

The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention

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Abstract

The United Nations Charter-based international order sought to reconcile the self-determination of peoples with the inviolability of state boundaries by presuming sovereign states to be manifestations of the self-determination of the entirety of their territorial populations. This presumption, albeit notionally rebuttable, traditionally prevailed even where states could only by a feat of ideological imagination be characterized as “possessed of a government representing the whole people belonging to the territory without distinction.” But the international reaction to fragmentation in the former Yugoslavia—regarding both the initial “dissolution” and the subsequent struggle over Kosovo—called into question the rigid doctrines of the past and opened the door to secessionist claims theretofore dismissible as beyond the pale. Although no vindication of Russian intervention in Ukraine can properly be drawn from the Yugoslav cases, the Ukrainian crises help to surface the hidden dangers of an emerging jurisprudence that would allow previously inadmissible considerations—whether ethnic, historical, constitutional, or “democratic”—to compromise the territorial inviolability norm.

A. Introduction

At the level of abstract principle, the United Nations Charter (The Charter) speaks in the name of the “Peoples of the United Nations” and predicates international peace and cooperation “on respect for the principle of equal rights and self-determination of peoples.”¹ Yet the Charter’s paramount operative norm has long been understood to be the territorial inviolability of existing sovereign states. This norm is highly prejudicial to the putative political communities that assert themselves in configurations non-coextensive with their states’ territorial populations. By sweepingly prohibiting inter-state exertions of coercion and force—while licensing such exertions within state boundaries—the international legal order has effectively privileged sovereignty arrangements that frustrate these communities’ demands for self-governance.

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¹ U.N. Charter Preamble, art. 1(2).

Whether this tension rises to the level of a contradiction depends on how one understands the legal meaning of “peoples”—as distinct from “ethnic, religious, or linguistic minorities”² or “indigenous or tribal peoples”³—as well as how one understands the right of all peoples “freely [to] determine their political status”—a phrase synonymous, in its original usage, with an option on sovereign independence.⁴ The Charter and the U.N. General Assembly’s quasi-authoritative interpretive glosses—above all, the *Friendly Relations Declaration*⁵ adopted in 1970—can be construed to reconcile the self-determination of peoples with the territorial inviolability of states by first rebuttably presuming sovereign states to be manifestations of the self-determination of the entirety of their territorial populations, and then interpreting this presumption through a pluralistic lens that disqualifies only the vestiges of western European colonialism.⁶ Thus, territorial inviolability prevails even where states can, only by a feat of ideological imagination, be characterized as “possessed of a government representing the whole people belonging to the territory without distinction.”⁷ Crafted in an ideologically riven international society

² See International Covenant on Civil and Political Rights art. 27, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

³ See Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 1(3), Sept. 5, 1991, 72 I.L.O. 169 (“The use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”). *But see* G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (seeming to elide the distinction).

⁴ See, e.g., G.A. Res. 1514 (XV), annex, ¶ 2 (Dec. 14, 1960); Declaration on the Rights of Indigenous Peoples, *supra* note 3, art. 3 (ascribing to indigenous peoples the right to self-determination, nominally including the right to “freely determine their political status,” though pointedly excluding any impairment of existing states’ “territorial integrity or political unity”); *id.* at art. 46. This qualification apparently assuaged African states that had theretofore insisted that the “principle of self-determination applies only to peoples under colonial and/or foreign occupation.” African Group, *Draft Aide Memoire on United Nations Declaration on the Rights of Indigenous Peoples* (2006), <http://www.ipacc.org.za/uploads/docs/Africanaidememoire.pdf>.

⁵ G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

⁶ See Brad R. Roth, *Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 Melbourne J. Int’l L. 393, 402–09 (2010) (showing that immediately following the decolonization of the bulk of the Non-Self-Governing Territories, the dominant conception of self-determination was tightly bound up with non-intervention in the internal affairs of emergent states); see, e.g., G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Dec. 21, 1965); G.A. Res. 36/103, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (Dec. 9, 1981) [hereinafter 1981 Non-Intervention Resolution] (an especially provocative 1981 non-intervention resolution, passed 120-22-6 over the opposition of many western liberal states, asserting that “[t]he duty of a State to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States”).

⁷ Friendly Relations Declaration, *supra* note 5 (“[W]ithout distinction as to race, creed or color.”); see also G.A. Res. 50/6 (Dec. 14, 1995), ¶ 1 (“[W]ithout distinction of any kind.”); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF. 157/23 (June 25, 1993).

comprised of western, socialist, and non-aligned blocs, this approach furnished the minimalist normative foundations essential to a broadly acknowledged global territorial order.

