing one advanced (that even the new Serbian leadership could not be trusted in their promises about Kosovo's future autonomy within Serbia and that, consequently, the Kosovar Albanian rights to internal self-determination

were not being respected), it is at least *plausible* that Kosovar Albanians would have meaningful autonomy within a Milosevic-less Serbia.

This conclusion is buttressed by several factors. One, as of 2008 Kosovo had become predominantly inhabited by ethnic Albanians.[47] In light of such population composition, drastically different from the predominantly Serbian population of the rest of Serbia, autonomy for Kosovo seemed dictated by pure pragmatics. In other words, Kosovar Albanians no longer spoke Serbian and no longer engaged with their Serbian neighbors, and even the Serbian government recognized that autonomy was the only viable option. Second, in 2008 the international community had become heavily involved in Kosovo. Security Council Resolution 1244 and the Rambouillet Accords had been passed and constituted relevant international documents stipulating that Kosovo should have autonomy; moreover, multinational entities and organizations such as UNMIK and KFOR had been working in Kosovo for years, sharpening the difference between Kosovo proper and the rest of Serbia.[48] It is almost impossible to believe that, in light of these two factors, Serbian leadership would renege on their promise of autonomy for Kosovo. All this thus leads to a startling revelation: the Kosovar Albanians had a better legal case for external self-determination and secession in 1990, when they first declared their independence, than they did in 2008, when they did so for the second time. What is paradoxical is that the world community refused to recognize Kosovo as an independent state in 1990, when their legal case for remedial secession appeared much stronger, and that the world community readily embraced Kosovars as new sovereign partners in 2008, when their legal case for remedial secession looked far worse. It is my argument that, as in East Timor, the great powers were instrumental in securing Kosovo's independence for Serbia, with disregard for any relevant legal rules.

Kosovo and the great powers' rule

Kosovo illustrates a situation similar to that of East Timor: a struggling minority group seeking self-determination is aided by the great powers and is ultimately able to achieve independence from its central government. Without the help of the great powers, and precisely, the military intervention staged by the great powers through NATO, the Kosovars would not have been able to secede from Serbia.

Arguably, Kosovo can be differentiated from East Timor because the latter represented a delayed exercise of self-determination in the decolonization paradigm, while the former constituted a case of remedial secession outside any decolonization context. Nonetheless, the role of the great powers and their influence in realizing the self-determination dream is very similar in Kosovo and in East Timor.

In Kosovo, the great powers were instrumental in ensuring that the Kosovar Albanians acquired their long-sought independence from Serbia. First, it was those great powers that are members of NATO that organized the 1999 series

of air strikes on the territory of the FRY, to force Slobodan Milosevic into withdrawing his troops from Kosovo.[49] Without such military intervention, it is doubtful that Kosovar Albanians would have been able to fight off Milosevic's potent military. Corollary to this observation is the fact that the United Nations Security Council could not and did not authorize the use of force because of veto opposition by another great power, Russia.[50] Thus, the rest of the great powers decided to bypass Russia by organizing a military intervention in Kosovo through the auspices of NATO, which Russia had never been a member of and would have been unable to stop, unless it declared true war on NATO countries. This observation by no means weakens the argument about the role of the great powers: it simply illustrates that several great powers, when joined together, are powerful enough to circumvent any opposition by a lone great power dissenter. The great powers' rule presupposes some unity and joint action by more than one great power, and the case of Kosovo confirms this phenomenon. Second, it was the same great powers that had organized the NATO military intervention into Kosovo that were instrumental in the drafting and passage of Security Council Resolution 1244, and the signing of the Rambouillet Accords. The great powers (this time with Russia) adopted a resolution contemplating a form of international administration for Kosovo and future status talks that would determine the ultimate political fate of this province.[51] Russia voted in support of this resolution because of this document's indeterminacy with regard to the status of Kosovo: the resolution reaffirmed the respect for the FRY's territorial integrity, while recognizing the need to ensure Kosovar Albanian autonomy and while leaving open for the future the question of final status for Kosovo.[52] As long as Kosovo was not given outright independence and as long as only Kosovar autonomy was discussed in this resolution, Russia was willing not to exercise its veto power. Resolution 1244 authorized the international administration of Kosovo, in the form of UNMIK, and a military security force to guard Kosovo's borders, in the form of KFOR. It is the presence of these administrative and military multinational forces that ensured the Kosovar Albanians' transition toward independence. UNMIK began state and capacity building in Kosovo, implicitly preparing the Kosovar authorities for independence, and KFOR ensured that Serbian forces could not thwart this process. Without their presence, the Kosovar Albanians would have never been able to build their society, infrastructure, legal system, and police forces, all of which were necessary for the creation of a new state. The Rambouillet Accords also envisioned a similar form of organization for Kosovo: autonomy from Serbia and future status talks to determine the province's ultimate fate.[53] Without this document, it is questionable whether Kosovar Albanians would have been able to achieve any form of internal autonomy within the FRY. Moreover, it is this document that the Kosovar Albanians relied on when they decided to declare independence from Serbia: that final status talks with Serbia, which had been contemplated in this document, were attempted but not fruitful, and that in light of such failed negotiations, Kosovo had the right to separate from Serbia.[54]

The role of the great powers is striking in Kosovo. Starting in 1999, they determined that Kosovar Albanians deserved independence from Serbia, based not on legal reasons, but most likely because of strategic, geopolitical factors in the Balkans, as well as because of important interests in Kosovo itself. First, the great powers seemed intent on undermining Serbia and limiting its territorial reach. As discussed earlier, Serbia was viewed as the culprit in the 1990s' civil war in the former Yugoslavia, and Western great powers were determined to halt the rise of a larger Serbia and to thwart its influence in the Balkans.[55] Stripping Kosovo away from Serbia worked toward the accomplishment of that goal. Second, the great powers established important commercial and military outposts in Kosovo post-Rambouillet Accords and the ousting of Serbia. Thus, some great powers essentially privatized the Trepca Mining Complex, located in Kosovo, which had an estimated value of $5 billion—an asset of significant economic importance to the great powers.[56] In addition, the United States' government constructed Camp Bondsteel in Kosovo, which is now the United States' second largest military base in Europe, as well as the largest American military base constructed since the Vietnam War.[57] Thus, through supporting Kosovar independence, the great powers have achieved important strategic, commercial, and military interests. It is thus not surprising that none of the great powers has ever advocated the position that Kosovar Albanians had a good *legal* case for secession. Condoleeza Rice, then Secretary of State of the United States, claimed that Kosovo was *sui generis* and that because of unique factors in this region, such as ethnic conflict and the presence of international administration, Kosovo was entitled to independence from Serbia. According to Secretary Rice:

> The unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration—are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today.[58]

Explicit in this message was that Kosovo could never be a model for any other separatist movement, and that Kosovo was not about remedial secession or external self-determination. Rather, Kosovo was simply unique—because the great powers had decided so. Kosovo illustrates the great powers' rule at its best, as well as the evisceration of legal rules on self-determination in favor of political determinations and strategic factors.

Other scholars have written on the role of the great powers and their influence in Kosovo. Professor Christine Chinkin has argued that "the Kosovo intervention shows that the West continues to script international law, even while it ignores the constitutional safeguards of the international legal order."[59] Moreover, Professor Chinkin wrote that instances of humanitarian intervention since 1990 have all involved a use of force by the West against a non-Western

state (Iraq, Somalia, Haiti, and then Kosovo). Thus, "it is hard to envisage that other states would be able to undertake such a campaign, either unilaterally or together, against the wishes of permanent members of the Security Council and without being challenged by them."[60] Consequently, in areas in which the West hasn't had a profound interest in stopping human rights abuses, military interventions have not occurred (Sudan, Afghanistan, Ethiopia, and Central Africa).[61] Professor Chinkin implicitly acknowledges the existence of the great powers' rule in the area of humanitarian intervention and the protection of human rights. Kosovo falls neatly into this paradigm: it was a case in which the great powers decided to intervene, in the name of human rights protection. However, this kind of intervention does not exemplify the creation of any legal norm on humanitarian intervention; rather, it symbolizes a selective use of force by the great powers, in areas in which they have significant geopolitical interests.

Finally, the great powers played an important role in both East Timor and Kosovo, but their role was distinct in each case. In East Timor, the legal rules pointed toward a favorable outcome for the East Timorese. In other words, the people of East Timor most likely had a valid legal case for delayed colonial self-determination (or even a good legal case for remedial secession from Indonesia, in light of Indonesian abuses of the East Timorese people). However, despite the existence of a solid legal case for self-determination, the East Timorese would never have been able to declare independence from Indonesia without the involvement of the great powers. The great powers' rule coincided with international law in East Timor, where the application of international politics and international law led toward the same conclusion. However, the application of international politics in the form of the great power's rule was necessary in securing the realization of the legal rules. Without such influence by the great powers, international law rules alone would not have secured East Timorese independence from Indonesia. In Kosovo, international law rules were not as clear, and a good argument can be mounted that the Kosovars did not have a solid legal case for self-determination.[62] However, the great powers determined that Kosovo should be independent, without any reliance on international law rules. International politics trumped international law in Kosovo, and the great powers' rule eviscerated any rule of international law. The great powers' role was as necessary in Kosovo as it was in East Timor, but, in the former, it worked in ignorance of international law, whereas, in the latter, it worked in tandem with international law. The only conclusion that can be drawn from this observation is that the great powers' rule seems more important than international law. A cynic might even argue that international law simply does not matter. My argument will stop short of making such a dark observation about the inutility of international law. International law matters *sometimes* and hopefully guides the great powers in some of their decisions. In cases of self-determination, however, it appears that international law and the great powers' rule do not always coincide and may, in fact, clash, as indeed they did in Kosovo.

Notes

1 B.S. Brown, "Human Rights, Sovereignty, and the Final Status of Kosovo," *Chicago-Kent Law Review*, 2005, Vol. 80, 235–238.
2 Ibid., pp. 238–249 (describing the collapse of the former Yugoslavia).
3 Z. Gruda, "Some Key Principles for a Lasting Solution of the Status of Kosova: Uti Possedetis, the Ethnic Principle, and Self-Determination," *Chicago-Kent Law Review*, 2005, Vol. 80, 353–387.
4 Ibid.
5 H.H. Perritt Jr., "Final Status for Kosovo," *Chicago-Kent Law Review*, 2005, Vol. 80, 3–7 (noting that Kosovar Albanians were allowed to open an Albanian language university in Pristina in 1969, and that the institutional changes under the 1974 SFRY Constitution resulted "in the growing Albanization of educational, political, and legal institutions").
6 I. King and W. Mason, *Peace at Any Price: How the World Failed Kosovo*, C. Hurst & Co., 2006, p. 34.
7 Ibid., p. 35.
8 P.R. Williams, "Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo's Final Status," *Denver Journal of International Law and Policy*, 2003, Vol. 31, 387–397.
9 Perritt, op. cit., p. 8 (describing measures undertaken by Slobodan Milosevic beginning in 1989 to curb the Albanian upheaval).
10 Brown, op. cit., p. 263 (noting that amendments to Serbia's Constitution in 1989 and 1990 negated the Kosovar autonomy).
11 King and Mason, op. cit., p. 39.
12 Williams, op. cit., p. 397.
13 King and Mason, op. cit., p. 40.
14 Ibid., pp. 41–43.
15 Ibid., p. 43.
16 Ibid., pp. 43–45 (describing the events leading up to the NATO air strikes in the former Yugoslavia).
17 Brown, op. cit., p. 40 (noting how the NATO bombing campaign was successful in forcing the Yugoslav government to agree to terms of peace).
18 *See* Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, U.N. Doc. S/1999/648 (1999). Available at: www.state.gov/www/regions/eur/ksvo_rambouillet_text.html (accessed Apr. 7, 2012) [hereinafter "Rambouillet Accords"]. *See also* S.C. Res. 1244, which directly references the Rambouillet Accords for the purpose of determining Kosovo's future status. S.C. Res. 1244, para. 11€, U.N. SCOR 54th sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999) [hereinafter "Resolution 1244"].
19 E. Hasani, "Self-Determination Under the Terms of the 2002 Union Agreement Between Serbia and Montenegro: Tracing the Origins of Kosovo's Self-Determination," *Chicago-Kent Law Review*, 2005, Vol. 80, 305–323.
20 Ibid., pp. 323–325 (providing a detailed account of the United Nations' administrative regime over Kosovo under the terms of the Rambouillet Accords).
21 Williams, op. cit., p. 415 (describing the political changes in Serbia as a result of Milosevic's removal from office).
22 I was in attendance at one of such protests in Novi Sad, Serbia, a city in the northern province of Vojvodina.

23 V. Trebicka, "Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination," *Yale Journal of International Law*, 2007, Vol. 32, 256–258 (describing status talks on the future of Kosovo and the fact that a "brokered political agreement . . . [had] proven much more elusive than was first thought").
24 Even in the wake of the official Kosovar declaration of independence, Serbian leadership maintained that such independence violated Serbia's sovereignty and territorial integrity. UNMIK News Coverage (2008) Ban Ki-moon urges Restraint by All Sides After Kosovo Declared Independence. Available at: www.unmikonline.org/archives/news02_08full.htm (accessed Apr. 7, 2012).
25 Trebicka, op. cit., p. 255.
26 UNMIK News Coverage, op. cit.
27 Ibid.
28 *See* Who Recognized Kosovo as an Independent State. Available at: www.kosovothanksyou.com/statistics/ (accessed Apr. 7, 2012).
29 *See* Chapter 1 for a discussion of the definition of a "people" for purposes of self-determination.
30 Ibid.
31 *See*, for example, King and Mason, op. cit., pp. 34–45 (describing different protests occurring in Kosovo throughout the 1980s and the 1990s).
32 For an excellent discussion of whether Kosovar Albanians constitute a people, *see*, for example, R. Elsie (2008) *Kosovo and Albania: History, People, Identity,* Feb. 25, 2008. Available at: www.opendemocracy.net/article/conflicts /reimagining_yugoslavia/kosova_albania_identity (accessed Apr. 7, 2012) (arguing that Kosovar Albanians are a people because they share the same language and "community of values," but observing that Kosovar Albanians have also grown to differentiate themselves from Albanians in Albania because of the insurmountable separation existing between Albania and the former Yugoslavia, caused by the split between Stalin and Tito).
33 *See* first part of this chapter for a discussion of the history of Kosovo within the former Yugoslavia and Serbia.
34 *See* Gruda, op. cit., p. 387.
35 King and Mason, op. cit., p. 33 (noting that the Yugoslav authorities tolerated only "expressions of purely cultural self-assertion").
36 P.C. McMahon, *Taming Ethnic Hatred: Ethnic Cooperation and Transnational Networks in Eastern Europe*, Syracuse University Press, 2007, 1st edn, p. 38 (describing how Stalin called on communist states to re-socialize the population under the banner of class rather than ethnicity or nation, which, in practice, translated into a "developmental straightjacket" for how ethnic relations were handled in communist countries).
37 King and Mason, op. cit., p. 33.
38 Ibid., p. 36.
39 Ibid.
40 Ibid., pp. 36–37.
41 Ibid., p. 37.
42 Ibid., p. 38.
43 *See* Chapters 1 and 2; *see also* Reference re Secession of Quebec, 1998, 2 S.C Res. 217.
44 Examples of other world leaders who have quashed ethnic rebellions within their territorial states include Chinese presidents (rebellions quashed in Tibet), Russian

leaders (rebellion recently quashed in Chechnya), Ivory Coast, Sudan, inter alia. For a discussion of Chechnya, *see* Chapter 8.

45 Rambouillet Accords, op. cit.

46 During a trip to Serbia in the spring of 2008, I witnessed a peaceful political protest on the streets of Novi Sad, the capital of the northern province of Vojvodina, where protesters were carrying banners with signs reading: "We have a right to the European future" and "Don't let Kosovo slow us down." This demonstrated that at least a portion of the Serbian population seemed aware of the necessity to grant some form of autonomy to Kosovo in order to have access to Europe.

47 Before the 1999 NATO air strikes on the former Yugoslavia, Kosovar Serb population numbered about 200,000 out of a total population of about 2 million in Kosovo; after the 1999 war, at least 100,000 Serbs fled Kosovo, facing "physical threats, unemployment, forced eviction and continuous harassment." Thus, the Serbian population in Kosovo was reduced drastically as a result of the 1999 war and NATO intervention. King and Mason, op. cit., pp. 68–69.

48 *See*, for example, King and Mason, op. cit., pp. 49–92 (describing the establishment of KFOR and UNMIK missions in Kosovo and their original mandates).

49 *See*, for example, J.C. Dunoff, S.R. Ratner, and D. Wippman, *International Law: Norms, Actors, Processes*, 3rd edn, 2010, p. 890 (describing the NATO air strikes on the Federal Republic of Yugoslavia).

50 Ibid., p. 891 (noting that Russia would have opposed any use of force against the FRY, and that China might have voted against such use of force as well).

51 Resolution 1244, op. cit.

52 Ibid.

53 Rambouillet Accords, op. cit.

54 BBC News (2008) Kosovar Declaration of Independence. Available at: http://news.bbc.co.uk/2/hi/europe/ 7249677.stm (accessed Apr. 7, 2012).

55 *See* first part of this chapter.

56 For a discussion of the privatization of the Trepca Mining Complex, *see* P. Stuart (2002) The Trepca Mining Complex: How Kosovo's Spoils were Distributed. Available at: www.wsws.org/articles/2002/jun2002/ trep-j28.shtml (accessed Apr. 7, 2012).

57 For a discussion of the United States' construction of Camp Bondsteel, *see* B. Stone (2005) The U.S.-NATO Military Intervention in Kosovo: Triggering Ethnic Conflict as a Pretext for Intervention. Available at: www.globalresearch.ca/index.php?context=va&aid=1666 (accessed Apr. 7, 2012).

58 U.S. Recognizes Kosovo as Independent State, statement of Secretary of State Condoleeza Rice, Washington DC (2008). Available at: http://kosova.org/post/United-States-Recognizes-Kosovo-as-Independent-State.aspx. (accessed Apr. 7, 2012).