Arguably, this “squaring of the circle” has passed into the realm of legal history. International reactions to the crises of authority on the territory of the former Socialist Federal Republic of Yugoslavia (SFRY)—in particular, the 1991–1992 recognitions of the SFRY’s constitutionally pre-established federal units (most importantly, Croatia and Bosnia-Herzegovina) as independent and inviolable states in the wake of the federation’s non-consensual “dissolution,” as well as the increasingly widespread acceptance of Kosovo’s 2008 *Unilateral Declaration of Independence*—have called into question the premises of the Cold War-era settlement. Critical elements of the applicable positive law, including the existence *vel non* of circumstances justifying external support for secession of integral units of sovereign states, are now authoritatively conceded to be unsettled.⁸ Moreover, the Yugoslav and other cases have inspired among many advocates and scholars a disparagement of the traditional territorial integrity norm for its insensitivity to claims based on considerations of democracy, constitutionality, history, or ethno-national coherence.⁹

There are, however, dangers inherent in invoking such considerations against the norm of territorial inviolability. The multifarious interpretations of those considerations in a pluralistic international legal environment jeopardize the few bright lines that have been drawn to establish a framework of accommodation among bearers of otherwise incompatible political values. By taking considerations of democracy, constitutionality, history, and ethno-national coherence “off the table” in determinations of the admissibility of aid to secession,¹⁰ traditional norms against cross-border projections of coercive power transcend competing perspectives on the legitimacy and justness of internal arrangements. To predicate the foundations of the peace and security order on ideologically contested propositions would signal that an external use of coercion or force to revise sovereign boundaries amounts to just another political conflict, rather than an extraordinary breach requiring an emergent and coordinated international response.

⁸ See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, ¶ 82 (July 22) [hereinafter *Kosovo Advisory Opinion*] (noting that states have expressed “radically different views” on the doctrinal issues central to determining Kosovo’s status: (1) “[w]hether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination, and exploitation, the international law of self-determination of peoples confers upon part of the population of an existing State a right to separate from that state”; (2) “whether international law provides for a right of “remedial secession” and, if so, in what circumstances”; and (3) “whether the circumstances which some participants maintained would give rise to a right of ‘remedial secession’ were actually present in Kosovo”).

⁹ See, e.g., JURE VIDMAR, *DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE* 225–30 (2013) [hereinafter VIDMAR].

¹⁰ See, e.g., *Friendly Relations Declaration*, *supra* note 5 (“Every 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.”).

The Ukraine Crises of 2014–2015 offer a reminder of the value of an international *modus vivendi* that brackets ideological disputes and affirms a (relatively) inflexible standard of territorial inviolability. Even given the uncertainties that developments of the last two decades have introduced, Russia's armed take-over of Crimea, and its direct and indirect forcible interventions in support of the "People's Republics" of Donetsk and Luhansk, are unambiguous violations of international legal norms.¹¹ But the more responsive the applicable law becomes to considerations that can be branded as either so controverted as to be parochial or so open-textured as to be indeterminate, the less that international law can serve to mobilize broad-based opposition to cross-border mischief and predation.

To be sure, the traditional insistence on territorial inviolability of existing states has an element of arbitrariness at its core. On occasion, this arbitrariness places intolerable stress on the putative rule, justifying the emergence of a narrow exception in keeping with the traditional framework's basic logic; a normative order that cannot bend will likely break. But an overall approach more favorable to external encouragement of secession would ultimately serve neither the moral principle of self-determination nor the practical project of inter-state peace.

B. The Neglected Virtues of Bright Lines: International Law in the 2014–2015 Ukraine Crises

Given the prevalent absence of authoritative interpretation—let alone adjudication and enforcement—international law is frequently dismissed as so open-textured as to admit of competing conclusions about its application to any significant controversy. Yet, international law also incurs criticism for the inflexibility of its foundational rules, which are deemed both insensitive to imperative principles of justice and unrealistic in the face of non-compliant but efficacious policies.

The Ukraine Crises of 2014–2015 provide occasion to affirm that international law indeed has determinate relevant applications; that its characteristic inflexibilities ground cooperation among participants who cannot be expected to agree about justice; and that de-legitimation of unlawful conduct serves an important purpose even where non-compliant policies cannot be reversed in the near term. Russian actions against Ukrainian territorial integrity have transgressed bright lines, provoking widespread condemnation as well as economic sanctions from some of Russia's most important trading partners. The

¹¹ See, e.g., G.A. Res. 68/262 (Mar. 27, 2014) (reaffirming Ukrainian territorial integrity against the purported transfer of Crimea to the Russian Federation, by a vote of 100 to 11—though disappointingly, there were 58 abstentions and 24 absences). As Mikulas Fabry's contribution to this symposium notes, the vote count understates the extent of expressed legal disapproval of Russia's action, as reflected in the comments of several states that saw fit to withhold an affirmative vote on the resolution. Mikulas Fabry, *How to Uphold the Territorial Integrity of Ukraine*, 16 GERMAN L.J. 416, 422 (2015).

brightness of these lines entails ruling out of consideration a series of matters that, while significant from some normative perspectives, have traditionally been understood to be legally irrelevant.

1. The Irrelevance of the Allegedly Unconstitutional Change of Government in Kiev

In February 2014, following massive opposition demonstrations and a violent response by his government's forces, Ukrainian President Viktor Yanukovich fled the capital, ultimately taking refuge in Russia. The Ukrainian legislature thereupon purported to formalize his removal from office and to replace him with an acting president. Nonetheless, in the contemporaneous words of Center for Strategic & International Studies fellow Stefan Soesanto:

Ascertaining the legitimacy of the interim government in Kiev is quite tricky. According to Article 111 of the Ukrainian constitution, the President can only be impeached from office by parliament through "no less than three-quarters of its constitutional composition." On 22 February 2014 the Ukrainian parliament voted 328–0 to impeach President Yanukovich who fled to Russia the night prior. However for an effective impeachment under constitutional rules, the 449-seated parliament would have needed 337 votes to remove Yanukovich from office. Thus under the current constitution, Yanukovich is still the incumbent and legitimate President of the Ukraine.¹²

The question became more than academic in the days that followed, when Russia cited an "invitation" from the constitutional president to send troops into Crimea "to protect civilians."¹³

Traditional doctrine assigns no significance to this controversy. From this vantage point, neither Yanukovich's international standing nor the validity of his invitation turns on discernment of the "right" answer as a matter of Ukrainian constitutional law. The international legal order is not a legal order of legal orders, but a legal order of sovereign

¹² Stefan Soesanto, *quoted in* Ashley Deeks, *Russia in Ukraine: A Reader Responds*, LAWFARE, March 5, 2014, <http://www.lawfareblog.com/2014/03/russia-in-ukraine-a-reader-responds/> (last visited June 18, 2015).

¹³ *Ukraine's Yanukovich Asked for Troops, Russia Tells UN*, BBC, Mar. 4, 2014, <http://www.bbc.com/news/world-europe-26427848> (last visited June 18, 2015). Not long afterward, Yanukovich retracted the "invitation." *See also Associated Press, Yanukovich Says He Was "Wrong" on Crimea*, N.Y. TIMES, Apr. 2, 2014, <http://www.nytimes.com/aponline/2014/04/02/world/europe/ap-eu-russia-yanukovich.html?ref=world> (last visited June 18, 2015).

political communities bearing the “inalienable right” to choose their own political systems,¹⁴ and therefore to breach, alter, or overthrow their existing constitutions. The test for a governmental apparatus’s capacity to exercise a state’s international legal rights has traditionally been “effective control through internal processes”; this has generally remained so—save for highly exceptional circumstances (Haiti, 1991–1994; Sierra Leone, 1997–1998; Cote d’Ivoire, 2010–2011)—even where unconstitutional changes of government have drawn adverse political reactions (including suspensions of the state’s participation in intergovernmental organizations).¹⁵

Having been effectively ousted, Yanukovich lacked all standing to speak for Ukraine internationally. He had even less standing to consent unilaterally on Ukraine’s behalf to the introduction of foreign forces for the purpose of imposing a partisan conception of public order (one that had manifestly suffered substantial, even if not country-wide, popular repudiation).¹⁶

Even more clearly, disturbance of a governmental order does not vitiate the territorial integrity of a state; such a disturbance at most raises questions about the legal standing of the agent (the government) to represent the principal (the state), not about the principal’s

¹⁴ Friendly Relations Declaration, *supra* note 5 (“Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”). The International Court of Justice famously noted in the *Nicaragua* case that to hold a state’s adherence to any particular governmental doctrine a violation of customary international law “would make nonsense of the *fundamental principle of State sovereignty, on which the whole of international law rests*, and the freedom of choice of the political, social, economic and cultural system of a State.” *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 263 (June 27) (emphasis added).

¹⁵ See Brad R. Roth, *Sovereign Equality and Non-Liberal Regimes*, 43 NETH. Y.B. INT’L L. 25, 44–48 (2012).

¹⁶ By the logic of self-determination that grounds the effective control doctrine, even a still-recognized government—at least, where its recognition had been essentially attributable to its having achieved effective control through internal processes—would appear to lack standing to invite foreign forces to resolve a full-blown crisis of governmental authority. See, e.g., Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRITISH Y.B. INT’L L. 189, 233–34 (1985); see generally INSTITUT DE DROIT INT’L, *Resolution: The Principle of Non-Intervention in Civil Wars*, Aug. 14, 1975, http://www.idi-iii.org/idiE/resolutionsE/1975_wies_03_en.pdf. This limitation has, concededly, not held up well in practice, especially where the government has had other indicators of popular approval or the opposition has been tainted by unlawful foreign assistance or peculiarly bad conduct.

Moreover, even where a given governmental order as a whole can speak unilaterally for the state, there is often reason to question whether a head of state or head of government can speak unilaterally for that governmental order in inviting foreign troops onto national territory. Where an elected president is unconstitutionally ousted by an elected legislature (as in Honduras in 2009 or Ukraine in 2014) there is guaranteed (almost irrespective of the actual language of the constitution) to be an “objectively evident” constitutional doubt about such Presidential authority—let alone (as in the Crimea example) where exercised with the effect of ceding national territory to a foreign power.

status or sovereign rights.¹⁷ Thus, a breach of constitutional norms does not problematize the unity of a state—irrespective of whether its constitutional organization is federal or unitary¹⁸—even where the irregularly constituted government is unpopular or not immediately efficacious in particular parts of the national territory.¹⁹