59 C.M. Chinkin, "Kosovo: A "Good" or "Bad" War?," *American Journal of International Law*, 1999, Vol. 93, 841–847.

60 Ibid.

61 Ibid.

62 For a solid examination of the Kosovar case for self-determination, *see*, for example, C.J. Borgen (2008) *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition*. Available at: www.asil.org/insights080229.cfm#_edn1 (accessed Apr. 7, 2012).

8 Chechnya

This chapter will focus on self-determination as it played out in the Russian province of Chechnya. Although the Chechens achieved a large measure of de facto independence in the early and mid-1990s, they were forcibly brought back within Moscow's rule. The great powers were not to get involved in this self-determination struggle, for fear of alienating a great power itself, Russia. For the same reason, the United Nations Security Council was never seized of this matter, despite allegations of gross human rights violations in Chechnya. Chechnya has not been able to secede from Russia *de jure*, because one of the great powers (Russia) has firmly opposed this idea. This chapter will thus examine the history of Chechnya, before turning to a discussion of the Chechens' right to self-determination, and the role of the great powers in this region.

History of Chechnya

Chechnya is a region in the North Caucuses, which has been fighting against foreign rule since the 15th century. Influenced by the Ottoman Empire, the Persians, and the Russians, the Chechens ultimately aligned with the Ottomans and fought against the Russian Empire. Consequently, most Chechens converted to Sunni Islam, under the Ottoman influence.[1] During the 18th century, the Russian Empire began spreading its influence in the Caucasus region. The Russians thus signed a peace treaty with the Eastern Georgian kingdom of Kartl-Kakheti in 1783, which had been devastated by Turkish and Persian invasions. According to the terms of this peace treaty, the kingdom of Kartl-Kakheti received protection from the Russian Empire in case of a future foreign invasion.[2] Chechen people, however, disliked the Russian influence and began resisting it as early as the late 18th century. In fact, Chechen leaders hoped to establish an Islamic state under *Shari'a* law. This dream remained unrealized as the Russian Empire retained its control and influence over the Caucasus region.[3]

Chechen rebellions against the Russian rule continued throughout the 19th and 20th centuries. Rebellions typically flared up during times of instability for the Russian Empire, thus coinciding with the Russo-Turkish War, and the Russian Revolutions of 1905 and 1917. After the fall of the Russian Empire and the creation of the Soviet Union, Chechnya was combined with Ingushetia to

Figure 8.1 Map of Chechnya

form the autonomous republic of Chechen-Ingushetia in the late 1930s.[4] The Chechens rebelled against the Soviet rule in the 1940s, resulting in the deportation of numerous Chechens to Kazakhstan and to Siberia in 1944.[5] Joseph Stalin and other Soviet leaders argued that the deportation was punishment for the Chechens' support of the German forces during World War II. Chechens were

ultimately allowed to return to Chechnya in 1956, during de-Stalinization under the then Soviet leader, Nikita Khrushchev. Most "Russification" policies in Chechnya continued after 1956, and the knowledge of the Russian language remained necessary for any advancement in the Soviet system.[6]

In 1991, during the collapse of the Soviet Union, an independence movement known as the Chechen National Congress was formed and began rallying for Chechen independence. This movement was opposed by the Russian Federation, a successor to the Soviet Union and a *de jure* ruler of Chechnya. In fact, Russia claimed to be the successor state to the Soviet Union; as such, it "inherited" the administration of provinces such as Chechnya. During the 1990s, Chechnya would remain locked in a violent struggle among several military, ethnic, and religious factions vying for control over this area.

In 1991, Chechnya obtained de facto independence from Russia. During the so-called First Chechen War (1994–1996), Russian forces attempted to regain control over the Chechen territory, but were largely unable to do so due to successful Chechen guerrilla raids in this mountainous region.[7] Russian President Boris Yeltsin signed a peace treaty with the Chechens in 1996, ending the First Chechen War. During this period of de facto independence, Chechnya became a "center of criminal activities of extraordinary proportions" and generally failed to build any representative institutions of a viable state.[8] In fact, after the First Chechen War, parliamentary and presidential elections took place in January 1997, and the newly elected government in Chechnya, while seeking to maintain Chechen sovereignty, appealed to Moscow for help. Chechnya needed to rebuild itself, as its infrastructure and economy were heavily undermined by the war.[9] Russia sent money for the rehabilitation of the Chechen state, but most of these funds were stolen by Chechen authorities and distributed between favored warlords.[10] Chechnya also faced a refugee crisis, with "nearly half a million people (40% of Chechnya's prewar population) [who] had been internally displaced and lived in refugee or overcrowded villages."[11] Fearing further violence, Russian military troops remained stationed in Chechnya.[12]

In September 1999 Moscow accused the Chechens for their involvement in a series of apartment bombings, which took place in several Russian cities.[13] As a retaliatory measure, Russia initiated a prolonged air campaign of military strikes against Chechnya, followed by a ground offensive in October 1999.[14] The latter effectively started the Second Chechen War. Because the second war had been much better organized and planned than the first, Russian military forces were quickly able to re-establish control over most Chechen regions.[15] In February 2000, Russian forces recaptured Grozny, the Chechen capital, and the pro-independence Chechen regime crumbled.[16] In the following years Russia was successful in installing a pro-Russia Chechen regime, and the most prominent separatist leaders died. In April 2009 Russia ended its counter-terrorism operations in Chechnya and pulled out most of its troops.[17] In the summer of 2009 the leader of the Chechen separatist government, Akhmed Zakayev, called for the halting of armed resistance against the Chechen police forces. In spite of this, violence still occurs in the North Caucasus, and Chechnya

remains a troubled and potentially explosive region.[18] In 2009 the American organization Freedom House included Chechnya in the "Worst of the Worst" list of most repressive societies in the world, along with Burma, North Korea, and Tibet, inter alia.[19]

The legal case for self-determination in Chechnya

The first step in deciding whether the Chechens have the right to self-determination is an examination of peoplehood: are Chechens a people, similar to the East Timorese or the Albanian Kosovars? As discussed already, any group arguing that it constitutes a people for the purposes of self-determination must satisfy both the subjective as well as the objective criteria.[20] First, a group must prove that it subjectively feels distinct from the other inhabitants of its mother state, and second, a group must show that it satisfies objective criteria of uniqueness, such as a common culture, language, ethnicity, religion, and territory. Chechens most likely satisfy both sets of criteria. First, it is clear that starting as early as the 18th century, they have fought against the Russian rule, thus expressing a sentiment of distinction and uniqueness, separating them from ethnic Russians. As discussed earlier, Chechens have persistently struggled against the Russian and Soviet rule, and have faced severe repercussions for their dissent. As one scholar has noted, as of the 1990s, it was impossible to find any Chechen person over 50 who did not grow up in a concentration camp.[21] Since the fall of the Soviet Union, the area has experienced an increased "Chechenization," a reshaping of the republic to limit any Russian influence and to reinforce the population's Chechen identity.[22] One clear example of this is the revival of the Islamic religion in Chechnya, which is traditional in this mostly Muslim republic but had been suppressed for an entire century by the Soviet Union.

Second, Chechens are sufficiently unique in order to satisfy the objective criteria of peoplehood. Most Chechens have laid historic and tribal claims to the Northern Caucasus territory; most Chechens belong to the Sunni Islam religion; most Chechens speak the Chechen language; and most Chechens abide by a Northern Caucasus culture, distinct from the Russian culture and shaped by this region's history and Ottoman influences.

> The Chechens are a distinct people, not an ad hoc group seeing an opportunity and trying to make off with an unfair share of the country's wealth. Indeed, few Russians would argue that the Chechens are not ethnically, religiously and culturally distinct from the majority of the population of the Russian Federation.[23]

Finally, Chechnya has been a part of Russia only by right of conquest (Russia had conquered Chechnya in 1864), and the Chechens have never accepted their forcible incorporation into Russia or the Soviet Union.[24]

An argument can be made that Chechens do not qualify for peoplehood because of the existence of separatist movements that have been waging

campaigns of violence against the Chechen government. Thus, an argument can be construed that not all Chechens feel that they belong to the same people—in other words, that some Chechens express allegiance to the current Chechen government, while other Chechens feel loyal toward a separatist movement that has been inflicting warfare and violence on the Chechens themselves. This would show that Chechens are subdivided into multiple factions and groups, and that they do not constitute a single people for the purposes of self-determination.

One such separatist movement is the separatist government of Ichkeria, a region within Chechnya, which enjoyed limited recognition in the early 1990s by a few states, and some diplomatic relations with the Taliban government of Afghanistan.[25] After one Ichkerian leader was assassinated by Russian forces in 2006, his successor, Doku Umarov, abolished the Chechen Republic of Ichkeria and proclaimed the Caucasian Emirate, with himself as Emir.[26] The Ickherian separatist movement has been harshly repressed by the Chechen leadership. Chechen President Ramzan Kadyrov, allegedly the wealthiest and most powerful man in Chechnya, disposes of a large private militia referred to as the "Kadyrovtsy." The militia has been accused of killings, kidnappings, and torture of many separatist activists.[27] Thus, because of strong government repression, separatist movements in Chechnya have had very limited success over the last decade. The presence of this, and other, separatist movements, however, does not undermine the argument that Chechens are a people. Separatist movements in Chechnya have been about political and military control of the region by people who are ethnically Chechen; these movements have not been led by non-Chechen ethnic minority groups and have not opposed the Chechen government for ethnic or ideological reasons. In fact, according to the 2010 Census, the population of Chechnya is composed of 93.5% Chechens and only 3.7% Russians.[28] This shows that an overwhelming majority of the population in Chechnya self-identifies as Chechen. Despite the fact that Chechnya is officially a part of the Russian Federation, this republic is vastly inhabited by ethnic Chechens who speak a distinct language and belong to a sharply different culture.[29] Chechens, like the East Timorese and the Kosovar Albanians, qualify as a people for purposes of self-determination.

The next inquiry in the application of the self-determination theory to Chechnya is whether Chechens are entitled to only internal self-determination and some form of autonomy from Russia, or if they should be entitled to external self-determination and an eventual secession from Russia. The case of Chechnya, unlike that of East Timor and like that of Kosovo, does not fall within the decolonization paradigm. Thus, the modern-day framework of remedial secession as the last remedy in case of oppression, elaborated on in Chapter 2, will apply. In fact, as discussed throughout this book, an argument can be advanced that international law tolerates a limited right of secession for peoples whose rights to internal self-determination have been egregiously disrespected by the mother state. The relevant inquiry for the Chechens is whether the latter has been true for them: have Russian authorities denied Chechens their inherent right to internal self-determination, in a manner

which would trigger the argument that Chechens' rights to external self-determination have accrued?

Chechens should have an undisputed right of internal self-determination. This right entails the existence of some form of provincial autonomy: the right for Chechens to form a regional government, to have Chechen-language schools and universities, as well as to openly practice their culture and religion. Chechnya is currently a republic within the federal state of Russia, and Chechens do have a local government and president.[30] They are also allowed to use the Chechen language, and the Chechen society has been increasingly embracing an Islam-dominated culture, where women are relegated to an inferior status and where men rule households and every aspect of everyday life. For example, Chechen president, Ramzan Kadyrov, has been quoted as saying that women are men's property, and that fathers, brothers, and husbands have the right to kill a woman who "fools around."[31] However, all accounts confirm that Chechen autonomy from Russia is far from meaningful.

Since the Second Chechen War, Russia has reasserted its tight control over Chechnya and has installed pro-Russian leaders to head the Chechen republic. The current Chechen President, Ramzan Kadyrov, is such a Kremlin-installed leader. Because of his allegiance to Moscow, he has been able to rule as a ruthless dictator, disregarding both Russian and international law. "Numerous experts on the North Caucasus, including those in international organizations, have described Kadyrov's rule over Chechnya as a 'personality cult' regime and stressed that Kadyrov's orders have become, in essence, the only law in the republic."[32] Thus, because of Kadyrov's authoritarian rule supported by Russia, Chechen people have not been able to exercise any meaningful form of self-government. Moreover, the recent reshaping of the Chechen society into a traditional Islamist model with subjugation of women has been largely driven by Kadyrov's policies and personal beliefs. Neither Russian nor Chechen law requires women to respect an Islamic dress code and wear headscarves, and Russian law actually prohibits the imposition of headscarves on women. Nonetheless, Kadyrov has pushed for an extra-legal requirement that women in public service, schools, and universities wear a form of a uniform, which includes a headscarf. Kadyrov has also publicly supported honor killings, and has expressed his view that men are superior to women and that women should obey men because they are men's property. None of these views seems supported by the majority of the Chechen people, and Chechenyzation itself has been described as "handing over the license to violence from federal forces to pro-Kremlin Chechen forces."[33] Thus, a strong argument can be made that Chechen people have not been allowed to freely exercise their culture and religion, because the only allowable exercise of such culture and religion has been the one dictated by Kadyrov, a Moscow-installed and Moscow-supported leader. Indirectly, Russia controls every aspect of Chechen life, and Chechenization has entailed a transfer of control over the region from Russian forces to Kadyrov, who essentially has carte blanche to rule the republic as he pleases. It is thus doubtful that Chechens have been meaningfully exercising their rights to internal self-determination.

If a people is denied its right to internal self-determination, and if the mother state chooses to severely oppress the people's rights, then external self-determination rights may be triggered. In the case of Chechnya, as seen already, it can be plausibly argued that Russia has not allowed Chechens to exercise their rights to internal self-determination meaningfully. The official autonomy that Chechnya enjoys within the Russian Federation is nothing but a personality cult led by a Russian-installed leader, Ramzan Kadyrov. Moreover, during the Second Chechen War, Russian forces arguably committed gross human rights violations in Chechnya.[34] Since then, Russia has engaged in other human rights abuses in Chechnya. According to a 2009 Amnesty International Report, Russian forces committed numerous human rights violations in Chechnya, which have included kidnappings, torture, and murder.[35] And the Kadyrov regime continues to engage in similar violations. By all accounts, the people of Chechnya have been severely oppressed by Russian armed forces and police forces, and by Kadyrov's pro-Russian regime. A good legal case for external self-determination can be argued on behalf of Chechens: because their rights to internal self-determination have not been respected and because they have been oppressed and abused, they should be entitled to exercise the external self-determination option and to remedially secede from Russia. Of course, this would entail eliminating Kadyrov as the leader of Chechnya, and allowing Chechens to choose, through democratic means, a new, truly Chechen, leader.

Compared to the Kosovar Albanians, Chechens may have a better legal case for external self-determination. Kosovar Albanians and Chechens may have been similarly situated during the 1990s, when Serbia, Kosovo's mother state, was ruled by Milosevic. At that time, Kosovar Albanians were oppressed and abused without any possibility of exercising internal self-determination rights. Similarly, Chechens faced harsh repression by Russia following the Second Chechen War, and most of their rights to internal self-determination were reduced and stripped away by Russian forces. After the fall of the Milosevic regime, the new democratic government of Serbia changed its outlook toward Kosovo, and it is plausible that the new Serbian regime would have been ready to grant meaningful autonomy to Kosovo. In Chechnya, however, Russia installed a brutal puppet regime led by Kadyrov, and as of today, there is no indication that Kadyrov's leadership is in jeopardy, or that Russia is prepared to grant meaningful, democratic autonomy to Chechnya. Today, Chechens could argue that they deserve external self-determination and remedial independence, in light of the Kosovo precedent, as they have a stronger case for secession than the Kosovar Albanians did.

Despite Chechen attempts at true independence from Russia during the early and mid-1990s, Chechens have faced repression and a lack of support by the international community, resulting in their inability to fundamentally change any of their political circumstances. As of today, Chechnya remains firmly ruled by Moscow, and the Kosovo precedent has played little role in any discussion of the Chechen situation. It is my argument that, as in the case of East Timor and Kosovo, the great power's rule played a determinative role in

assessing the people's quest for self-determination. The great powers have not been supportive of Chechnya and, as a consequence, Chechnya remains a "Kadyrov-cracy."

Chechnya and the great powers' rule

What has been the great powers' involvement in Chechnya? What has been their role in this conflict for territorial independence? First, it is informative that Chechnya has struggled for independence from a great power itself, Russia. None of the other peoples struggling toward remedial secession (East Timorese and Kosovar Albanians) has entailed cases where the mother state is a great power. Second, despite reports of gross human rights violations by Russian armed forces during the Second Chechen War, in the late 1990s, the great powers remained indifferent to the suffering of the Chechen people. While the North Treaty Atlantic Organization ("NATO") countries were busy launching air strikes on the Federal Republic of Yugoslavia ("FRY") because of Serbian human rights abuses in Kosovo, they turned a blind eye to similar suffering in Chechnya. Obviously, Chechen territory is not within NATO territory, but neither was the FRY. In other words, NATO countries have shown a willingness to extend their military operations outside of the territory of NATO member states, only in cases where the NATO-led military action would not be directed against a great power. In the case of Kosovo, NATO intervention was directed against the FRY, a state not belonging to the great powers' club. In the case of Chechnya, however, NATO countries decided that inaction was the best course of action, because NATO intervention would have to be exercised against Russia, a great power. In both instances, Kosovo and Chechnya, Russia has not supported independence for the Kosovar Albanians and the Chechens. In the case of Chechnya, however, Russia has benefited from the great powers' rule and has thus implicitly precluded the possibility of any kind of military intervention on behalf of the Chechens. The FRY and its successor state, Serbia, have not benefited from the great powers' rule and military intervention on behalf of the Kosovar Albanians did take place in 1999.

At the same time, the United Nations was heavily involved in East Timor, organizing pro-independence referendum and ensuring that violence did not spread massively following referendum. No United Nations agencies were ever directly involved in Chechnya, and most local elections in Chechnya have been conducted under questionable legality, without any help from the international community. For example, when Chechnya's regional constitution entered into effect in 2003 after referendum, independent observers alleged that the official voter turnout seemed to be much higher than the reality, questioning thereby the legitimacy of Chechen voting processes.[36] The reason for this distinction between the treatment of Kosovo and East Timor, on the one hand, and Chechnya, on the other, lies precisely in the great powers' rule. Because Chechen independence would upset a great power (Russia), that great power would block any meaningful United Nations Security Council action into Chechnya.

Thus, Russia would veto any Security Council resolution authorizing the deployment of international troops to Chechnya, as it does any such resolution with respect to Kosovo. Moreover, most other great powers were unwilling to upset Russia, which could turn into a potent foe.

Thus, when Russia opposed Chechen independence, most other great powers tacitly supported this conclusion. United States' President Bill Clinton refused to criticize Russia for sending tanks and troops to brutally quell the uprising during the Second Chechen War, stating that Chechnya was an internal affair.[37] Unfortunately, many other countries followed Clinton's lead and refused to get involved in Chechnya, despite allegations of human rights abuses. Geopolitics, in the case of Chechnya, dictated that Chechens would not be supported in their independence quest, despite their legal case for external self-determination. For example, when Chechnya achieved de facto independence following the First Chechen War, none of the great powers chose to support it, to help it rebuild its society and infrastructure, or to engage with it on any diplomatic level. As early as 1991 Boris Yeltsin argued that Chechens did not have the constitutional right to secede, that Chechen secession would stir other separatist movements within Russia, and that Chechnya was a major hub in the oil infrastructure of the Russian Federation and thus vital to Russian economy and energy access.[38] None of these conclusions was challenged by any other great power, and none of these conclusions addresses the underlying issue of self-determination for the Chechens under international law. A people's right to self-determination exists regardless of domestic constitutional provisions of its mother state, irrespective of any precedential value that the exercise of such self-determination may have for other separatist groups, and independent of any claim by the mother state about the strategic importance of the self-determination-seeking region.

Chechnya illustrates the idea of a struggling minority group, seeking self-determination rights from the central government (Russia), unaided by the great powers. Alone, Chechnya could not face the Russian military power and could not undertake the economic challenges of achieving viability as an independent state. Some have suggested that it is the Chechen inability to build democratic institutions and peace during its de facto independence, in between the two Chechen wars, which caused the great powers to refuse to recognize Chechnya as a legitimate self-determination-seeking entity.[39] Others have also noted the lack of appeal of the Chechen leaders: essentially, during de facto independence from Russia in between the two Chechen wars, Chechnya had turned into a "brigand" state where corruption and violence were rampant.[40] However, I posit that it is Russian membership in the great powers, and *precisely*, the Russian veto power on the Security Council that directly caused the lack of international involvement in Chechnya. Had the international community become involved in Chechnya by contributing toward democracy and institution-building, similarly to what was done in Kosovo, presumably Chechen leaders would have been able to build up a quasi-democratic state and to diminish the use of violence.

It is interesting to compare Chechnya with Kosovo for another reason: in both cases, two great powers (Russia and China) were opposed to any military intervention against the mother states (Russia and the FRY). Because of such opposition, the United Nations Security Council was unable to act and the use of force against Russia or the FRY was never authorized within the United Nations. However, in the case of Kosovo *only*, other Western great powers proved willing and able to bypass Russia and China and to ultimately enable the Kosovar Albanians to achieve statehood and independence. In Kosovo, as discussed in Chapter 7, the Western great powers orchestrated the NATO-led 1999 military intervention in the FRY. The two great powers that had been opposed to military action in the FRY, Russia and China, agreed to the compromise solution of United Nations Security Council Resolution 1244, passed in the wake of the 1999 NATO intervention, as discussed above in Chapter 6.[41] Implicitly, Russia and China recognized that Kosovo may one day achieve independence, through their willingness to support an intermediary solution of enhanced autonomy for Kosovo coupled with shared sovereignty between Serbian authorities and the newly created international administration of Kosovo led by the United Nations and the European Union. Despite Russian and Chinese opposition to military action in Kosovo, these great powers appeared willing to support other kinds of international involvement in Kosovo. Thus, in addition to the 1999 military action, Western great powers became heavily involved in institution-building in Kosovo and in preparing the Kosovar Albanians to independence. It can be argued that the Kosovar declaration of independence in 2008 did not come as a surprise to the Western great powers, which had paved the way for Kosovar Albanians to assert statehood and separate from Serbia. In the case of Chechnya, to the contrary, Western great powers did not do anything to bypass Russia and China, and the Chechens have never enjoyed any kind of concrete support from the international community.

Arguably, Western great powers could have intervened in Chechnya through a NATO-initiated humanitarian intervention. Similarly, Western great powers could have provided other, non-military, support to the Chechens. Yet, because of Russian and Chinese membership in the great powers' club, other great powers have engaged in inaction. Providing support to a people wishing to territorially secede from a great power itself was anathema to the great powers' rule, which operates by creating and enhancing super-sovereignty for a limited number of militarily and economically superior states. Upsetting the great powers' rule by undermining the territorial integrity of one great power would ultimately disfavor all great powers by threatening their super-sovereign status in the international arena. The Chechens have been victims of the great powers' rule, in contrast to the Kosovar Albanians, who have not. Ultimately, the lack of willingness on behalf of Western great powers to upset Russia led toward global indifference and inertia vis-à-vis Chechnya and toward a tacit approval of human rights abuses in Chechnya by Russian forces.[42] Chechnya could not and cannot achieve independence alone. Unfortunately, it does not appear that Chechen independence will be realized in the near future.

As in the case of Kosovo, the great powers' rule did not coincide with international law in Chechnya. A solid argument exists that Chechens have a proper legal case for external self-determination, but that, despite that case, they have not been able to realize their rights, because of the great powers' rule, which has dictated that Chechens should remain a part of Russia. The great powers' rule has affected the legal rules on self-determination by dictating that self-determination may remain an unrealized dream for any peoples seeking to exercise these rights against a great power.

Notes

1 *See*, for example, P. Ford, "A Remote Republic Rattles Moscow," *Christian Science Monitor*, 1994, 7; P. Ford, "A History of Antagonism," *New York Times*, Dec. 13, 1994, A3.
2 L. Ilyasov (2009) The Diversity of the Chechen Culture: From Historical Roots to the Present. Available at: http://unesdoc.unesco.org/images/0018/001860/186004e.pdf (accessed Apr. 7, 2012).
3 Ibid.
4 Y. Karny, "Georgia Breach in the Bloody Caucasus, the Bolsheviks Only Interrupted the Fighting," *Washington Post*, Jul. 25, 1993, C2.
5 T.N. Tappe, "Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims," *Columbia Journal of Transnational Law*, 1995, vol. 34, 255, 274–5.
6 Ibid. (concluding that "[i]t is safe to generalize that the Chechens hate Russian rule, having suffered so greatly from it"); *see also* S.S. Montefiore (1995) "The Crazy Gangsters of Grozny," *Sunday Telegraph (London)*, reprinted in *National Times*, 28.
7 J.I. Charney, "Self-Determination: Chechnya, Kosovo and East Timor," *Vanderbilt Journal of Transnational Law*, 2001, Vol. 34, 455, 462–463.
8 Ibid., p. 463.
9 *See* Freedom House, Chechnya [Russia] (2003). Available at: www.freedomhouse.org/country/chechnya (accessed Apr. 7, 2012).
10 Ibid. (noting that reconstruction efforts have been plagued by corruption).
11 A. Goldfarb with M. Litvinenko, *Death of a Dissident: The Poisoning of Alexander Litvinenko and the Return of the KGB*, Free Press, 2007, p. 95.
12 *See* Freedom House, op. cit. (noting that the 1996 peace deal called for the withdrawal of most Russian forces from Chechnya).
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 *See* Chapter 3.
21 Tappe, op. cit., pp. 274–275.
22 Human Rights Watch (2011), 'You Dress According to Their Rules,' Enforcement of an Islamic Dress Code for Women in Chechnya. Available at: www.hrw.org/reports/2011/03/10/you-dress-according-their-rules (accessed Apr. 7, 2012).

23 Tappe, op. cit., p. 279.
24 Ibid., p. 280.
25 N. Abdullaev (2001) "Are Chechens in Afghanistan?", *Moscow Times*. Available at: www.cdi.org/russia/johnson/5597-11.cfm (accessed Apr. 7, 2012).
26 T. Pkhakadze (2008) *What is Hidden Behind the Idea of the Caucasian Emirate?* Available at: www.itstime.it/Commenti/CaucEmiri.pdf (accessed Apr. 7, 2012).
27 *See*, for example, Human Rights Watch, op. cit.; *see also* Amnesty International (2009) Russian Federation Rule Without Law: Human Rights Violations in the North Caucasus. Available at: www.amnesty.org/en/library/asset/ EUR 46/012/2009/en/66cda198-85c0-452c-a2c5-98cac593a990/eur460122009en.pdf (accessed Apr. 7, 2012).
28 Federal State Statistics Service, Preliminary Results of the 2010 All-Russian Population Census. Available at: www.perepis-2010.ru/results_of_the_census/results-inform.php (accessed Apr. 7, 2012).
29 Tappe, op. cit., p. 279 ("Beneath the thin layer of colonial administration has always lurked distinct cultures").
30 Freedom House, op. cit.
31 Human Rights Watch, op. cit.; *see also* A. Gamov (2008) "Interview with Ramzan Kadyrov," *Komsomolskaya Pravda*. Available at: www.kp.ru/daily/24169/380743/ (accessed Apr. 7, 2012).
32 Human Rights Watch, op. cit.
33 Ibid.
34 Freedom House, op. cit.
35 Amnesty International, op. cit.
36 *See*, for example, M. Tumsoyev (2003) "Chechnya: From a Pseudoreferendum to Pseu-doelections," Prague Watchdog. Available at: www.watchdog.cz/?show=000000-000004-000001-000072&lang=1 (accessed Apr. 7, 2012). ("The results of the March referendum on the draft Chechen constitution were predetermined long before even the mere idea of a referendum was approved by Kremlin's spin doctors.")
37 S. Greenhouse, "U.S. Says Russian Move Is 'An Internal Affair'," *New York Times*, Dec. 12, 1994, A13; *see also* BBC Summary of World Broadcasts, Chechnya: Muslim Countries Reject Dudayev's Appeal For Help; Matter Is Russia's Internal Affair, Dec. 2, 1994, at SU/2168/B.
38 Tappe, op. cit., pp. 283, 287.
39 Charney, op. cit., pp. 462–463.
40 Tappe, op. cit., p. 283.
41 *See* Chapter 6 for a detailed discussion of Resolution 1244.
42 For a discussion of the United States' policy of indifference toward Chechnya, and of tacit support for Russia, *see*, for example, E. Bagot, "US Ambivalence and the Russo-Chechen Wars: Behind the Silence," *Stanford Journal of International Relations*, 2009, Vol. 9, 32–33. ("A combination of confusion over territorial integrity, the strategic unimportance of Chechnya for the United States, concerns about democracy promotion in Russia, post-Cold War security interests, the need for a partner in the War on Terror, a lack of moral authority to condemn Russia's behavior, and a sense of helplessness has prevented the United States from intervening in a meaningful way in the Russo-Chechen wars. Essentially, strategic interests have rendered it unwilling to condemn Russia's actions.")

9 Georgia (South Ossetia and Abkhazia)

This chapter will explore self-determination issues within the Caucasus region, by focusing on two Georgian breakaway provinces, South Ossetia and Abkhazia. These two provinces have enjoyed de facto independence from Georgia, but have never been recognized as independent by any states other than Russia. In fact, most "Western" great powers (the United States and all European great powers) support Georgia, which they view as a strategic ally and a potential North Atlantic Treaty Organization (NATO) member. Russia, another great power, has had tense relations with Georgia for a number of years and thus supports South Ossetia and Abkhazia, by helping them militarily, politically, and financially. No other states were directly involved in this situation, most likely for fear of alienating Russia. The United Nations Security Council was never seized of this matter, despite warfare and human rights abuses, because one of the great powers (Russia) would most certainly exercise its veto power and prevent any collective action through the United Nations. South Ossetia and Abkhazia have not been able to secede from Georgia *de jure*, because they do not enjoy support from the majority of the great powers. In order to discuss these points more thoroughly, this chapter will describe the history of Georgia, before focusing on the issue of self-determination for South Ossetia and Abkhazia, finally addressing the great powers' rule in the context of South Ossetia and Abkhazia.

History of South Ossetia and Abkhazia

South Ossetia is an autonomous administrative district of Georgia, and Abkhazia is an autonomous republic also within Georgia. These two provinces have functioned as de facto states in recent years and have been recognized as independent states by a small number of states.[1] Moreover, South Ossetia and Akbhazia spurred international controversy during the summer of 2008, when Russia decided to support the two provinces by sending military troops to Georgia. The Russian intervention evolved into war between Georgia, on one side, and Russia, South Ossetia, and Abkhazia, on the other.[2] As of today, the status of both of these provinces is heavily disputed. Russia and a small minority of states view them as independent, sovereign entities, but allegations have

Figure 9.1 Map of the Republic of Georgia

surfaced that Russia secretly hopes to annex these two regions into its own territory. Most Western states support Georgia and consider these provinces an integral part of Georgia. Finally, South Ossetians and Abkhazians view themselves as deserving independence. This section will review the history of South Ossetia and then Abkhazia, before turning to a discussion of the recent Georgian War (in 2008).

South Ossetia

Ossetians are descendants of the Alans, a Sarmatian tribe. They became Christian during the early Middle Ages and migrated toward the Caucasus Mountains, where they eventually became a part of a Georgian state.[3] The territory of the modern-day South Ossetia joined Russia in 1801, along with Georgia. Following the Russian Revolution in 1917, South Ossetia became a part of the Georgian Democratic Republic, and in 1922, the Soviet Georgian government established the South Ossetian Autonomous Oblast.[4] During Soviet times, Ossetians enjoyed partial autonomy within Georgia, including the right to speak the Ossetian language and to teach it in schools. Along with Ossetian, however, Russian and Georgian were also official state languages.[5]

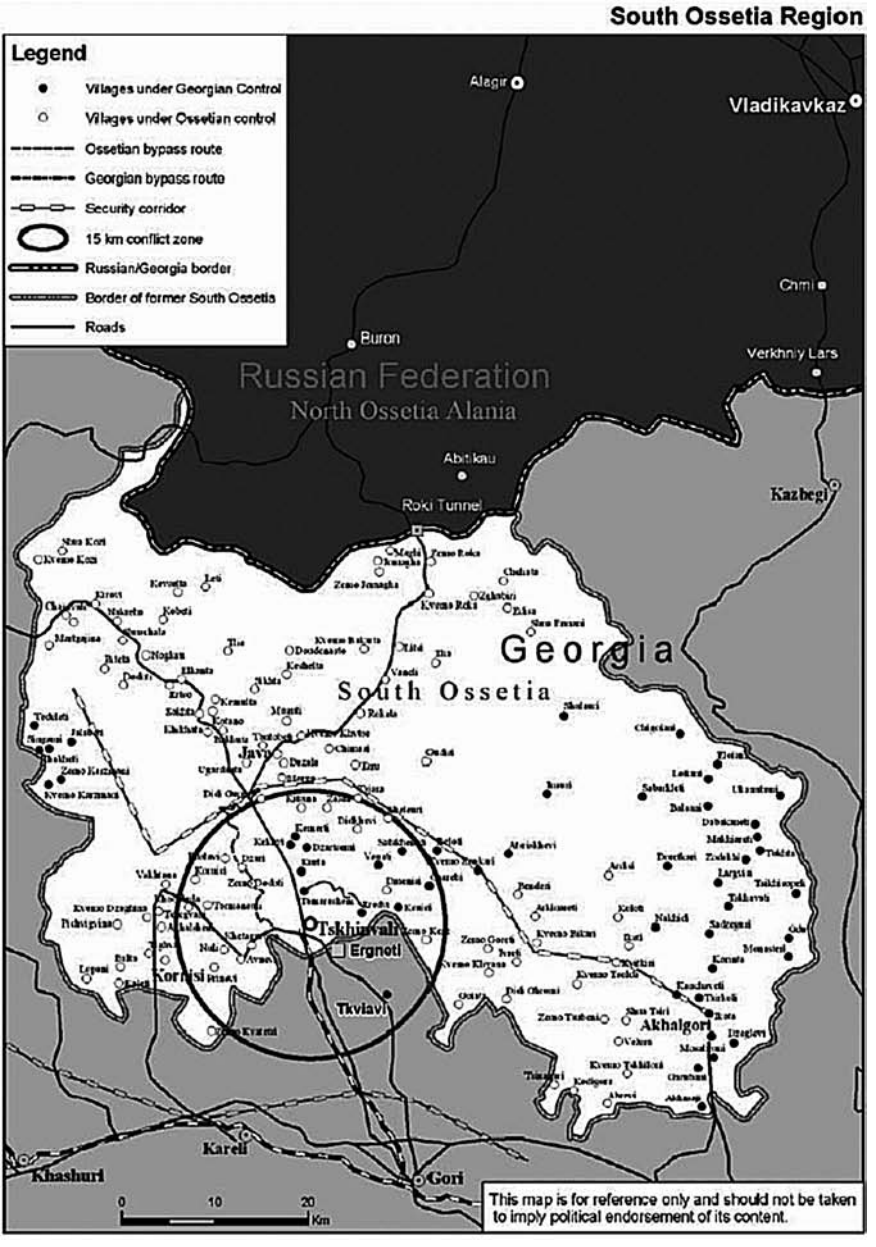

Figure 9.2 Map of South Ossetia

Figure 9.3 Map of Abkhazia

Ossetians have always experienced hostile relations with Georgia. As early as 1918–1920, a series of Ossetian rebellions took place, during which Ossetians claimed independence from Georgia. These uprisings were crushed by Georgian National Guards and army units.[6] During the Soviet rule of Georgia, Georgians and Ossetians lived relatively peacefully, with a high level of interaction and intermarriages occurring between the two ethnic groups. Tensions in the region began to rise in the late 1980s, amid the rising nationalism among both Georgians and Ossetians, facilitated by the impending collapse of the Soviet Union.[7] On September 20, 1990, Ossetians proclaimed South Ossetia as the South Ossetian Democratic Republic, a fully sovereign entity within the Soviet Union.[8] In response, Georgia abolished South Ossetia's autonomous status altogether in December 1990.[9] Violent conflict broke out at the end of 1990, and Russian and Georgian troops were dispatched to South Ossetia, resulting in violence and a brutal war characterized by a general disregard for international humanitarian law rules.