II. The Irrelevance of Crimea's Alleged Will to Secede and Join the Russian Federation

In a hastily organized referendum, held under less than free and fair conditions, an ostensible majority of Crimean voters opted for secession from Ukraine and incorporation into Russia.²⁰ Putting aside the irregularities that tainted both the regional parliament's vote to call the referendum and the referendum itself, Crimea's ethnic mix and various evident manifestations of regional public opinion lend a general plausibility to the claim that some substantial majority—even if not the officially-reported overwhelming majority—favored the region's transfer to Russian control.²¹

¹⁷ States retain their international legal personality, as well as obligations previously incurred, notwithstanding fundamental changes of governmental order. The political community is not understood to be re-founded when there is constitutional discontinuity; in *Gabcikovo-Nagymaros*, it is not that democratic Hungary succeeds to the international legal obligations of communist Hungary, but that the obligations incurred by Hungary's communist government are those of Hungary *tout court*. See Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovak.), Judgment, 1997 I.C.J. 7, 64, ¶ 104 (Sept. 25) (“profound changes of a political nature”—the collapse of communism—did not amount to a “fundamental change in circumstances” affecting treaty obligations).

¹⁸ See Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. No. 19, art. 2 (“The federal state shall constitute a sole person in the eyes of international law.”).

¹⁹ Unfortunately, the Badinter Commission's opinions on the 1991–1992 Yugoslav crisis introduce confusion by conflating issues of domestic-constitutional and international law. The Commission reasoned that because the very existence of the Yugoslav state presupposed functioning federal institutions, the collapse of these institutions and the recourse to force entailed nothing less than “a process of dissolution” of the Yugoslav state into its component republics. See Conference on Yugoslavia Arbitration Commission, Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11, 1992, July 4, 1992, 31 I.L.M. 1488, 1496–1500 [hereinafter Badinter Commission Opinions]. However, this rationale of the European community's arbitral commission arose in response to unique circumstances, and thus far, no general trend has emerged to support any ambitious extrapolations from the logic of the Badinter judgments.

²⁰ David Herszenhorn, *Crimea Votes to Secede From Ukraine as Russian Troops Keep Watch*, N.Y. TIMES, March 16, 2014, <http://www.nytimes.com/2014/03/17/world/europe/cremea-ukraine-secession-vote-referendum.html> (last visited June 18, 2015). But see C. J. Chivers & Patrick Reevell, *Russia Moves Swiftly to Stifle Dissent Ahead of Secession Vote* N.Y. TIMES, Mar. 14, 2014, <http://www.nytimes.com/2014/03/15/world/europe/pressure-and-intimidation-sweep-cremea-ahead-of-secession-vote.html> (last visited June 18, 2015) (“With a mix of targeted intimidation, an expansive military occupation by unmistakably elite Russian units and many of the trappings of the election-season carnivals that have long accompanied rigged ballots across the old Soviet world, Crimea has been swept almost instantaneously into the Kremlin's fold.”).

²¹ *Crimea Referendum: Voters 'Back Russia Union,'* BBC, March 16, 2014, <http://www.bbc.com/news/world-europe-26606097> (last visited June 18, 2015) (“Some 58% of people in Crimea are ethnic Russian, with the rest made up of Ukrainians and Tatars.”).

Whatever facts might be convincingly established about popular sentiment in the region, the territory's international legal status would, according to traditional doctrine, be unaffected. Sub-national units, however unambiguous may be their popular mandate for secession, lack an international legal right to be acknowledged as independent and to thereby invite foreign intervention. Even if "remedial secession"—as to the legality of which the International Court of Justice expressly withheld judgment in its advisory opinion on Kosovo's *Unilateral Declaration of Independence*²²—could be successfully invoked in the face of demonstrable predation on the part of the central government, mere popular apprehension about possible future predation would not plausibly justify a change in a region's international status.

Additionally, the region's ethnic composition—however dissimilar to that of the state to which it presently belongs, or compatible with that of the state to which it aspires to belong—is not legally material. Nor is it material that the region's incorporation into the former state occurred for arbitrary reasons and in contradiction to the region's historical ties to the latter state. Territorial allocations are notoriously arbitrary, and if such arbitrariness were allowed to problematize inter-state boundaries, the result would be to license cross-border violence across the globe.

Nor can "democratic" considerations, despite their increased relevance in international law,²³ resolve the "majority of whom" problem inherent in self-determination controversies outside of the decolonization context.²⁴ Not only is the regional population not the only cognizable stakeholder, but majority votes within a sub-national territory may compromise the political equality of internal minorities—all the more likely where the regional majority's ethnic identity grounds the independence claim. Even where regional boundaries have a pre-existing constitutional status and reflect authentic historical delineations, rather than ethnic gerrymandering, the international order has little reason to disincentivize conferrals of constitutional autonomy by transmogrifying them into instruments for the disruption of state sovereignty.

III. The Irrelevance of Ukraine's Resort to Force to Resolve a Political Dispute in Its Eastern Regions

In response to the proclamations of the "People's Republics" of Donetsk and Luhansk, the Ukrainian central government has demonstrated resolve to restore its territorial integrity through the use of military force. This might be thought to run afoul of an emerging

²² Kosovo Advisory Opinion, *supra* note 8, para. 82.