Thousands of ethnic Ossetians and Georgians fled the region.[10] In 1992 Georgia accepted a ceasefire in order to avoid a difficult confrontation with Russia. Under the terms of this peace agreement, Georgia and the separatist government of South Ossetia pledged not to use force against each other; Georgia also promised not to impose sanctions on South Ossetia, but it retained control over significant portions of South Ossetia.[11] A peace-keeping force

consisting of Ossetians, Russians, and Georgians was established, and the Organization for Security and Cooperation in Europe ("OSCE") set up a mission in Georgia to monitor this peace-keeping operation.[12]

From 1992 until 2004 South Ossetia was relatively peaceful, but tensions started escalating again when Georgian authorities began strengthening their efforts to bring South Ossetia under the Tbilisi rule. Georgia thus established an alternative pro-Georgian government for South Ossetia in Tbilisi; Georgia also dispatched police forces to South Ossetia to close down a large black market complex.[13] Violence erupted over the summer of 2004, involving shootouts, hostage taking, and occasional bombings among Georgian troops, South Ossetian militia, freelance fighters from Russia, as well as peace-keepers. A ceasefire agreement was reached in August 2004.[14]

After 2004 Georgia began to protest against the increasing Russian economic and political presence in South Ossetia. Georgians also considered the existing peace-keeping force to be non-neutral; this view was supported by the United States as well as by the European Union South Caucasus envoy Peter Semneby, who stated that "Russia's actions in the Georgia spy row have damaged its credibility as a neutral peace-keeper in the EU's Black Sea neighbourhood."[15] Russian support for South Ossetia has become more obvious over the years, as the Russian ruble became the de facto currency in Ossetia and as Russia began issuing Russian passports to ethnic Ossetians.[16] Ultimately, violence escalated again in the summer of 2008, resulting in a brief, albeit serious, war among Ossetians, Georgians, and Russians.

Abkhazia

Abkhazia flourished as an independent kingdom in the 9th and 10th centuries. Subsequently, Abkhazia was unified as part of the Georgian monarchy, and then came within Ottoman dominance and control starting in the 1570s.[17] During the Ottoman rule, the majority of Abkhazians converted to Islam.[18] Throughout the 19th century, the rulers of Abkhazia shifted back and forth across the religious divide between the Russians and the Ottomans, both vying for the dominant influence in this Caucasus region. In 1864 Abkhazia was absorbed into the Russian Empire as a special military province; large numbers of Muslim Abkhazians emigrated to the Ottoman Empire at this time.[19] After the 1917 Russian Revolution, Georgia enjoyed a brief period of independence, but, in 1821, the Bolshevik Red Army invaded Georgia and Abkhazia was made a Socialist Soviet Republic, with the ambiguous status of a treaty republic associated with the Socialist Soviet Republic of Georgia.[20] In 1931 Stalin made Abkhazia an autonomous republic within Georgia.[21] Under Soviet rule, Abkhazians enjoyed limited autonomy, but Abkhaz schools were closed and many Russians and Armenians were encouraged to move into Abkhazia.[22] The Abkhaz were given a greater role in the governance of their province after Stalin's death, and the region remained relatively stable until the late 1980s and the disintegration of the Soviet Union.

In the late 1980s ethnic tensions escalated between the Abkhaz and Georgians amid rising nationalism on both sides. Many Abkhaz feared that an independent Georgia would abolish their autonomy and argued for the establishment of an independent Abkhazia within the Soviet Union. After Georgia declared independence in 1991, a power-sharing agreement was reached between the Georgian and Abkhaz leadership, and the situation remained relatively calm.[23] After a change in the Georgian leadership in 1992, the Abkhaz declared independence from Georgia and launched a campaign of ousting Georgian officials from Abkhazia. In response, Georgia sent troops into Abkhazia in August 1992. Georgian troops engaged in ethnically based looting, assault, and murder and Abkhazian forces were forced to retreat.[24] Throughout this war, Georgians accused Russia of providing covert military support to the Abkhaz rebels. In 1993 better armed and trained Abkhaz forces expelled Georgian forces from the Abkhaz capital, Sukhumi. Abkhaz militants then proceeded to commit numerous atrocities against remaining ethnic Georgians; the mass killings and destruction lasted for two weeks and left thousands dead. Most other ethnic Georgians fled the region, escaping the Abkhaz-imposed ethnic cleansing. Human rights organizations, such as Human Rights Watch, reported gross human rights violations on both the Georgian and Abkhaz sides during this war, and the overall human rights situation in Abkhazia has remained precarious.[25] For example, thousands of ethnically Georgian refugees have been moving out and into Abkhazia throughout the past decade.[26] Moreover, Georgian officials have accused Russian peacekeepers, present in Abkhazia since the war, of inciting violence by supplying Abkhaz rebels with arms and financial support. As in the case of South Ossetia, Russian support for Abkhazia has become more obvious when the Russian ruble became the de facto currency of Abkhazia, and Russia began issuing passports to local Abkhazians.[27]

South Ossetian and Abkhazian War of 2008

In August 2008 Georgian armed forces pushed into South Ossetia, claiming that South Ossetians had fired at them first. This claim by the Georgians remains heavily disputed, and it is unclear who started the August 2008 war. As one scholar has noted, "[t]he facts are shrouded by the fog of war and contradictory claims."[28] Russia quickly became involved in this conflict. It accused Georgia of genocide, claiming that thousands of South Ossetian civilians were killed by the Georgian troops. In response, Russia sent troops into South Ossetia and launched air strikes on Georgian territory. After a few days of heavy fighting Georgian troops were ejected from South Ossetia.[29] Meanwhile, the Russian military troops stationed in Abkhazia began marching into Georgia; this advance was accompanied by reports of widespread looting, burning, and killing of civilians by Ossetian militia.[30] On August 12 the Russian president ordered a halt to Russian military operations in Georgia, and a peace plan was brokered by the European Union, which Russia,

Georgia, as well as the South Ossetian and Abkhazian separatist leaders signed and endorsed.[31]

Yet, Russia has refused to withdraw its military troops from Georgia. Russia has also signaled no intention to end its military presence in the disputed Georgian regions of Abkhazia and South Ossetia.[32] In fact on August 25, 2008, Russia recognized these as independent states. As will be discussed later, a small number of other states chose to follow Russia's lead and to recognize South Ossetia and Abkhazia as sovereign states.[33] Russia now says that its troops stationed in Abkhazia and South Ossetia are guests of the newly born nations, and their status is not regulated by this peace plan.[34] To amplify this argument, the government of Abkhazia signed a series of controversial agreements with Russia, which leased or sold a number of key state assets to Russia and which relinquished border control of Abkhazia to Russia. The Abkhaz parliament also authorized the construction of a Russian military base in Abkhazia in 2009.[35]

The status of South Ossetia is currently being negotiated between the central government of Georgia and the Russian-supported separatist government of South Ossetia. Recently these negotiations have broken down in light of Russia's decision to reinforce the region militarily and give Russian passports to South Ossetians.[36] The government of Georgia has expressed that it views these moves as attempts by Russia to annex the region effectively. The European Union, Council of Europe, NATO and most other United Nations member states do not recognize South Ossetia as an independent state.[37] South Ossetians held a second independence referendum in 2006, in which a majority of Ossetians voted for independence. Despite the fact that referendum was monitored by numerous international observers and other countries, it was not recognized internationally because of the lack of ethnic Georgian participation and the lack of its recognition by the Georgian government in Tbilisi.[38] The European Union, OSCE and NATO condemned referendum. After Russia recognized South Ossetia as an independent state in 2009, a small number of other states followed suit. Nicaragua, Venezuela, Nauru, and Tuvalu have all also recognized South Ossetia as a sovereign state.[39] Most Western states condemned the act of recognition, because of its alleged violation of Georgia's territorial integrity.[40] The Western response to the situation has been mild, however, as most Western states did not wish to alienate and isolate Russia.[41] In the summer of 2008 information surfaced that South Ossetia would be absorbed into Russia, so that South and North Ossetians could live together in one unified Russian state.[42] This information was later disputed by the South Ossetian president, Eduard Kokoity, who stated as follows: "We are not going to say no to our independence, which has been achieved at the expense of many lives; South Ossetia has no plans to join Russia."[43] As of today, the status of South Ossetia has not been resolved: it is a "partially recognized" state that enjoys de facto independence from Tbilisi. However, any final status for South Ossetia is far from determined, as a relatively large percentage of ethnic Georgians still live in South Ossetia and any attempt at creating an ethnically

pure (and independent) republic of South Ossetia would involve large transfers of the Georgian population.

The international status of Abkhazia is also a work in progress. The Georgian government levels the same criticism against Russian involvement in Abkhazia, which currently remains a province of Georgia, but which operates as a de facto state.[44] In the wake of the 2008 war, as with the case of South Ossetia, Russia recognized Abkhazia as an independent state. Venezuela, Nicaragua, Nauru, the unrecognized republic of Transnitria, and the partially recognized republic of South Ossetia all also recognized the independence of Abkhazia.[45] Russian involvement in Abkhazia, like this great powers' involvement in South Ossetia, has caused concern to Georgians and to other European Union, OSCE, and NATO countries. Russia maintains a strong political and military presence in Abkhazia and has issued Russian passports to thousands of ethnic Abkhaz.[46] Russia has also started work on establishing a naval base in Abkhazia. In response, the OSCE Parliamentary Assembly passed a resolution in 2008 calling on Russia to refrain from maintaining ties with Abkhazia "in any manner that would constitute a challenge to the sovereignty of Georgia."[47]

Most other sovereign nations consider Abkhazia to be an integral part of Georgia. The United Nations Security Council has reaffirmed "the commitment of all member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders."[48] In addition, the United Nations has urged parties to resolve this conflict through negotiation and peaceful and diplomatic dispute settlement, based on autonomy for Abkhazia within the territorial framework of Georgia.[49] The Abkhaz separatist government, however, has rejected this approach and considers Abkhazia to be an independent country. In 2006 the People's Assembly of Abkhazia passed a resolution calling for the international community to recognize Abkhaz independence, based on the fact that Abkhazia possesses all the characteristics of a sovereign state.[50] As in South Ossetia, the population of Abkhazia is ethnically diverse, with ethnic Abkhaz representing the majority of this republic's population, but with some percentage of ethnic Georgians, Armenians, and Russians also present.[51] As with South Ossetia, any final status for Abkhazia is far from being negotiated.

The legal case for self-determination in South Ossetia and Abkhazia

Do ethnic South Ossetians and Abkhaz qualify for self-determination under international law? As in previous chapters addressing the cases of East Timor, Kosovo, and Chechnya, this issue will be analyzed in detail later.

The first issue with respect to the legality of self-determination under international law for any group is whether the group constitutes a people.[52] This question can likely be answered in the affirmative for both the South Ossetians and the Abkhaz. The South Ossetians and the Abkhaz satisfy the subjective criteria of peoplehood: both groups feel a sense of self and uniqueness

and consider themselves distinctly different from their official rulers.[53] Both the South Ossetians and the Abkhaz have expressed resistance to Ottoman influences and to Russian domination, as evidenced in various rebellions throughout history. Both groups have also resisted Georgian rule, and have, in the wake of the Russian Revolution, when Georgia briefly attained independence, rebelled against Georgian leadership.[54] This kind of attitude, while severely repressed during the Soviet era, has persisted and re-emerged in the late 1980s and early 1990s, when the Soviet Union crumbled and when these two groups resumed their fight for independence from Georgia. And, despite their internationally unresolved status, both republics consider themselves independent and reject any United Nations' sponsored peace plans that involve the preservation of Georgian territorial integrity over South Ossetian and Abkhazian statehood.[55] Moreover, the South Ossetians and the Abkhaz satisfy the objective criteria of peoplehood: both groups are ethnically distinct and have common cultural, linguistic, and possibly religious traits that distinguish them from their mother states (Russia and Georgia).[56] Similarly to the East Timorese, the Kosovar Albanians, and the Chechens, it can be safely argued that South Ossetians and the Abkhaz are peoples for the purposes of self-determination.

The next issue with respect to the legality of self-determination for the South Ossetians and the Abkhaz is what paradigm of self-determination applies in these cases: the colonial one, similar to the case of East Timor, or the non-colonial one, present in the cases of Kosovo and Chechnya. As South Ossetia and Abkhazia were never colonized but rather existed as autonomous districts or provinces within Georgia and the former Soviet Union, the non-colonial paradigm of self-determination applies.[57] Thus, it is necessary to distinguish between internal and external self-determination. First, the South Ossetians and the Abkhaz enjoy rights to internal self-determination under international law, because they are peoples existing officially within larger mother states. During the Soviet era, South Ossetia and Akbhazia enjoyed relative autonomy within Georgia.[58] However, both provinces were subject to a strong central Soviet rule, and any dissent was harshly repressed. It is questionable whether the South Ossetians and the Abkhaz were able to exercise meaningful internal self-determination rights during the non-democratic Soviet era. Similarly, in the wake of the Soviet dismantlement and the independence of Georgia, it is uncertain whether any autonomy for South Ossetians and the Akhaz would persist, or whether it would be stripped away by a more nationalist Georgian government.

Georgia has insisted on the preservation of its territorial integrity, and has offered to negotiate with South Ossetia and Abkhazia in order to grant them autonomy from the central Georgian government. For example, in 2007, Georgia created the Provisional Administrative Entity of South Ossetia, intending that this provisional administration would negotiate with the Georgian authorities over the final status of the province.[59] Later that year Georgia set up a state commission to develop a proposal for South Ossetia's

autonomous status within the Georgian state.[60] Moreover, in 2008, Georgian President Mikheil Saakashvili offered a new autonomy structure to Abkhazia: a broad concept of autonomy within the Georgian state, a joint free economic zone, as well as representation in the central government including the post of vice-president.[61]

It is debatable whether the Georgian promise of autonomy for South Ossetia and Abkhazia is trustworthy. It should be noted that in the wake of the August 2008 Georgian War, President Saakashvili signed into legislation law on the occupied territories passed by the Georgian parliament.[62] The law covers the breakaway regions of South Ossetia and Abkhazia and dictates restrictions on free movement and economic activity in the territories. The law bans air, sea, and railway communications and international transit through these regions and concludes that de facto state agencies and officials operating in these breakaway regions are illegal. The law stipulates that it will remain in force until the "full restoration" of Georgian jurisdiction over the breakaway regions.[63] In light of this law on occupation, it is questionable whether Georgia is truly prepared to respect South Ossetian and Abkhaz internal self-determination rights. It is possible that such rights would be restored if Georgia managed to reacquire control over the breakaway regions, but it is also plausible that Georgian authorities would maintain tight control over the separatists and would never properly grant them any meaningful autonomy.

Thus, in many respects the South Ossetian and Abkhaz cases are similar to that of Kosovo. Kosovar Albanians enjoyed relative autonomy within Serbia under the communist Yugoslav structure. When the former Yugoslavia dissolved and the Serbian government adopted a stronger nationalist stance, tensions and eventually war broke out between Serbia and Kosovo. Serbia maintained its position that Kosovo was an integral part of its territory and ultimately offered autonomy to Albanian Kosovars within a Serbian mother state.[64] Similarly, South Ossetians and Abkhazians enjoyed relative autonomy within Georgia under the communist Soviet Union. When the Soviet Union crumbled and Georgia became an independent state, Georgian leadership adopted more nationalistic policies and war and violence broke out in South Ossetia and Abkhazia. Georgia maintains that the territory of these provinces is Georgian, but has offered autonomy in exchange for peace and the preservation of Georgian territorial borders.[65] As in the case of Kosovo, it is uncertain whether Georgia would respect its promise of true autonomy for the South Ossetians and the Abkhaz. Thus, as in Kosovo, the case for external self-determination, premised on a failure of the exercise of internal self-determination, depends on the meaningfulness of the central government's promise for autonomy. If it can be concluded that South Ossetians and the Abkhaz will enjoy true rights to internal self-determination, then their case for external self-determination is foreclosed, under the relevant international law principles. If, however, it is concluded that Georgia will never meaningfully respect South Ossetian and Abkhaz rights to internal self-determination, then it should also be concluded that these two provinces qualify for external self-determination,

ultimately leading toward remedial secession. The Russian, South Ossetian, and Abkhaz leaderships have all turned to the Kosovo precedent to demand external self-determination and independence for the two provinces. Following Kosovo's Unilateral Declaration of Independence, the Russian parliament issued a joint statement reading: "Now that the situation in Kosovo has become an international precedent, Russia should take into account the Kosovo scenario . . . when considering ongoing territorial conflicts."[66] And the South Ossetian leader directly complained that his country had a better legal case for independence than Kosovo, stating that "[w]e have more political-legal grounds than Kosovo to have our independence recognized."[67]

Why have international solutions been so different for Kosovo than for South Ossetia and Akbhazia? In other words, why has the international community supported independence for Kosovo, while failing to extend the same level of support to South Ossetia and Abkhazia? The answer lies in the great powers' rule and its application to the conflicts in the Caucasus.

South Ossetia and Abkhazia and the great powers' rule

Most of the Western great powers have expressed their support of Georgia and have refused to recognize the independence plight of South Ossetia and Abkhazia. Even Russia, although it officially supports such independence, is rumored to in fact want to annex these two regions.[68] Thus, South Ossetia and Abkhazia illustrate examples of unsuccessful self-determination struggles, in which a people is unsupported by the great powers and is thus unable to achieve independence.

First, most great powers are often unwilling to offend or alienate another great power. In the case of South Ossetia and Abkhazia, the conflict has pitted Western great powers, supportive of Georgia, which they view as a potential NATO ally in the Caucasus, and Russia, highly skeptical of any Western influence in the Black Sea and consequently the Caucasus, and thus supportive of South Ossetia and Abkhazia. It is unclear if Russia truly supports independence for the two provinces, or if it wants them reabsorbed into the territory of Russia, at the expense of Georgian borders. This kind of opposition among the great powers may prevent South Ossetia and Abkhazia from achieving negotiated statehood any time in the near future. This situation is reminiscent of East Timor and its position of oppression within Indonesia during the Cold War. As discussed in Chapter 6, the western great powers supported Indonesia, which they considered a potent ally in Southeast Asia, and thus tolerated oppression of the East Timorese people and never expressed any meaningful support for East Timorese independence, until the end of the Cold War.[69] This situation is also similar to the case of Chechnya in other respects. Chechens may never gain independence because of the Western great powers' unwillingness to alienate Russia, the Chechen official ruler.[70] Similarly, the Western great powers may refrain from any meaningful intervention in South Ossetia and Abkhazia, because of the potential to upset Russia, which harbors strong

interest in this region. Finally, the situation, while factually similar to the case of Kosovo, is politically distinct. Kosovo sought independence from a small, politically disfavored country: Serbia. Thus, most great powers were willing to support Kosovo in its quest for independence. While Russia supported Serbia and vetoed United Nations Security Council involvement in the region, it did not have such strong geopolitical interest in preserving Serbian territorial integrity and thus did not forcefully oppose NATO intervention in Serbia. The Western great powers probably gauged that Russian opposition to the NATO intervention would be relatively minor, and that the said NATO intervention would not cause tremendous friction in the great powers' equilibrium of influences across the globe. Similarly, in the case of Kosovo, Western great powers provided administrative, logistical, financial, and political support to Kosovar Albanians. Russia, although opposed to military intervention in Kosovo, did not strongly oppose such other modes of involvement and capacity building in this region. It is very likely that Russia would strongly oppose any sort of intervention by the West in South Ossetia and Akhazia, and it is very likely that Western great powers never attempted any such kind of intervention because of the likelihood of Russia opposition. Russia remains a super-sovereign great power on the world arena, and no other great powers have dared to alienate Russia through intervention in Russian-dominated areas. Consequently, South Ossetia and Akbhazia have remained shielded from external influence, and unable to exercise external self-determination rights leading toward secession. Thus, the interplay of great powers' politics and their rule has dictated different outcomes for South Ossetia and Abkhazia; as it did for Kosovo.

Second, because of the great powers' rule, the international community's involvement in Kosovo has been radically different from its involvement in the Caucasus, despite the factual similarity existing between these cases. In the case of Kosovo, as detailed in Chapter 7, the international community became involved in military, political, strategic, and logistical manners, helping the Kosovar Albanians build their state.[71] Thus, the international community intervened militarily to prevent Milosevic's forces from forcibly bringing Kosovo back within Serbia. The international community provided help with institution-building in war-torn Kosovo, with the development of education and infrastructure, as well as with the training of professionals necessary for the functioning of any viable society. All these efforts presupposed that Kosovo would soon become independent, and worked toward preparing Kosovar Albanians for the exercise of such independence. Even the Kosovar Unilateral Declaration of Independence reads like an international document, prepared by UN technocrats on advice from diplomats and lawyers. In South Ossetia and Akbhazia, contrariwise, the international community has been involved in a peace-keeping and peace-brokering capacity, but has never engaged in true statehood-building operations.

In South Ossetia, the OSCE has been involved in brokering a peace agreement between the Georgian and Ossetian leadership. Moreover, the ceasefire agreement that ended the 2008 war in South Ossetia had been brokered by the

European Union and the French President, Nicolas Sarkozy.[72] Similarly, the international community has been involved in a limited role in Abkhazia. For example, the United Nations established an observer mission in Abkhazia (the United Miss); the United Nations has also been involved in Akbhazia through an international humanitarian and international human rights role.[73] The position of the United Nations vis-à-vis Akbhazia has always been unfavorable in terms of Abkhaz independence: the United Nations has maintained that there should be no forcible change in borders, that any change in international borders should be obtained through peace, negotiations, and diplomacy, and that any Georgian intervention in Abkhazia is legitimate because Georgia has the sovereign right to intervene in an internal matter.[74] The OSCE has also engaged in dialogue with representatives from Abkhazia and has been concerned with ethnic human rights violations in this troubled province.[75] And some human rights NGOs, such as France-based Premiere-Urgence, have been engaged in economic revival and rehabilitation programs to support the vulnerable Abkhaz population.[76]

Because of such limited aid from the international community, neither the South Ossetians nor the Abkhaz have been able to build strong democratic institutions, to revitalize the economy of their war-torn regions, or to establish enough global support for their statehood. Essentially, the international community has been uninterested in supporting South Ossetia and Abkhazia in their quest for independence because of the great powers' rule—a precarious geopolitical equilibrium that has frozen conflicts in the Caucasus for two decades, preventing the application of international law norms toward the resolution of these conflicts. Unlike the cases of East Timor and Kosovo and similarly to the case of Chechnya, the great powers' rule has worked against the rule of international law in South Ossetia and Abkhazia, where the applicability of self-determination norms could have arguably led toward remedial secession.

Finally, it is interesting to note how the great powers have used the international law rhetoric to support or deny independence for the peoples of Kosovo, South Ossetia, and Abkhazia.[77] It seems that the United States and its Western great power allies have relied on international law to deny the existence of a self-determination remedy for the South Ossetians and the Abkhaz. Thus, the Western great powers have defended Georgian territorial integrity and sovereignty and reiterated the need for negotiated solutions, thereby denying the South Ossetian and Abkhaz forcible claims for independence.[78] However, in the case of Kosovo, Western great powers have not used any such arguments to support the right of secession for the Kosovar Albanians. Rather, these great powers claimed that Kosovo was *sui generis* and that, because of its unique circumstances, it deserved independence.[79] As one scholar has already noted, "the US seems to try to duck the issue of legality when the law does not suit its purposes."[80] This dichotomy between the position of the great powers vis-à-vis the Caucasus, where they relied on international law to argue that South Ossetia and Abkhazia did not have the right to secede from Georgia, and vis-à-vis Kosovo, where the same great powers bypassed international law reliance

altogether to claim uniqueness as justification for the Kosovar secession, exemplifies the notion of the great powers' rule. The great powers' rule is not about the law, it is about politics and the geostrategic interests of these potent countries. In some instances, the great powers' rule coincides with the result that should have been dictated by international law (for example, as in East Timor), but in other instances, the great powers' rule circumvents international law completely and dictates starkly different results (as in the cases of Kosovo and Georgia).[81]

The most relevant observation about the great powers' rule in the context of attempted secessions is that the great powers' support, or lack thereof, for a secessionist movement, plays a crucial role with respect to recognition. If the great powers are willing to recognize a secessionist entity as a state, this will likely speed up other recognitions, for example, because most great powers, except for Russia, have supported Kosovo, Kosovo has been recognized by a relatively large number of countries and may be closer to a model of a successful secession, simply because many states are willing to treat it as a sovereign partner, and thus many more states may become willing to do so in the future. Reversing the process—that is, unrecognizing Kosovo—may become politically impossible. In contrast, secessionist movements that have not garnered the support of the majority of the great powers, such as Chechnya, South Ossetia, and Abkhazia, "may control territory, but they are political pariahs."[82] In other words, if these secessionist entities are unable to obtain recognition by some key number of states, their de facto secession will remain "frozen" and they may never become able to engage in international relations. Thus, the great powers' rule may play a determinative role in the field of recognition, and may ultimately prevent secessionist movements from attaining statehood. Once again, the great powers' rule in this context has nothing to do with the international law of self-determination, but rather, focuses solely on politics and the pursuit of strategic interests.

Notes

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4 *See*, for example, David Marshall Lang, *A Modern History of Georgia*, Weidenfeld & Nicolson, 1962; *see also* International Crisis Group Europe Report 159 (2004), Georgia: Avoiding War in South Ossetia. Available at: http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019224.pdf (accessed Apr. 7, 2012).
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22 *See*, for example, G. Hewitt, *The Akbhazians: A Handbook*, Curzon Press, 1999, p. 96.
23 B. Coppieters and R. Legvold, *Statehood and Security: Georgia after the Rose Revolution*, American Academy of Arts and Sciences, 2005, p. 384.
24 S.E. Cornell, *Small Nations and Great Powers: A Study of Ethnopolitical Conflict in the Caucasus*, Curzon Press, 2001, pp. 345–349 (describing the escalating tensions in 1992 in South Ossetia).
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26 For a more detailed accounting of the refugee situation in Abkhazia, *see* UN High Commissioner for Refugees (2004) Background Note on the Protection of Asylum Seekers and Refugees in Georgia remaining outside Georgia. Available at: www.unhcr.org/refworld/pdfid/43a6878d4.pdf (accessed Apr. 7, 2012).
27 BBC News, op. cit.
28 Borgen, op. cit., p. 5. For a description of what allegedly happened to provoke the 2008 war in Georgia, see C.J. Chivers and E. Barry, "Accounts Undercut Claims by Georgia on Russia War," *New York Times*, Nov. 7, 2008, A1.
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30 *See*, for example, Council of the European Union, Indep. Int'l Fact-finding Mission on the Conflict in Geor. (2009) Available at: www.ceiig.ch (accessed Apr. 7, 2012) (detailing the list of offenses committed by the South Ossetian troops and militias).
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33 G.L. White and J.W. Miller, "Russia Raises Ante on Separatist Georgia Regions," *Wall Street Journal*, Aug. 26, 2008, A9; Council of the EU, op. cit. (explaining that this assertion by Russia greatly hinders the possibility of resolution). Nicaragua and Venezuela have also recognized South Ossetia and Abkhazia. *See* G. Dubinksy, "The Exceptions That Disprove the Rule? The Impact of Abkhazia and South Ossetia on Exceptions to the Sovereignty Principle," *Yale Journal of International Law*, 2009, Vol. 34, 241. Small Pacific island nations of Nauru and Tuvalu have recognized South Ossetia as an independent state. Nauru, Vanuatu, and Tuvalu have also recognized Abkhazia. RIA Novosti (2011) Pacific Island Recognized Abkhazia's Independence. Available at: http://en.ria.ru/world/20110531/164348947.html (accessed Apr. 7, 2012); Information Telegraph Agency of Russia, Vanuatu Recognizes Independent Abkhazia Minister. Available at: www.itar-tass.com/en/ c154/154842.html (accessed Apr. 7, 2012); RIAN (2011) Tuvalu Becomes Sixth State to Recognize Abkhazia. Available at: http://en.rian.ru/world/20110923/167060636.html (accessed Apr. 7, 2012).

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38 N. Mchedlishvili (2006) Georgian Rebel Region to Vote on Independence. Reuters. Available online: www.kurdishglobe.net/display-article.html?id=D24CB8C311CE6D3ABA82D1C52E948435 (accessed Apr. 7, 2012); Civil Georgia (2006) S. Ossetia Sets Repeat Independence Referendum. Available at: www.civil.ge/eng/article.php?id=13522 (accessed Apr. 7, 2012); Regnum (2006) 99% of South Ossetian Voters Approve Independence. Available at: www.regnum.ru/english/737823.html (accessed Apr. 7, 2006).

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42 T. Halpin (2008) "Kremlin Announces that South Ossetia Will Join 'One United Russian State'," *The Times*. Available at: http://georgiandaily.com/index.php?option=com_content&task=view&id=6948&Itemid=65 (accessed Apr. 7, 2012).

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47 Ibid.

48 UN Security Council Resolution 1808, Apr. 15, 2008. Available at: www.un.org/News/Press/docs/ 2008/sc9299.doc.htm> (accessed Apr. 7, 2012).
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52 For a discussion of the theory of self-determination, *see* Chapter 3.
53 *See* first two sections of this chapter for a detailed discussion of the history of the South Ossetian and Abkhaz "peoples."
54 Ibid.
55 Ibid.
56 *See*, for example, Borgen, op. cit., p. 4 (noting that South Ossetians are ethnically distinct from Georgians and "have comprised a semi-autonomous community within Georgia for seven hundred years"). For a discussion of the Abkhaz and their ethnic uniqueness vis-à-vis the Russians and the Georgians, *see*, for example, D. Levinson, *Ethnic Groups Worldwide: A Ready Reference Handbook*, Oryx Press, 1998, p. 34 (noting that the Abkhaz make up 2% of Georgia's population, and a significant Abkhaz population in Russia "that was established in the late 1800s after an Abkhaz revolt against Russian rule in Georgia failed and the Abkhaz were forced to flee." Further noting that the Abkhaz have been in the region for potentially 6000 years and various tribes combined to form a "distinct Abkhaz ethnic group.")
57 For a discussion of the different paradigms of self-determination, *see* Chapter 1. For a discussion of self-determination in the context of East Timor, Kosovo, and Chechnya, *see* Chapters 6, 7, and 8 respectively.
58 *See* first two sections of this chapter.
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61 Civil Georgia (2008) Saakashvili Outlines Tbilisi's Abkhaz Initiatives. Available at: www.civil.ge/eng/ article.php?id=17473 (accessed Apr. 7, 2012)
62 Civil Georgia (2008) Bill on Occupied Territories Signed into Law. Available at: www.civil.ge/eng/ article.php?id=19868&search (accessed Apr. 7, 2012).
63 Ibid.
64 For a discussion of Kosovo, *see* Chapter 7.
65 *See* first two sections of this chapter.
66 UNOMIG (2008) Recognition May Come "This Year," South Ossetia's Leader Says, Report. Available at: www.unomig.org/media/headlines/?id=10173&y=2008&m=02&d=21 (accessed Apr. 7, 2012).

67 CNN (2008) Bush Warns Moscow Over Breakaway Autonomy. Available at: www.cnn.com/2008/WORLD/europe/08/25/russia.vote/index.html (accessed Apr. 7, 2012).
68 Erlanger, op. cit.
69 *See* Chapter 6.
70 *See* Chapter 8.
71 *See* Chapter 7.
72 *See*, for example, Kramer, op. cit.
73 For a description of UNOMIG, *see* United Nations Observer Mission in Georgia (2009) Georgia-UNOMIG-Background. Available at: www.un.org/en/peacekeeping/missions/past/unomig/background.html (accessed Apr. 7, 2012).
74 Ibid. (noting that UN bodies recognize "the need for a peaceful settlement of the conflict in the framework of the relevant Security Council resolutions, and [have] reaffirmed their commitment to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders").
75 The OSCE has passed resolutions on the gravity of the situation in Abkhazia at the 1994 Budapest Summit and at the 1996 Lisbon Summit. Resolution of the OSCE Budapest Summit, Dec. 6, 1994; Resolution of the OSCE Lisbon Summit, Dec. 2–3, 1996.
76 Premiere-Urgence NGO, France. Available at: www.pu-ami.org/ (accessed Apr. 7, 2012).
77 For an excellent comparison of Kosovo and South Ossetia and the role of the great powers, *see* Borgen, op. cit.
78 Ibid., p. 17.
79 For example, US Secretary of State Condoleezza Rice explained that "[t]he unusual combination of factors found in the Kosovo situation . . . are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today." U.S. Department of State (2008) Rice Statement on Recognition of Kosovo as Independent State. Available at: www.america.gov/st/texttrans-english/2008/ February/20080218150254bpuh5.512637e-02.html (accessed Apr. 7, 2012).
80 Borgen, op. cit., p. 25.
81 The only great power that has consistently relied on international law to argue against the Kosovar independence but to argue in favor of the South Ossetian and Abkhaz independence is Russia. Russia argued against the Kosovar independence because such Kosovar secession would be a "subversion of all the foundations of international law." P. Reynolds (2008) Legal Furore over Kosovo Recognition, BBC News. Available at: http://news.bbc.co.uk/2/ hi/europe/7244538.stm (accessed Apr. 7, 2012). Russia also argued for the legality of its use of force against Georgia, based on international law, self-defense, and the need to protect Russian citizens in South Ossetia and Abkhazia. Borgen, op. cit., p. 17. Russia has also argued, with respect to South Ossetia, that "sovereignty is based on the will of the people" and that "territorial integrity can be demonstrated by the actual facts on the ground." CNN (2008) France: Cease-Fire, Not Peace Reached in Georgia. Available at: http://ibnlive.in.com/news/ ceasefire-not-peace-reached-in-georgia-sarkozy/71039-2.html (accessed Apr. 7, 2012). Russia seemingly intended to construct the argument that South Ossetians had the right to external self-determination because of abuses that they had suffered at the hands of the Georgian

authorities on the ground. Thus, Russia has been the lone great power whose reliance on international law has been consistent. However, even in the case of Russia, one could wonder about its seemingly contradictory position of opposition to the Kosovar secession and support for the South Ossetian and Abkhaz secession. This contradictory attitude can only be explained by the great powers' rule, which has shaped Russian foreign policy decisions, despite Russian official statements of reliance on international law. As Christopher Borgen has written, "russia actually increased its use of the language of international law as a way to frame its foreign policy and organize support among its regional neighbors and other like-minded states." Thus, according to Borgen, Russia has increasingly relied on international law rhetoric because of its "increasingly skeptical . . . cooperation with the West." Borgen, op. cit., p. 27. Borgen seems to imply that Russian reliance on international law has little to do with Russia's profound belief in the rule of international law, but that rather, Russia sees such reliance as beneficial in its opposition to the foreign policy of the Western great powers.

82 Borgen, op. cit., p. 27.

10 South Sudan

This chapter will examine the most recent case of secession in the 21st century: South Sudan. In January 2011 the majority of the people of South Sudan voted in referendum to separate from their mother state, Sudan. Sudan had been a British colony, and, when it won independence, the territory of South Sudan remained incorporated into the new state of Sudan, pursuant to the principle of *uti possidetis* and the global acceptance of the idea that decolonization entailed the creation of new states pursuant to the existing colonial borders. The secession of South Sudan can be viewed as a delayed exercise of decolonization, if one were to accept the idea that South Sudan should have become independent when the British withdrew from their colonies in Africa. Conversely, South Sudan can be examined as a true case of secession outside the decolonization paradigm, if one were to embrace the premise that the state of Sudan had been legitimately formed at independence, and that South Sudan is now simply separating from its mother state. In order to assess these difficult questions, this chapter will focus first on the history of South Sudan, before addressing the issue of self-determination in the South Sudanese context, and the application of the great powers' rule to this geographic area. As in the case of East Timor, the great powers were instrumental in ensuring that South Sudan remained a part of Sudan, and then, over the last decade, the great powers played a dominant role in paving the South Sudanese way toward independence.