²³ See generally Gregory H. Fox & Brad R. Roth, *Democracy and International Law*, 27 *REV. INT'L STUDS.* 327 (2001).

²⁴ As noted famously by Ivor Jennings: "[T]he people cannot decide until somebody decides who are the people." IVOR JENNINGS, *THE APPROACH TO SELF-GOVERNMENT* 55–56 (1956), *quoted in* VIDMAR, *supra* note 9, at 243.

international legal norm against recourse to force to resolve internal political disputes—an internal *jus ad bellum* responsive to the contemporary reality that civil conflicts rather than inter-state wars now constitute the greatest overall “threat to the peace.”²⁵ Such a development might even be imagined to license Russia to provide cross-border military support (in the form of weaponry or even direct uses of force) to the embattled enclaves, to prevent their being bloodily overrun and to encourage a political rather than a military solution.

Though some may wish to see the emergence of an internal *jus ad bellum*, its realization in positive international law is far-off and likely to be elusive. Such a norm—unless it were to freeze any status quo established by whatever means on the ground, thereby rewarding quick forcible seizures—would require prejudgment of the merits of internal disputes. Absent such prejudgment—analogue to, but inevitably far more complicated than, the international order’s insistence on respect for borders (however arbitrarily drawn)—it would be impossible to answer the fundamental question: Is what counts as “recourse to violence” the resistance to *de facto* territorial authority, or the suppression of that resistance? Any such intricately qualitative judgment would be open to charges of bias and parochialism.

Thus far in international law, the concept of *jus ad bellum* designedly has had no application to internal conflict. Insurgents seeking secession (or regime change) enjoy no international protection (other than the truncated set of *jus in bello* standards applicable to non-international armed conflicts), but so long as they are not inadmissibly assisted from abroad (or seeking to frustrate decolonization), international law does not seek affirmatively to constrain them from taking their best shot at seizing power, nor to deprive them of success should they achieve it.²⁶ At the same time, states maintain the sovereign right to suppress challenges to their territorial integrity, and their acknowledged governments are vested with authority on their behalf to use force (within the tactical limitations established by international *jus in bello* norms) to secure that aim. More crucially, no foreign state has the authority to supply cross-border support to forces

²⁵ It is sometimes suggested that the pattern of recent Security Council’s Chapter VII edicts in response to internal conflicts establishes a norm against recourse to violence to resolve internal political disputes. See, e.g., Kalkidan Obse, *The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice: A Perspective Based on the African Union Normative Framework*, 27 LEIDEN J. INT’L L. 817, 828–29 (2014). But the Security Council’s extemporary decrees, even if they could be said to comprise such a pattern, do not by themselves establish norms applicable in the absence of Chapter VII resolutions.

²⁶ As the ICJ in the Kosovo Advisory Opinion noted, the “illegality attached to the declarations of independence [of Southern Rhodesia, Northern Cyprus, and Republika Srpska] 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*).” Kosovo Advisory Opinion, *supra* note 8, para. 81.

defending insurgent-held internal territory.²⁷ The paradigmatic example is the lawfulness (putting aside the *jus in bello* controversies) of Croatia's forcible extinguishment (in Operations Flash and Storm of 1995) of Serb-nationalist insurgent enclaves in Western Slavonia and Krajina, as against the almost-universally acknowledged unlawfulness of support for those enclaves by the Federal Republic of Yugoslavia (Serbia and Montenegro).

IV. The 2014–2015 Ukraine Crises as an Argument Against Muddying the Waters

Russia's incursions, direct and indirect, into Ukraine have crossed a bright line. Observers from a multiplicity of normative perspectives can perceive in common this transgression. (Indeed, in respect of its intervention in the Donetsk and Luhansk regions, Russia's factual denials, however implausible, manifest a consciousness of the norm's clarity.) The bright line exists as part of a framework of accommodation among bearers of a diversity of interests and values.²⁸ It makes possible cooperation among international actors who cannot be expected to agree on the legitimacy or justice of internal governmental arrangements. If, in pursuit of a higher justice, the global system forsakes traditional norms in favor of more nuanced and value-laden approaches to international involvement in internal conflict, it will end up grounding its foundational norms in the very principles that are inconclusively contested. Legal condemnation will thus be indistinguishable from mere political condemnation.

Legal assessments are, of course, inherently and ineluctably political. They are not, however, reducible to mere partisanship; indeed, it is precisely the political purposes that they serve that require their transcendence of immediate political agendas. Events such as Russia's putative annexation of Crimea and its intervention in Eastern Ukraine, though resistant to total abolition, are nonetheless fairly rare occurrences in contemporary international relations. To keep them rare, the international order needs to be able to distinguish violations of foundational norms from conduct that is merely politically provocative, and thus subject to assessments that turn on differing geostrategic interests and ideological principles. It is a pluralist normative order that establishes and maintains the capacity to call aggression by its true name.²⁹

²⁷ See, e.g., Friendly Relations Declaration, *supra* note 5 (“[N]o State shall . . . interfere in civil strife in another State.”).