History of South Sudan

Until the 2011 independence referendum, South Sudan had been a part of the larger state of Sudan. The Sudanese borders were drawn in 1884, in the wake of the Berlin Conference, at which European powers divided the African continent among themselves.[1] Sudan thus became a part of the British colonial empire. Sudan's borders, like those of many other African states, were drawn randomly, by European leaders who cared little about the ethnicity, culture, religion, or language of the inhabitants of such newly created states.[2] As a consequence, in Sudan, the newly created borders encompassed predominantly Arab descendants of colonizers in the North, and different ethnic groups of black Africans in the South. The British colonial rule emphasized the

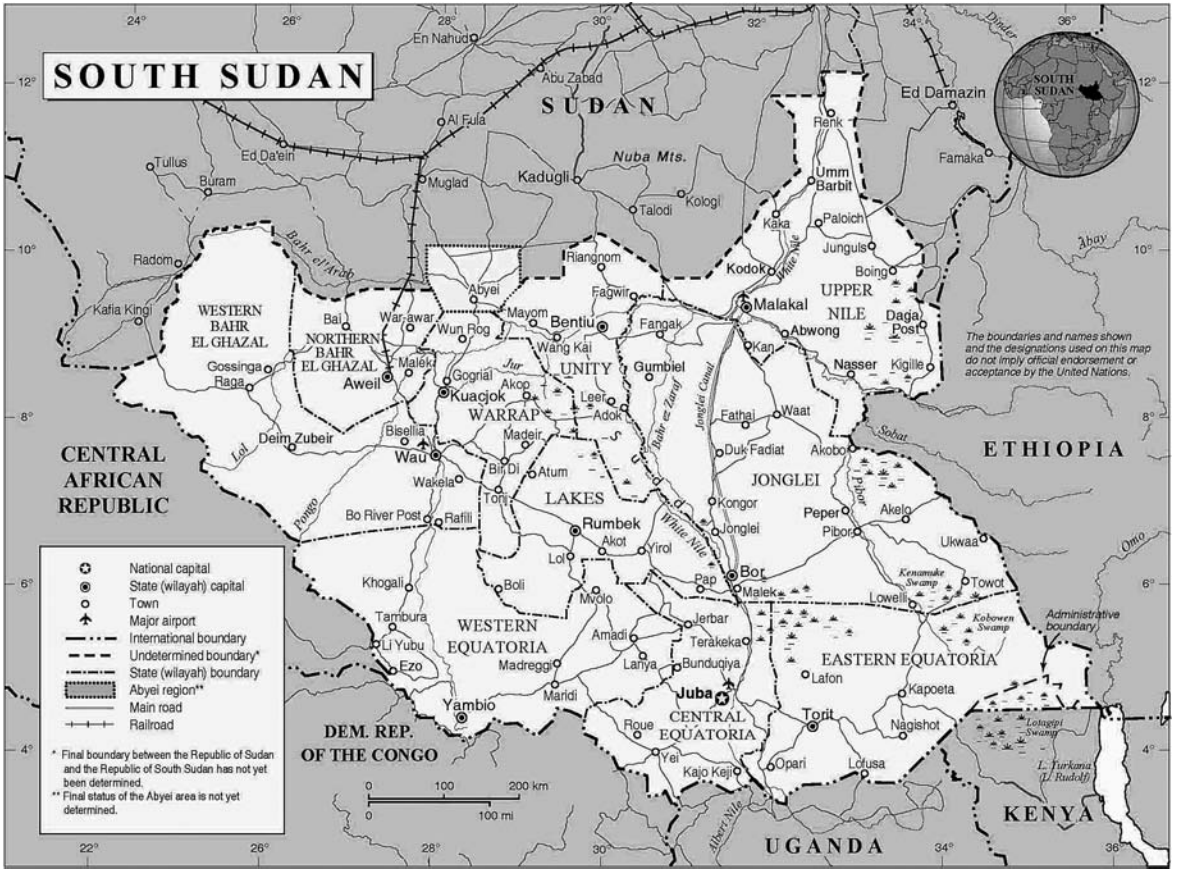

Figure 10.1 Map of South Sudan

North–South divide, and under the British administration, the North "quickly established political and economic domination before beginning a campaign of infrastructure destruction throughout the south."[3] In 1899 the British reached an agreement with Egypt, a neighboring state, which had also laid territorial claims to Sudan. Pursuant to this agreement, Sudan would be run by a governor-general, appointed by Egypt with British consent. While history books may reflect the fact that Sudan was thus administered by both Great Britain and Egypt until its independence, de facto the British continued to rule over Sudan. The British rule administratively split the North and the South of Sudan into two units; moreover, the British enforced separate immigration, trade, and language policies for the two colonized units until after World War II.[4] At the infamous Juba Conference in 1947, British colonizers decided to formally unite the North and the South into a single administrative unit, and the British ensured that South Sudan would not have meaningful representation in the new unified colony of Sudan by hand picking representatives for the South.[5] According to one commentator, the Juba Conference "was convened to inform the chiefs of South Sudan of the irreversible decision to hand over South Sudan to the new colonial masters from North Sudan."[6] According to the same commentator, the British should never have handed South Sudan to North Sudan because this unjust decision created an internal colony (the South) within a unified Sudan.[7] In the wake of the global decolonization movement, Sudan finally won its independence from this double colonization by Great Britain and Egypt in 1956. However from the start of its independence, Sudan was a divided state, between the Muslim north and a black south.[8]

South Sudan fought a first independence war in 1962, a mere six years post-decolonization. This war was one of secession: rebels, who would later name themselves the South Sudan Liberation Movement ("SSLM"), fought the central Sudanese government.[9] When they failed to win independence, they negotiated a degree of autonomy pursuant to the 1972 Addis Ababa Agreement.[10] The Agreement provided for the establishment of a High Executive Council in South Sudan, led by a southern president as well as a southern regional assembly. Moreover, English was recognized as the principal language of the South, with Arabic remaining the official language of the whole state of Sudan.[11] Thus, South Sudanese rebels settled for a form of internal self-determination in 1972, when their claims for external self-determination remained rebuked by Sudan and the rest of the world community. However, the central Sudanese government failed to respect the terms of the 1972 Agreement, and, in 1983, Islamic politics and policies were imposed throughout the entire nation. According to one scholar:

> the denial of democratic values equal justice for all, superimposition of Shari'a [Islamic law] to be the law of the land in 1983; the abrogation of the Addis Ababa Agreement of 1972; the annulment of secular democratic institutions and replacing them with sectarian system based on Islamic percepts have immensely attributed to the continuous paranoia and

> irreversible institutional paralysis in the country and negated any concept of unity in diversity in a united Sudan.[12]

Thus, as early as 1983 the central government of Sudan reneged on its promise to respect internal self-determination rights of the South. This denial of rights resulted in the second civil war, which was in many respects a continuation of the first war.[13] The second civil war resulted in the signing of a Declaration of Principles in 1994; the Declaration was not a ceasefire but rather an expression of the parties' "wish list" of issues on which they desired future negotiations.[14] The second civil war, especially throughout the 1990s, remained an "orphan" of the Cold War and "failed to receive meaningful attention either from within Africa or the international community."[15] The current Sudanese president, General Omar al-Bashir, seized power during the second civil war, through a bloodless coup in 1989.[16] His regime aligned itself with radical Islamists and resulted in a prolonged denial of any meaningful autonomy for the South. Starting in the new century, however, the plight of the South Sudanese began receiving renewed attention by the world community. Al-Bashir thus faced not only persistent rebellion in the South, but also growing pressure on behalf of the international community to respect South Sudanese rights.[17] In 2005, in light of such pressure, Al-Bashir engaged in substantive negotiations with the SSLM, which resulted in the signing of the Comprehensive Peace Agreement ("CPA") and the establishment of the Inter-Governmental Authority on Development.[18] The CPA provided for autonomy in the South, as well as for the holding of referendum for self-determination on January 9, 2011.[19]

Referendum took place between January 9 and 15, 2011; according to official results, more than 99% of the population voted for independence.[20] Those voting allegedly included not just the people of South Sudan, but also expatriates and those living in the North.[21] Pursuant to the referendum results, South Sudan became a new independent state on July 9, 2011.[22] Following the act of independence, South Sudan was admitted into the United Nations as well as several other international organizations; moreover, many states, including al-Bashir-ruled Sudan itself, quickly recognized South Sudan as a new state.[23] Despite official independence, some areas in South Sudan remain disputed, such as the region of Abyei, where a separate referendum will allegedly take place to determine whether this region will remain in South Sudan or if it will join North Sudan.[24] The Nuba Mountains have also been fought over by the Sudanese government and the South. In addition, South Sudan has been plagued by conflict and inter-ethnic war since its independence. The official government of South Sudan is currently at war with at least seven armed groups from nine of its 10 states.[25] In December 2011 tribal clashes in the Jonglei area resulted in violence, death, and the displacement of thousands of individuals.[26] The director of an international aid agency lamented that human rights abuses in South Sudan were "off the Richter scale,"[27] and the Central Intelligence Agency (CIA) has warned that genocide would likely occur in South Sudan within the next five years.[28]

The legal case for self-determination in South Sudan

Many commentators have labeled the South Sudanese separation from Sudan as a case of self-determination, possibly in light of the fact that South Sudanese independence resulted from popular referendum—the most commonly prescribed method of self-determination.[29] This section will analyze the legality of the South Sudanese case for self-determination under relevant international law. While the right to external self-determination has effectively been exercised by the people of South Sudan, it is important to assess the legality thereof, as well as to draw legal conclusions for future secessionist movements.

The first issue regarding self-determination of any group is whether such group constitutes a "people." Thus, are the South Sudanese a people, a "self" for the purposes of self-determination? Do they share common traits, such as language, culture, religion, and ethnicity, and do they believe in such a common belonging? South Sudan constitutes a "heterogeneous political culture," with multiple ethnic groups speaking over 60 different tribal languages coexisting in 10 internal regions or "states."[30] English has been recognized as the official language at the time of independence in 2011.[31] Moreover, some South Sudanese are Christian, having been converted into Christianity by missionaries present throughout the colonial era, while others practice a variety of indigenous religions.[32] Objectively, it would be hard to conclude that the inhabitants of South Sudan constitute a single people. In other words, the "self" seems divided into myriad mini-selves and tribal "selfistans." Subjectively, it is also difficult to conclude that the inhabitants of South Sudan share a common sense of belonging to the same unity. Recent ethnic clashes and warfare have resulted in thousands of deaths and even more internal displacements, with various groups vying over territory, cattle, and other resources.[33] Thus, under a traditional assessment of what constitutes a people, the South Sudanese would fall short of this classification.

A broader view of peoplehood may help the argument that the South Sudanese do constitute a self for the purposes of self-determination. Their "self" may consist of a sentiment of exception from the larger state of Sudan. The South was officially united with the North at the 1947 Juba Conference, where the British colonizers effectively betrayed the interests of the South at the expense of creating a North-dominated colony of Sudan.[34] In 1956, when Sudan gained independence, the principle of *uti possidetis* or respect for colonial borders dictated that South Sudan remain a part of Sudan. The Organization of African Unity, at the 1964 Cairo Conference, recognized this principle: in essence, however unfair or random colonial borders appeared, such borders would remain the guiding principle throughout decolonization.[35] While this position was espoused by African leaders mainly to avoid territorial warfare and chaos during the creation of so many new states, many have recognized that the application of *uti possidetis* has produced unfair and unfortunate results,[36] one of which was the incorporation of South Sudan into a single Sudanese state. Thus, since 1956, the inhabitants of South Sudan have been "internally colonized" and subjugated by their own official leaders.[37] The sentiment of oppression has resulted in two wars for independence fought by South Sudan against

the parent state of Sudan. Since independence, Sudan has been a largely divided state, between the dominant North and the independence-fighting South.

In addition to the fact that South Sudanese "self" may be defined by this sentiment of injustice, oppression, and non-belonging to the larger state of Sudan, it can also be observed that inhabitants of South Sudan are distinct from those of the North in two ways. First, Northern Sudan is inhabited by non-black Arabs, whereas the South is mostly populated by black Africans. Second, Northern Sudanese are Muslim, and have been attempting to impose Islamist policies and even *Shari'a* law on all Sudan.[38] South Sudanese are Christian or animist, and have always resisted the imposition of such Islamist policies. Thus, although the inhabitants of South Sudan belong to different ethnic groups, all are both black Africans and non-Muslim; these two factors effectively distinguish them from the Muslim Arab inhabitants of North Sudan. A commentator has described "unity" in South Sudan as one brought about by choice and through freedom.[39] It may be important to respect such unity, and to recognize it as establishing peoplehood and a legal case for self-determination because of the inherent injustice of the opposite choice. In fact, the other "unity," that of Sudan (encompassing the South as well), is one brought about by force and centuries of colonial domination. Thus, it is possible to argue that the inhabitants of South Sudan constitute a people that deserves the respect of its right to self-determination.

The second issue regarding self-determination focuses on the type of self-determination to which a people may have rights. International law recognizes that all peoples have a right to internal self-determination: a form of autonomy within the mother state, whereby a people's rights to political representation, as well as rights to social, linguistic, and cultural freedoms are guaranteed and respected by that mother state.[40] Did the state of Sudan respect the South Sudanese people's rights to internal self-determination? Most likely it did not, between decolonization in 1956 and the end of the first independence war. The Addis Ababa Agreement of 1972 arguably established meaningful autonomy for South Sudan and guaranteed the respect of internal self-determination rights for its people.[41] However, in 1983, Sudan reneged on this promise and, until 2005, when the CPA was negotiated, the South Sudanese did not enjoy any internal self-determination rights.[42] By 2005 the schism between the Arab North and the African South may have become too profound, and any promise by al-Bashir's regime to grant additional autonomy to the South would have been illusory. It may be argued, therefore, that the people of South Sudan were entitled to external self-determination: the right to separate from their mother state because their rights to internal self-determination had not been respected. According to one commentator, "[i]ndependence for South Sudan was always a no-brainer. Its people were separated from the rest of Sudan by two of the continent's biggest religious and linguistic dividing lines; only the administrative convenience of British colonialists had put them together."[43]

But under international law, South Sudanese independence may not be a "no brainer." First, it is possible (although not probable) that al-Bashir was prepared

to restore the Addis Ababa Agreement and its delegation of autonomy to South Sudan. In order to justly external self-determination, one must conclude that internal self-determination had failed as an option. Thus, we would have to conclude that al-Bashir or his successors would never grant meaningful autonomy to the South, and that the South's rights to internal self-determination would never be respected. The conclusion that external self-determination had accrued as a right to the people of South Sudan thus requires the conclusion that all internal self-determination options had been exhausted. Second, it is important to categorize the case of South Sudan's self-determination as one occurring within the decolonization paradigm, or one occurring outside such parameters. It is possible to argue that South Sudan's exercise of self-determination is a case of delayed decolonization: that South Sudan should have been granted independence at decolonization and should not have been incorporated into the larger state of Sudan. This issue had been debated by the International Court of Justice in the case of East Timor, albeit more indirectly. In the East Timor case, described in Chapter 5, Portugal withdrew from this country as a colonizer but Indonesian forces swept in and forcibly annexed East Timor.[44] After 25 years of Indonesian occupation, the people of East Timor were ultimately allowed to vote for independence in popular referendum. Thus, the case of East Timor stands for the proposition of delayed decolonization—the idea that East Timor should have been decolonized and granted independence back in the 1970s, and that the intervening Indonesian occupation, because it was unlawful, has no legal bearing on the exercise of East Timorese self-determination in the decolonization paradigm. The International Court of Justice discussed the case of East Timor, as described in Chapter 5, but the world court refused to issue any legal pronouncements on the argument of delayed decolonization for the East Timorese.[45] As in the case of East Timor, the people of South Sudan could claim that they were forcefully and unlawfully annexed by a third state (the larger state of Sudan) at decolonization, and that, accordingly, their independence now represents a case of delayed decolonization.

If one concludes that the separation of South Sudan from Sudan represented a case of self-determination through delayed decolonization, the legality of self-determination itself stands on firm ground. International law recognizes the right of colonized peoples to exercise self-determination and to free themselves of external domination or oppression by a colonizing power.[46] However, if one were to conclude that South Sudan seceded from Sudan outside the parameters of decolonization, because Sudan has existed as an independent nation since 1956 and the territory of South Sudan separated itself therefrom decades after Great Britain withdrew as the colonizer, then the case of South Sudan becomes more problematic legally. It is debatable today whether international law recognizes the right of self-determination of peoples outside the decolonization paradigm; such an argument is certainly plausible but doubts persist as to its absolute legality.[47] If South Sudan seceded from Sudan, in the same way as Kosovo seceded from Serbia, then arguments can be raised about the legality of such non-colonial external self-determination.

Third, South Sudanese independence poses serious questions about the intersection of the principles of self-determination and territorial integrity. The case of South Sudan is in this respect similar to that of Western Sahara. In the case of Western Sahara, discussed in Chapter 5, the International Court of Justice concluded that the people of Western Sahara were entitled to self-determination, but the Court stopped short of analyzing territorial claims to this region laid by Morocco and Mauritania.[48] The world court thus never address the issue of self-determination and its possible conflict with territorial claims and the principle of territorial integrity. The case of South Sudan is similar to Western Sahara because, in both instances, the decolonization process took place under the principle of *uti possedetis*, without taking into consideration any territorial claims of the different peoples involved in the process of obtaining independence for themselves. As in the case of Western Sahara, in South Sudan those territorial claims remained present since decolonization, causing a civil war and ultimately resulting in the partition of the state of Sudan. In Western Sahara, currently controlled by Morocco, no such partition has taken place as of today, but talks of popular referendum for the people of Western Sahara have been present over the last decade.[49] Thus, both of these cases raise serious legal issues about how to best reconcile self-determination with the territorial integrity of the mother state, or of another neighboring state which has asserted territorial claims to the self-determination exercising entity.

The best legal argument to justify self-determination of South Sudan requires the acceptance of several assumptions: that the inhabitants of South Sudan constitute a people, that their rights to internal self-determination have never been respected by Sudan and never will be, and that their assertion of independence represents a case of delayed decolonization. This legal argument is plausible, and it would be interesting in the near future if the world court were called to rule on South Sudanese independence, or of any similarly obtained independence in another region of the world. Having the world court's stamp of approval would effectively discern and develop a normative legal framework of external self-determination in such difficult circumstances. Conversely, hearing that the world court disapproves of external self-determination in cases falling outside the decolonization paradigm would put a legal end to arguments about secessionist rights of non-colonized peoples. The world court could arguably develop an intermediary solution, consisting of very limited, narrow normative frameworks under which external self-determination, leading to remedial secession, would be legal. Without such a legal framework, it would appear that external self-determination remains heavily influenced by the great powers' rule.

South Sudan and the great powers' rule

As the examples of East Timor, Kosovo, Chechnya, and Georgia, the independence of South Sudan can be analyzed within the parameters of the great powers' rule. The great powers were instrumental in ensuring the lack of

independence for South Sudan, from decolonization until 2011, and then were similarly instrumental in promoting South Sudanese separation from Sudan in the new century. As discussed earlier, the legal case for self-determination of the people of South Sudan is plausible, and the case of South Sudan may stand for an example of coincidence between international law and the great powers' rule. The great powers' rule however was determinative of the outcome: without the support of the great powers, South Sudan would never have become the most recent new state on our planet.

As already discussed, South Sudan was an orphan of both colonization and the Cold War, and its arguably well-deserved independence was postponed for many decades because of global politics and the great powers' expression of dominance on the world scene.[50] As noted earlier, South Sudan is distinct from the North in two key aspects: the people of the South are mostly Black Africans of Christian or animist religions, whereas the northerners are mostly Arab Muslims.[51] During several decades of the British colonial rule over Sudan, the North and the South were administered separately, and the British installed separate trade, linguistic, and immigration policies for these two units.[52] The British may have done so purposely, under the guise of divide and conquer, an attitude prevalent among colonial administrators.[53] However, it may have happened more inadvertently, by realizing that South Sudanese blacks were more ethnically, culturally, religiously, and linguistically similar to their neighbors in Uganda, Ethiopia, and Kenya rather than to their Sudanese neighbors in the North. For example, education wise, the South Sudanese were never encouraged to study in Khartoum, the Sudanese northern capital, but rather, they were sent to other black African outposts throughout the British colonial empire.[54] The unification of North and South did not occur until the infamous Juba Conference in 1947. Post-World War II, more frequent calls for decolonization caused most colonial powers to rethink their policies. Thus, Great Britain began hatching a plan for Sudanese independence. The British considered the South to be too underdeveloped, rural, and culturally unsophisticated, and they thus chose to reunite the South with the North, in order to then bestow independence on the entire Sudan. This kind of a decolonization attitude was common: "[O]n the eve of their departure, colonial authorities generally established alliances and networks with members of the elite in their strategy to ensure that colonial structures survived the nominal transfer of power to 'indigenous' people."[55] In Sudan, the British preferred "[t]he lighter-skinned people of the north" who were "given preferential treatment and left to control the country when the British left."[56] The Juba Conference reflected this kind of thinking: Great Britain essentially betrayed the interests of the South by choosing to place the southerners within a larger new colonizer, North Sudan.[57] The southerners were not represented at Juba, and their voices on these issues were never properly heard.[58] Thus, as a victim of colonial policies and a geopolitical ploy by a great power, Great Britain, the South of Sudan was incorporated into a larger state of Sudan.

As already discussed, the people of the South never felt a sense of belonging to their new independent state of Sudan, and they fought two independence

and autonomy wars over the decades.[59] Yet, because of Cold War politics, the people of the South remained internally colonized. Prior to the fall of the Berlin Wall and the end of the Cold War, Sudan was supported by two great powers, the Soviet Union (predecessor to Russia) and China.[60] It was thus very unlikely that any significant international action would take place to aid the South in its autonomy and independence quest. Post-Cold War, in the 1990s, the South failed to attract any significant attention from the world community and the North was able to continue imposing its strict Islamic policies on the inhabitants of the South.[61] The situation finally changed in 2005, when enough world powers began exercising serious pressure on al-Bashir, the Sudanese President, essentially forcing him to negotiate with the southern rebels, to grant them autonomy and to promise a referendum toward potential independence in 2011. What sparked the change in the international community's attitude toward South Sudan, and, most importantly, the change in the great powers' politics and policy toward this region? While a completely accurate answer may never come to light, commentators have suggested that September 11, 2001, the date of the al-Qaeda attacks on the World Trade Center, played a dominant role.[62] In other words, post-9/11, Western great powers and in particular the United States became fearful of strong, Muslim regimes. To the extent that al-Bashir was perceived as fitting that role, the decision may have been made at the White House and at its counterparts to halt the rise of the single state of Sudan by supporting a secessionist movement in the south. Thus, the world community began exercising various forms of sanction against al-Bashir, resulting eventually in his indictment and the issuance of an arrest warrant against him by the International Criminal Court.[63] The world community also chose to highlight atrocities being committed in the Darfur region in South Sudan, allegedly supported by al-Bashir's government. Hence, the world opinion swung against al-Bashir, and most of the prior support that he had enjoyed from other states dwindled.[64] Weakened by such pressure, al-Bashir capitulated, negotiated with the rebels in 2005, and agreed to the holding of an independence referendum.[65] In the wake of referendum results, al-Bashir was quoted as stating that he supported such independence[66]—a stark change of heart by a leader who as recently as a decade ago was ready to commit crimes against humanity and possibly genocide to prevent the South from separating. The great powers' support of the South, which consisted of political, diplomatic, and economic pressure on Khartoum, as well as of the involvement of various international organizations in the South, especially in Darfur, was instrumental in enabling the South to secede. Similar to the case of Kosovo, where the Western great powers essentially enabled the Kosovar Albanians to form their own independent state, the Western great powers were instrumental in preparing the South Sudanese for independence.

The fact that South Sudan may also have had a solid legal argument to support their people's exercise of self-determination does not detract from the conclusion that the great powers' rule represented a key factor in allowing for the South's independence. South Sudan is simply an example of coincidence

between international law and the great powers' rule, similar to East Timor. In these instances, the exercise of the great powers' rule may be a good thing: the great powers may be perceived as helping in the application of international law to a given situation. Thus, the great powers may be the most relevant actors in international law. However, what is disappointing is the failure of international law, through its organs, and especially courts, to develop new normative rules on self-determination. A pronouncement by the world court on the legality of the exercise of external self-determination by non-colonized entities outside of the decolonization paradigm would advance the rule of law and would distract from the perception that, post-Cold War, we are back to the great powers' rule. International law does and should matter.

Notes

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35 Border Disputes Among African States, O.A.U. Res. AGH/RES.16(I), 1964 (reaffirming the strict respect by all member states of OAU of "the sovereignty and territorial integrity of each State and for its alienable right to independent existence" and declaring that all member states "pledge themselves to respect the frontiers existing on their achievement of national independence").
36 The International Court of Justice analyzed the principle of *uti possidetis* in the Case Concerning the Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554, Dec. 22, 1986. The world court held that "the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved." Ibid., para. 23. The world court then noted that the principle of *uti possidetis* "conflict[s] outright with another one, the right of peoples to self-determination." Ibid., para. 25. However, the world court concluded that "the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice . . . The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples." Ibid.
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40 *See* Chapter 1 for a full discussion of internal self-determination.
41 Wakengela and Koko, op. cit., p. 24.
42 Ibid., p. 25.
43 Richardson, op. cit.
44 For a detailed discussion of the East Timor case, *see* Chapter 6. For a discussion of the East Timor case in the International Court of Justice, *see* Chapter 5.
45 For a detailed discussion of the East Timor Case in the International Court of Justice, *see* Chapter 5.
46 *See*, for example, Chapter 1; *see also* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 1960; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 1970.
47 *See* Chapter 1 for a debate of whether international law recognizes the right to external self-determination to non-colonized peoples.
48 *See* fourth section of Chapter 5.
49 *See* fourth section of Chapter 5.
50 For a history of South Sudan, *see* first section of this chapter; for the legal case of self-determination for South Sudan, *see* second section of this chapter.
51 *See* first section of this chapter.
52 Ibid.
53 *See*, for example, Wakengela and Koko, op. cit., p. 22 (noting that colonial authorities used "differential modernization" in order to give preference to some

ethnic groups over others within the same colonial unit; the objective of these policies was to "divide the colonized and prevent the emergence of a unified anti-colonization front among Africans").

54 De Chand, op. cit., p. 2 (noting that South Sudanese were not educated at the University of Khartoum, but rather in British East Africa and Southern Africa).

55 Ibid.

56 Rawls, op. cit.

57 De Chand, op. cit., p. 2 (arguing that the decision to unify the North of Sudan with the South "contributed first to a total sale out and betrayal of the African people of South Sudan that precipitated the ongoing chronic 40 year old civil war").

58 Ibid., p. 3 (noting that the Southerners were not present in 1946–1947, when the decision to unify the north and the south was made; noting also that the British government handpicked 13 delegates from the south as an act of "tokenism," thus precluding the south from having any meaningful representation in these negotiations).

59 *See* first section of this chapter.

60 A. Fedyashin (2011) "Sudan's Impending Split," *RIA Novosti*. Available at: http://en.rian.ru/analysis/20110109/162045034.html (accessed Apr. 7, 2012) (noting that Khartoum and Russia and China have enjoyed good relations over the years; noting also that China has invested $15 billion in Sudan); *see also* A. McGregor (2009) Russia's Arms Sales to Sudan a First Step in Return to Africa: Part Two, Jamestown Foundation. Available at: www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=34494 (accessed Apr. 7, 2012) (observing that both Russia and China have sold weapons to Sudan, despite an existing arms embargo).

61 Wakengela and Koko, op. cit., p. 25 (observing that the second Sudanese civil war "failed to receive meaningful attention either from within Africa or the international community").

62 Other commentators have also noted the influence of 9/11 on Western, and, particularly, American support of independence for South Sudan. *See*, for example, Mamdani, op. cit. (noting that it was "the real grip of post-9/11 fear" that explained the possibility for the south to have independence referendum and that the north agreed to such referendum in order to defer "a head-on confrontation with US power").

63 International Criminal Court, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Mar. 4, 2009. Available at: www2.icc-cpi.int/iccdocs/doc/doc639078.pdf (accessed Apr. 7, 2012) (al-Bashir's arrest warrant accuses him of having committed various war crimes and crimes against humanity).

64 It should be noted, however, that Russia and China have continued, somewhat surreptitiously, to support al-Bashir's regime, through arms sales to Khartoum. *See* McGregor, op. cit. The vast majority of other states, including all the Western great powers, have condemned al-Bashir's regime over the last five years.

65 T. Waters (2011) Let His People Go: Sudan's Lesson for Secession. EJIL: Talk! Available at: www.ejiltalk.org/let-his-people-go-sudans-lesson-for-secession/ (accessed Apr. 7, 2012) (noting that independence referendum in 2005 took place because of pressure from the United States).

66 Ibid. (al-Bashir, in the wake of South Sudan's independence referendum, stated that "[w]e cannot deny the desire and the choice of the people of the south," and "[t]his is their right").

Postscript and conclusion

The great powers' rule and its implications for future "selfistans"

> The elephant in the room is the concept of power.[1]

This remark, spoken by Professor Valerie C. Epps at the 2012 American Society of International Law Annual Meeting in Washington, DC, perfectly summarized the lengthy discussion on statehood among a group of prominent American legal scholars. While the traditional concept of statehood, embodied in the Montevideo Convention, as described in Chapter 3, entails four criteria (territory, government, population, and the capacity to enter into international relations), these four elements do little to clarify the issue of when a people legally accrues the right to separate from its mother state and to form a new sovereign state.[2]

One of the scholars at this conference, Professor Paul Williams, posited that the key to this issue could perhaps be found in the fourth criterion of the Montevideo Convention, the capacity to enter into international relations. According to Professor Williams, an aspiring new player on the international scene needs to demonstrate to the outside world that it is worthy of achieving statehood and that it has "earned" its sovereignty.[3] The idea of earned sovereignty implies that only those peoples that have struggled for independence through legitimate means, and that have proved to external states that they would be a desirable new sovereign partner, will eventually become sovereign states. The theory of earned sovereignty would thus deny statehood to those peoples that have been labeled as violent and that have arguably used illegal means to assert their independence, such as Republika Srpska, Chechnya, or Northern Cyprus. By the same token, peoples that have engaged through peaceful means with the international community, such as the Kosovar Albanians or the East Timorese, would have earned their right to exist as sovereign states. According to this view, the first criterion of statehood, territory, for both the mother state in its initial incarnation, incorporating the secessionist entity, and for such an entity itself, is trumped by the fourth criterion of statehood, the capacity to enter into international relations. As the capacity to enter into international relations with other states flows from the idea of earned sovereignty by the secessionist entity, territoriality becomes

trumped by such earned sovereignty. In other words, a people becomes entitled to form its "selfistan" because it has shown that it can behave as a good world citizen.[4]

An alternative view was offered at the same conference by Professor Lea Brilmayer of Yale Law School. Almost two decades ago, Professor Brilmayer championed the view that self-determination and secession could be construed as consistent with the norm of territorial integrity because international law truly deals with secessionist claims by evaluating the people's claim to a particular territory.[5] Secessionist groups "win" and form "selfistans" in instances where they can demonstrate a valid historical claim to territory, such as in the case of former colonies. Secessionist groups "lose" in most cases of non-colonial secession because such groups' historical grievance about territory is different and lacks general support within the international community. For example, colonized peoples and peoples subjected to foreign occupation have been entitled to form sovereign states, because their claims to territory stemmed from valid historical grievances. In other words, their claims to their own territory had been denied for decades by the colonizers and the occupiers, who did not have any valid territorial claims and who acquired such territory through sheer power and military force. By way of contrast, peoples that have not been colonized or occupied do not necessarily have the right to form "selfistans" because their claims to a given territory may be historically disputed.

Despite the two views on secession presented here, it was Professor Epps' remark, just quoted, that resonated the most. Power is inherent is every instance of external self-determination leading toward secession. Every secessionist movement will need sufficient power in order to separate from its mother state; every mother state will need power to combat a separatist entity within its borders. Furthermore, every people and every mother state will often rely on external actors, and, in particular, the great powers, for support. The great powers will enhance or thwart the power of a people or of a mother state, and will thereby often influence the outcome of the secessionist struggle. The "selfistans" that eventually form are those that have enjoyed the support of the great powers.

Professor Williams' and Professor Brilmayer's theories do not take into consideration the concept of power, and do not directly address the influence of the great powers on peoples struggling for external self-determination. Professor Williams' theory of earned sovereignty is appealing—it is legally, politically, and morally pleasing to assert that those peoples that have demonstrated their capacity to become good world citizens should become entitled to their sovereignty. What Professor Williams does not discuss is the fact that all such sovereignty-earning peoples have enjoyed significant support from the great powers, and that, because of such support, these peoples have not needed to engage in violent secessionist tactics. Instead, they have outsourced the fight against their mother states to the great powers themselves. The great powers have then exerted influence and pressure on the mother state to let go of the secessionist people. As case studies in Chapters 6 through 10

have demonstrated, all successful secessionist peoples (East Timor, Kosovo, and South Sudan) have enjoyed support from the majority of the great powers. The great powers have been instrumental in ensuring the people's safety, in providing military support against the mother states' forces, in logistical support and capacity-building for the emerging state, and in political and institutional assistance culminating in the new state's ability to access international institutions and to engage in international relations. As Professor Brilmayer stated at the Montevideo Conference, the "main prize" for all peoples asserting rights to external self-determination remains the achievement of statehood, because only states can qualify for financial assistance, can access international tribunals such as the International Court of Justice, and can become members of premier organizations such as the United Nations.[6] Great powers have exercised determinative roles in ensuring that some peoples attain statehood. Such peoples have "earned" sovereignty because of the great powers' support. Conversely, all peoples that have not earned their sovereignty, because of willingness to engage in warfare and at times human rights abuses at the expense of the mother state or other regional ethnic groups, have been denied support by the majority of the great powers. In these instances, such peoples have been left to their own devices in the struggle for secession and statehood. The great powers have not aided such peoples and have not done anything to weaken the mother state's power, possibly driving such peoples to resort to violence. When Bosnian Serbs in the Republika Srpska asserted claims to self-determination, the Badinter Commission quickly dismissed such claims and instead ruled that these Serbs had minority group rights as well as the right to choose their nationality.[7] The European Union as well as the United States also chose not to support Bosnian Serbs' claims to self-determination and statehood, and decided instead that Bosnian Serbs should remain a part of the newly created Bosnian state. Bosnian Serbs fought a brutal civil war in Bosnia. It can be argued that had their claims to self-determination and statehood been supported by the great powers initially, Bosnian Serbs would not have resorted to such extensive violence. Had the great powers exercised pressure on Bosnia to allow the Bosnian Serbs to secede, this may have prevented violence and could have led toward a peaceful secession of the Bosnian Serb "selfistan." The same argument can be asserted with respect to Northern Cyprus. Had the majority of the great powers supported external self-determination for the Turkish population of Northern Cyprus, this part of Cyprus could have peacefully seceded and violence could have been avoided. It is easy for peoples to earn their sovereignty when such sovereignty is supported by the great powers. It is also easy to label peoples as not worthy of sovereignty if they engage in violence in order to realize their self-determination claims, when such peoples have been abandoned by the world community and when their only hope of secession may lie in the very same resort to violence. The same argument can also be raised vis-à-vis Chechnya: the Chechens have fought violently against Russian forces in two Chechen wars.[8] The Chechens have never been supported by any great powers, and their resort to violence may

have been due to a realization that Russia would never peacefully let go of this territory. Finally, a similar argument can be made regarding Georgian provinces, South Ossetia and Abkhazia.[9] These two provinces' statuses have been "frozen" as a result of the great powers' struggle over the Caucuses region; any application of the concept of earned sovereignty would be illusory in this politically and militarily charged context.[10] As one scholar has noted with respect to the difference in the world community's treatment of Kosovar Albanians and Chechens:

> While in Kosovo the international community essentially endorsed the Albanian Kosovar's claims to self-determination, in Chechnya the reactions were more muted, essentially focusing on opposition to the violence used by the Russians against the Chechens without reference to their possible right to self-determination, within or without Russia. This distinction may be easily dismissed by experts in international relations due to the fact that the Federal Republic of Yugoslavia (FRY) is a relatively poor country that was run by a person already indicted by the ICTY [International Criminal Tribunal for the former Yugoslavia] for international crimes—Slobodan Milosevic—and his supporters. On the other hand, Russia despite its troubles was a significant military power with substantial economic resources . . . Furthermore, it is a permanent member of the UN Security Council, holding the veto right.[11]

Professor Brilmayer's theory implicitly takes into account the existence of the great powers, and rightly acknowledges that self-determination is not simply about peoples but also about territory. What Professor Brilmayer does not directly discuss is how the presence and influence of the great powers has often influenced the alteration of territory, either to accommodate a people or to preserve the territorial status quo of the mother state. As another scholar noted, peoples that struggle for independence from strong, powerful states will not succeed because "[l]arge and powerful countries with stable polities such as Russia, China, and India can defend their territorial integrity and are unlikely to become candidates for Kosovo-type challenges."[12] In addition, according to the same scholar, "[s]tates like Israel and Turkey are proving that, as long as they enjoy American blessings, they can see through secessionism and even undertake cross-border raids on militants threatening their sovereignty."[13] In instances in which the great powers have supported the secessionist people, such as in East Timor, Kosovo, and South Sudan, the mother states' territorial borders have been altered in order to allow these peoples to form their "selfistans." In instances in which the great powers have not provided any support to the secessionist people or the great powers have actually supported the mother states, the latters' territorial borders did not suffer any changes. Professor Brilmayer offers criteria to explain in which instances a self-determination-seeking people should be allowed to form a new state and to thereby cause a reduction in the mother state's territory, such as, for example,

when the people has a solid historical claim to a given territory. However, the soundness of historical claims alone cannot explain the results of secessionist struggles over the last few decades. The Bosnian Serbs, the Turks in Northern Cyprus, the Chechens, the South Ossetians, and the Abkhaz may have historical claims to their territories that are as sound as those asserted by the East Timorese, the Kosovar Albanians, and the South Sudanese. In addition, many of the successful peoples that have recently gained independence have significant minority groups living within their newly formed states; such minority groups could, in turn, assert perfectly legitimate historical claims to their bits of the new secessionist state. Why is it that Serbs living in the northern part of Kosovo could not claim self-determination based on regional history? Why is it that the inhabitants of the Abyei region in South Sudan could not claim statehood for themselves, because they were "there first?" Arguments about the danger of excessive partition leading toward the undesirable existence of very small states are not helpful in this regard either. Some parts of Europe have been "excessively" partitioned over time, leading toward the existence of very small states, such as Luxembourg, Liechtenstein, Monaco, San Marino, and Andorra. Similarly, northern Kosovo and Abyei could exist as new, small states, to name a few examples. All these results can only be explained through the concept of power and, in particular the great powers' rule.

As discussed and argued throughout this book, the great powers' rule has become the dominant political, and perhaps pseudo-legal, theory in the world of self-determination claims. International law on self-determination is unclear on the ability of peoples to exercise external self-determination in a non-decolonization paradigm. As discussed in Chapter 1, scholars are divided over whether international law bestows a right on non-colonized peoples to seek independence from their mother state through the exercise of external self-determination.[14] At best, it can be argued that international law tolerates the exercise of external self-determination by peoples under the most extreme circumstances. Moreover, as discussed in Chapter 5, the International Court of Justice has repeatedly failed to develop a normative legal framework for the exercise of external self-determination in true cases of secessionist struggles.[15] The world court was likely influenced by the politically charged context of every situation, and was thus swayed by the great powers' rule, by avoiding answering the difficult legal question, as in the case of Kosovo, East Timor, and Western Sahara, and by thereby legitimizing the existing territorial situation, without assessing its underlying legality. Case studies in Chapters 6 through 10 demonstrate that international law itself cannot explain recent results of secessionist struggles. Accepting the premise that international law may bestow a right of external self-determination on those peoples whose rights have been exceptionally oppressed by the mother state, one may wonder as to why the Tibetans or the Chechens have not been able to claim independence from China and Russia respectively? Accepting the premise that international law requires the existence of internal self-determination options for all peoples before they can claim the right to secede, one may also wonder as to why the

Kosovar Albanians or even the East Timorese have not been required to exhaust autonomy options within Serbia and Indonesia before resorting to secession. And if one accepts the argument that Kosovar Albanians, the East Timorese, and the South Sudanese have engaged in sufficient unsuccessful internal self-determination quests that then triggered their rights to seek external self-determination, why is it that the Bosnian Serbs, the Northern Cypriots, and the Western Papuans could not similarly seek independence from Bosnia, Cyprus, and Papua New Guinea? International law is vague, inconsistently applied, and fails to account for the disparity of secession-related results. Some "selfistans" are formed and carved out of existing mother states; others remain unfulfilled dreams of various peoples.

It has been the scope and task of this book to propose, and perhaps acknowledge, the existence of a novel solution: the great powers' rule. As discussed in Chapter 4, the great powers' rule requires the presence of four criteria in every secessionist claim exerted by a people in today's world: the showing of severe oppression and abuse of the people by its mother state; the demonstration of weakness of the mother state's central government; the presence of some form of international administration of the disputed territorial entity; and, finally and most importantly, the support of the majority of the great powers.[16] The first three criteria hinge on the fourth and, conversely, the fourth criterion is determinative of the first three. However, the presence of the first three criteria may be important in order to validate the great powers' involvement. The great powers most often do not get involved in situations involving minor territorial skirmishes; their attention is triggered only by instances of severe humanitarian crises. All successful secessionist groups have been able to showcase their suffering at the hands of a tyrannical mother state; all successful groups have also demonstrated the weakness (and inherent undesirability) of the existing central administration of their mother state. All successful secessionist peoples have also been able to garner enough international support for the involvement of some form of international organization, assistance, or military aid. And in all instances, the great powers have condoned the international community's involvement in a secessionist struggle. Thus, in East Timor, Kosovo, and South Sudan, the East Timorese, the Kosovar Albanians, and the South Sudanese peoples demonstrated that their rights were being abused by their respective mother states, that their mother states' governments were incapable and unworthy of asserting control over their entire territories, and that the international community had already sent assistance to these troubled regions. Most importantly, however, the great powers were behind these three secessionist movements and were instrumental in enabling these peoples to exercise external self-determination. As discussed in Chapters 6, 7, and 10, international law may at time coincide with the great powers' rule by validating the same successful self-determination outcome. However, as other case studies demonstrate, international law cannot consistently determine the outcome of all self-determination struggles, because of its vagueness on the subject of external self-determination. Conflicts in the Caucasus region, in

Chechnya and in Georgia, have been frozen because of the great powers' geopolitical interests in preserving the territorial status quo; similarly, it can be argued that de facto states such as Republika Srpska, Northern Cyprus, and the Palestinian territory have never attained sovereign statehood because of the great powers' lack of willingness to support these external self-determination quests. It can be also argued that other peoples deserve self-determination and secession under international law, but that because of the great powers' rule, they have been prevented in any such attempts. These cases involve Tibet and West Papua.[17]

The great powers' rule has dominated world affairs in the area of self-determination. While it is unlikely that the great powers' rule will disappear any time soon, its presence is nonetheless undesirable for several reasons. First, as discussed in Chapter 4, the great powers' rule inappropriately mixes law and politics by effacing legal criteria for self-determination with political and strategic interests of the super-sovereign states. It is regrettable that the International Court of Justice has not taken the opportunity in the recent Kosovo case to develop normative rules on external self-determination in a non-colonial situation, as such new legal rules could have thwarted the influence of the great powers' rule.[18] We can remain hopeful that the world court will in a future case develop such new jurisprudence on external self-determination and non-colonial secession. Unfortunately, it is equally likely that the world court will remain dominated by world politics and the great powers in the foreseeable future. Second, the great powers' rule enhances the phenomenon of sliding-scale sovereignty by contributing toward inequality among states. While it may be inevitable that some states are more powerful than others, the great powers' rule fosters further inequality among states by supporting some at the expense of others, creating thereby an intricate geopolitical equilibrium which is soundly founded on the very existence of the great powers' balance of power and influence. The creation of regional spheres of influence can disrupt regional stability and lead toward violence and warfare. The end of the Cold War brought about wars in the former Yugoslavia, the Caucasus region, and some African states, such as the Democratic Republic of Congo, Somalia, and Sudan. If the great powers' rule ever faces an existential threat, or if any of the great powers loses its own sphere of influence, it is possible that this will lead toward additional wars. Inequality among states sparks regional jealousy and could produce instability and conflict. Conflicts and ethnic violence have already plagued the existence of newly created secessionist states, such as East Timor, Kosovo, and South Sudan. In all three instances, the creation of these new states created new ethnic tension and demands by smaller groups living within these new states for their own independence, or for a return to the territory of the original mother state. The creation of these three new states did not end violence; rather, violence now pits new actors against one another.[19] Third, the great powers' rule leads toward the creation of dependent independent states. The great powers support people when it is in their interest to do so. Thus, the great powers have enabled some peoples to form their "selfistans,"

by providing enhanced political, financial, and military support, as evidenced by the cases of East Timor, Kosovo, and South Sudan. While East Timor may be slightly more stable today, one decade after its independence, both Kosovo and South Sudan remain fully dependent on the great powers' support. If the great powers were to withdraw assistance from Kosovo and South Sudan, both states would crumble, because they are not truly independent but rather dependent on the great powers' help and support. Both Kosovo and South Sudan depend on external actors for the safety and stability of their borders. The Kosovar and South Sudanese constitutions have been drafted by Western legal experts; their judiciaries trained by Western lawyers; their institutions built through Western aid; their infrastructure developed through Western loans and investment. East Timor was created as a state by the international community in the beginning of the new millennium. The international community and particularly the great powers were instrumental in organizing East Timorese independence referendum, in providing logistical and financial assistance and political support, and in positioning peace-keepers on the ground to stave off Indonesian forces. Arguably, even today East Timor could fall prey to Indonesia once again if the great powers turned their backs. Without financial assistance, East Timor would almost certainly fail economically. East Timor, Kosovo, and South Sudan are dependent independent states, created and continuously supported by the great powers.

There exist other independent developing states that depend heavily on foreign aid. However, virtually all such states are able to maintain control over their borders and territory and to assert some semblance of independent statehood. Kosovo and South Sudan, as of today, do not even appear independent, and East Timor may just be emerging from a form of international trusteeship. The creation of such dependent independent states is troublesome in many respects. First, the existence of dependent independent states undercuts the concept of state sovereignty: states are supposed to be sovereign actors capable of independently engaging in foreign affairs and relations with other states. Dependent independent states do not possess such basic attributes of state sovereignty, and almost all their basic functions of statehood are outsourced to external actors, namely the great powers. Second, the existence of dependent independent states may cause further regional instability, and if the great powers ever withdraw military support from such states, their borders may become prime targets of other, more powerful regional players. One of the basic tenets of statehood is the ability of a state to control its territory and defend its borders; the alternative, if states were not able to do so, is chaos and continuous warfare. The presence of dependent independent states creates the potential for such chaos and violence, because these states are not able to defend their own territory. Finally, dependent independent states are often puppets in the hands of their benefactors, the great powers. Through these states, the great powers may weave a web of geopolitical interests and influences that may be detrimental to the overall development of a region and which may contribute further to the super-sovereign status of the great powers themselves. For example, the great

powers have supported Kosovo in its independence and statehood; on such independence, one of the great powers, the United States, bought an important mining complex in Kosovo and established a military base in this region, enhancing thereby its own financial and military status.[20] Similarly, the great powers have supported the independence of oil- and resources-rich South Sudan, where they will reap the benefits of such support in the near future.[21] Dependent independent states thus contribute directly toward the enhancement of the super-sovereign great powers' status on the world scene, which in itself is an undesirable outcome as it contributes further toward states' inequality.

To return to Salman Rushdie's rhetoric, a people may draw a circle around its feet and proclaim a "selfistan" if the great powers condone such a result. The great powers' rule has become a de facto norm of external self-determination. A people seeking a "selfistan" should not look toward international law for guidance in today's world; rather, it should seek the great powers' support. In the 21st century, we have returned to a medieval conception of power, as residing in the hands of the fortunate super-sovereign few. It has been the prime goal of this book to draw attention to the phenomenon of the great powers' rule, to describe how the great powers' rule has influenced recent external self-determination quests, and to ask provocative questions about the desirability of this rule and its presence in international affairs.

Notes

1 American Society of International Law (ASIL) Annual Meeting (2012), Panel entitled "What is a State?" (author in attendance) (Mar. 30, 2012).
2 For a full discussion of self-determination and statehood, *see* Chapter 3.
3 ASIL Meeting, op. cit. Professor Williams had developed the theory of earned sovereignty in his earlier work. *See*, for example, J.R. Hooper and P.R. Williams, "Earned Sovereignty: The Political Dimension," *Denver Journal of International Law and Policy*, 2003, Vol. 31, 355.
4 As discussed throughout this book, I respectfully borrow the term "selfistan" from Salman Rushdie. *See* S. Rushide, *Shalimar the Clown*, Jonathan Cape, 2005, p. 102. The term "selfistan" as used throughout this book is not pejorative; rather, it implies the randomness of certain secessionist results. Some peoples have formed new states (selfistans) somewhat easily while others, although similarly situated, have been denied the same possibility. Rushdie depicted such randomness by asserting that an individual could simply draw a circle around his or her feet and call that territory a "selfistan." Id. The great powers' rule essentially validates the existence of some selfistans while disallowing others to form.
5 L. Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," *Yale Journal of International Law*, 1991, Vol. 16, 177. Professor Brilmayer returned to this idea a decade later in "Secession and Self-Determination: One Decade Later," *Yale Journal of International Law*, 2000, Vol. 25, 283.
6 ASIL Meeting, op. cit. A perfect illustration of Professor Brilmayer's point, that the main prize for any secessionist entity remains the achievement of statehood, is the case of Palestine. The Palestinians have been denied statehood for decades. Consequently, the Palestinians have not had full access to the United Nations,

have not benefited from financial assistance from organizations such as the International Monetary Fund (IMF) or the World Bank, and have been denied access to jurisdictional venues, such as the International Criminal Court, which just recently rejected a Palestinian application arguing that Palestine was not a state and that the tribunal could only examine grievances asserted by states. *See* JTA (2012) ICC prosecutor: No Probe on Gaza War Crimes because Palestine not a State. Available at: www.jta.org/news/article/2012/04/03/3092521/icc-cant-rule-on-gaza-war-crimes-because-pa-not-a-state-prosecutor-says (accessed Apr. 7, 2012).

7 For a discussion of the Badinter Commission opinion on the legality of self-determination for the Bosnian Serbs, *see* Chapter 2.

8 For a discussion of Chechnya, *see* Chapter 8.

9 For a discussion of Georgia (South Ossetia and Abkhazia), *see* Chapter 9.

10 For a discussion of "frozen" conflicts in the Caucasus, *see* Christopher J. Borgen, "Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's 'Frozen Conflicts'," *Oregon Review of International Law*, 2007, Vol. 9, 477.

11 J.I. Charney, "Self-Determination: Chechnya, Kosovo and East Timor," *Vanderbilt Journal of Transnational Law*, 2001, Vol. 34, 455.

12 S. Chaulia (2008) A World of Selfistans? Global Policy Forum. Available at: www.globalpolicy.org/ component/content/article/171-emerging/29875.html (accessed Apr. 7, 2012).

13 Ibid.

14 *See* Chapter 1.

15 *See* Chapter 5.

16 For an elaboration of the great powers' rule, *see* Chapter 4.

17 For a full list of various ethnic groups and peoples that have asserted claims for different types of self-determination against their mother states, *see* M. Weller, *Escaping the Self-Determination Trap*, Brill, 2008, p. 160 (Annex II). It is beyond the scope of this book to offer an assessment as to the legality and legitimacy of each of these claims. Rather, I argue that the existence of so many self-determination-seeking-entities demonstrates that the great powers have been selective in offering their assistance and support to only a select few.

18 For a staunch critique of the International Court of Justice's unwillingness to delve into difficult self-determination issues in the Kosovo advisory opinion, *see* V. Epps, "The Paucity of Law in the ICJ's 2010 Advisory Opinion on Kosovo's Declaration of Independence," *ILSA Quarterly*, 2010, issue 1, Vol. 19.

19 All three new states, East Timor, Kosovo, and South Sudan, have been plagued by violence in the years following their young existence. For a discussion of violence in East Timor in 2006, *see* USA Today (2006) East Timor Violence Raises Civil War Fear. Available at: www.usatoday.com/news/world/2006-05-26-easttimor_x.htm (accessed Apr. 7, 2012) (noting "worries that one of the world's youngest nations is plunging into civil war seven years after its break from 24 years of repressive occupation by Indonesia"). For a discussion of renewed violence in Kosovo, *see* T. Karon (2011) "New Violence in Kosovo Could Pose a Quandary for an Overstretched NATO", *Time*. Available at: http://globalspin.blogs.time.com/2011/07/27/new-violence-in-kosovo-could-pose-a-quandary-for-nato/ (accessed Apr. 7, 2012) (arguing that violent clashes in Kosovo indicate that "hotheads on both sides [Serbs and Kosovar Albanians] sense an opportunity to rewrite the outcome of the 1999 war"). For a discussion of ongoing violence in

South Sudan, *see* A.K. Sen (2012) "Obama calls for Restraint as Violence grows along Sudan's Border," *Washington Times*. Available at: www.washingtontimes.com/news/2012/apr/2/obama-calls-for-restraint-as-violence-grows-along-/ (accessed Apr. 7, 2012) (noting that Sudan and South Sudan "are teetering on the brink of an all-out war").

20 *See* Chapter 7.

21 *See* Chapter 10.

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