²⁸ See generally BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT (2011).

²⁹ The preceding section was adapted from the written version of panel remarks delivered at the October 2014 annual meeting of the American Branch of the International Law Association. Brad R. Roth, *The Neglected Virtues of Bright Lines: International Law in the 2014–15 Ukraine Crises*, 21 ILSA J. INT'L & COMP. L. 317 (2015).

C. The Inevitable Blurring of Lines: International Law in the Yugoslav Cases

The traditional approach outlined above is concededly unappetizing. It sacralizes boundaries that reflect conquests predating the establishment of the twentieth-century global peace-and-security order, and addresses internal conflicts in a manner designedly neutral as between just and unjust—perhaps even good and evil—causes. It reaffirms and reinforces outcomes that can range from untoward to morally intolerable.

One thus cannot be surprised that the international community has abided *ad hoc* deviations from the traditional approach's strict logic. But one equally cannot be surprised that in so doing, the international community has sought to assimilate innovations to business as usual, avoiding any overt admission of fundamental change in the doctrinal structure. This combination has led to intellectual dishonesty and an accompanying erosion of doctrinal foundations, without the emergence of any substituted doctrinal framework for resolving secession questions.

A crucial episode occurred at the commencement of the post-Cold War era with the international community's recognition of the statehood and territorial inviolability of units declaring independence from the unraveling Socialist Federal Republic of Yugoslavia (SFRY). That collective practice drew on a legalistic rationale provided by the judgments of European Community's Conference on Yugoslavia Arbitration Commission (Badinter Commission). For reasons that made eminent political sense, the Badinter Commission judgments were presented as applications of unaltered international law. Yet on close examination, the judgments failed altogether to square with the logic of the pre-existing doctrine. Both the outcomes and the seemingly disingenuous denials of innovation served several important political (and indeed, moral) purposes, but they raise significant questions about the principles and policies that actually animate recognition practice.

A second episode stemming from the Yugoslav experience was the international reaction to the 2008 *Unilateral Declaration of Independence* by the "Provisional Institutions of Self-Government of Kosovo." This episode, too, is associated with authoritative legal commentary, although the ICJ Advisory Opinion scrupulously evaded the pivotal questions, thereby allowing a deviation from traditional doctrine to co-exist with continuing denials of doctrinal change.

1. Non-Consensual Dissolution: The Badinter Commission's Unacknowledged Improvisation

On 25 June 1991, Slovenia and Croatia—component republics of the Yugoslav federation—declared independence. Slovenia's ensuing seizure of border posts in its territory from the Yugoslav People's Army (JNA) prompted a brief armed conflict, but a cease-fire shortly followed. Slovenia's path to independence—though formally delayed by the terms of the 7 July 1991 Brioni Accords—was from then on essentially unimpeded.

Croatia's independence effort, however, prompted much more serious difficulties. Forces representing Croatia's minority (twelve to fifteen percent) Serb population, geographically concentrated in the central region of Krajina and the northeastern regions of Western and Eastern Slavonia,³⁰ were in armed rebellion against the elected nationalist Croatian government—rebellion facilitated by units of the Serb-dominated JNA stationed in Croatian territory. Pro-independence governments in Macedonia and in Bosnia-Herzegovina were also laying the groundwork for secession, meaning that four of the six Yugoslav republics, comprising a majority (over fifty-six percent) of the federation's population, were seeking to withdraw from the SFRY. With the federal government's constitutional processes deadlocked, Serbia's partisans within federal institutions resorted to unconstitutional measures to seek to maintain the federation on Serbia's terms or, failing that, to annex to Serbia substantial Croatian and Bosnian territories bearing concentrated Serb populations.

As the war in Croatia intensified, with the preponderance of atrocities being committed by Croatian Serb irregulars,³¹ the European Community on 27 August 1991 formed a Commission to advise on the legalities of the crisis. (Although referred to as an "Arbitration Commission," its judgments were understood not to be binding.)³² The Commission, comprised of five European Constitutional Court Presidents from France, Germany, Italy, Spain, and Belgium., was led by French *Conseil Constitutionnel* President Robert Badinter.

Notwithstanding the Commission's august membership, its mandate left little doubt from the outset about the contours of its ultimate conclusions. Simultaneously with their formation of the Commission, the EC ministers issued the following statement:

The European Community and its member States are dismayed at the increasing violence in Croatia. They remind those responsible for the violence of their determination never to recognize changes of frontiers which have not been brought about by peaceful means

³⁰ Peter Radan, *The Serb Krajina: An Unsuccessful Secession from Croatia*, in *THE ASHGATE RESEARCH COMPANION TO SECESSION*, 523, 523 (Aleksandar Pavković & Peter Radan eds., 2011). From the standpoint of many of Croatia's Serbs, withdrawal from the federation represented an existential threat, vitiating that community's consent to the boundaries of the republic. The new Croatian proto-state officially characterized itself as "the national state of the Croat nation," with Serbs relegated to the status of a national minority rather than a constituent nation. *Id.* For good measure, it adopted some of the same historical symbols of Croatian identity employed by World War II-era Nazi-backed Independent State of Croatia (NDH), which encompassed roughly the territory of both Croatia and Bosnia-Herzegovina and which orchestrated mass killings of Serbs.

³¹ Prosecutor v. Martić, Case No. IT-95-11-T, paras. 161–336 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007) (showing factual findings and details of the character of the Serb-nationalist military and paramilitary campaign in Croatia).

³² See, e.g., VIDMAR, *supra* note 9, at 79.

and by agreement. It is a *deeply misguided policy on the part of the Serbian irregulars to try to solve the problems they expect to encounter in a new constitutional order through military means*. It is even more disconcerting that it can no longer be denied that *elements of the Yugoslav People's Army are lending their active support to the Serbian side*. The Community and its member States call on the Federal Presidency to *put an immediate end to this illegal use of the forces under its command*. The Community and its member States will never accept a policy of *fait accompli*. They are *determined not to recognize changes of borders by force* and will encourage others not to do so either³³

These statements, consistent with earlier pronouncements of the Conference on Security and Cooperation in Europe (CSCE),³⁴ manifestly prejudged all of the essential elements of the legal controversy.³⁵ What remained was to rationalize the solution—independence for Croatia and other seceding republics with their constitutionally established boundaries intact—by reference to existing legal doctrines.

³³ Declaration of Yugoslavia, European Political Cooperation Extraordinary Ministerial Meeting, No. 4b/64 of 27 Aug. 1991, *reprinted in* EUROPEAN FOREIGN POLICY: KEY DOCUMENTS 363 (Christopher Hill & Karen E. Smith eds., 2000) (emphasis added), http://hist.asu.ru/aes/EFP_Documents_0415158222.pdf.

³⁴ Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 575 (1992).

³⁵ The official Serbian counter-narrative was as follows:

The Serbian people . . . demanded respect and protection of their legitimate national and civil rights. When Croatia decided to secede from Yugoslavia and form its own independent State, the Serbs inhabiting their ethnical territories in this republic decided to break away from Croatia and remain within Yugoslavia Faced with the serious danger of a more widespread conflict, the Presidency of the SFRY instructed the Yugoslav People's Army to prevent such conflicts by standing as a neutral force between the parties in conflict. However, the Croatian authorities, instead of accepting such a mission of the YPA [JNA], openly attacked not only the Serbian people which it branded as a band of outlaws, but also . . . the Yugoslav People's Army which it termed an army of occupation. This is how war was thrust upon Yugoslavia. In such a situation it was essential to protect the Serbian people from extermination.

S.F.R.Y. Collective Presidency Chair Borislav Jovic, *Address at the Assembly of the Socialist Federal Republic of Yugoslavia* (Mar. 19, 1992), *reprinted in* REV. INT'L AFFAIRS 11–12 (1992), *quoted in* Weller, *supra* note 34, at 574.

While many scholars have criticized the Badinter Commission judgments,³⁶ few have identified the fundamental problem: The Commission was charged with accomplishing a task that fell not merely outside the scope of existing legal rules, but *ultra vires* of international law's traditional purposes. The traditional approach of international law did not provide—nor purport to provide—a principled basis for governing the interactions of the federation's constituent groups; it left those as matters “essentially within the domestic jurisdiction,” to be worked out through internal processes, however harsh.

The central theme of the Commission's approach was to characterize the SFRY not as a state in civil war, beset by multiple contested efforts at secession, but as a federation undergoing a non-consensual “dissolution.” Traditionally, however, crises of constitutional or other effective authority have not been deemed to affect a state's status. Many states—quintessentially Somalia and Lebanon—have experienced long periods during which they have lacked an effective central government while rival authorities have maintained zones of control, but it has never been suggested that these states had “dissolved.” Absent mutual consent of efficacious regional authorities, dissolution would follow only from a decisive creation—by force, if necessary—of a stable set of new facts on the ground.

But of course, such fact creation was precisely what the Badinter Commission had, quite understandably, been designed to pre-empt. The result was a blend of constitutional law and international law principles, concocted in order to draw a line against the ethno-national project that both the European political leadership and the judges evidently deemed, on moral and political grounds—and not without justification in those terms—to be most at fault for the descent into violence: the Serb nationalist movement.

The critical move came in the Commission's very first Opinion, dated 29 November 1991. There, the Commission asserted that:

In the case of a federal-type State, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the State implies that the

³⁶ For trenchant criticisms of the Badinter Commission opinions, see, e.g., Miodrag Jovanovic, *Constitutionalizing Secession in Federalized States: A Procedural Approach* 83–114 (2007); Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination*, 29 *YALE J. INT'L L.* 423, 438–44 (2004); Mikulas Fabry, *International Norms of Territorial Integrity and the Balkan Wars of the 1990s*, 16 *GLOBAL SOC'Y* 145 (2002); Peter Radan, *Yugoslavia's Internal Borders as International Borders: A Question of Appropriateness*, 33 *E. EUR. Q.* 137 (1999); Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 *MICHIGAN J. INT'L L.* 31 (1998); Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?* 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 57 (1993).

federal organs represent the components of the Federation and wield effective power.³⁷

In assessing the facts on the ground at that time, the Commission found that:

The composition and workings of the essential organs of the federation . . . no longer meet the criteria of participation and representativeness inherent in a federal state; the recourse to force has led to armed conflict from the different elements of the federation which has caused the death of thousands of people and wrought considerable destruction within a few months. The authorities of the Federation and the Republics have shown themselves to be powerless to enforce respect for . . . ceasefire agreements . . .³⁸

Since the very existence of the Yugoslav state presupposed functioning federal institutions, the Commission reasoned, the collapse of these institutions and the recourse to force entailed nothing less than “a process of dissolution” of the Yugoslav state into its component republics. The Yugoslav state was thereby said to be losing its international legal personality, with the six republics collectively succeeding to that personality.³⁹

In the second and third Opinions, issued on 11 January 1992, the Commission made further determinations that flowed directly from the first judgment. According to the Commission, with the disappearance of central authority, the republics’ territorial relations *inter se* were to be governed—even before the territories’ objective emergence as states, let alone any formal external recognition—by the venerable principle of *uti possidetis*, which in the decolonization context had ascribed to the newly independent states their previous colonial boundaries.⁴⁰

From a traditional standpoint, these judgments are littered with errors: First, the Commission treats federal states as though different from unitary states, whereas a federal

³⁷ Badinter Commission Opinions, *supra* note 19, at 1495, No. 1, para. 1(d).

³⁸ *Id.* at 1496–97, No. 1, para. 2.

³⁹ *Id.* at 1498, 1500, No. 1, para. 3.

⁴⁰ *Id.* at 1498, 1500, Nos. 2 & 3. Although the Commission did not predicate its framework of decision on constitutional interpretation, it asserted that the principle by which the boundaries were internationalized applied “all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics’ territories and boundaries could not be altered without their consent.” *Id.* at 1500, No. 3. This statement rather conveniently omitted mention of the provision of Article 5 that required consent of all Republics to the changes in SFRY frontiers.

or unitary institutional configuration—an artifact of a constitutional order that the state may alter or overthrow in the exercise of “inalienable” sovereign prerogative—is traditionally deemed irrelevant to a state’s international legal personality.⁴¹

Second, as noted above, the Commission departs from a consistent pattern of state practice and *opinio juris* in identifying a loss of governmental coherence with a loss of state coherence. Many states have undergone far more prolonged periods in which the central government lacked effective control over large portions of the national territory, yet in none of these cases did the international order regard the state as having been in a process of dissolution.⁴²

Third, whereas the Commission deems an inability to maintain effective control and to quell violence in the national territory as indicative of dissolution of the SFRY, it applies no such efficacy standard to the governments of the emergent successor states (in particular, Croatia and, subsequently, Bosnia-Herzegovina, both of which would manifestly have failed such a test).⁴³ This turns on its head the traditional rule against “premature recognition” that resists acknowledging new sovereignty arrangements until they have been irreversibly established on the ground.⁴⁴

Fourth, the Commission imports the principle of *uti possidetis* from the decolonization process, unmindful of the implications of newly decolonized entities having been liberated from the colonial powers rather than from one another. In the colonial context, *uti possidetis* preserved the *status quo inter se*, whereas here it produced a drastic shift in power relations among the emergent states’ constituent groups.⁴⁵ Indeed, at least from the perspective of the Serb minorities in Croatia and Bosnia, the SFRY internal boundaries had been thoroughly predicated on the unity of—and balance of federal rights among—the ethnic communities that the Yugoslav state embodied.⁴⁶ Moreover, whereas *uti possidetis* had previously taken effect upon the establishment of new states emerging from

⁴¹ See Montevideo Convention, *supra* note 18, art. 2 (“The federal state shall constitute a sole person in the eyes of international law.”).

⁴² See, e.g., Robert H. Jackson & Carl G. Rosberg, *Why Africa’s Weak States Persist: The Empirical and Juridical in Statehood*, 35 *WORLD POLS.* 1 (1982).

⁴³ See generally ANA S. TRBOVICH, *A LEGAL GEOGRAPHY OF YUGOSLAVIA’S DISINTEGRATION* (2008).

⁴⁴ See, e.g., J.L. BRIERLY, *THE LAW OF NATIONS* 138 (C.H.M. Waldock ed., 6th ed. 1963) (“[S]o long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence of the old state in a struggle that has obviously become hopeless is not a sufficient cause for withholding it.”), quoted in David A. Ijalaye, *Was “Biafra” At Any Time a State in International Law?*, 65 *AM. J. INT’L L.* 551, 558 (1971).

⁴⁵ See, e.g., Pomerance, *supra* note 36, at 50–57.

⁴⁶ See Radan, *Yugoslavia’s Internal Borders as International Borders*, *supra* note 30.

colonialism, here the boundaries were deemed to become inviolable at the inception of a “process of dissolution.”⁴⁷

By invoking the combination of non-consensual dissolution and *uti possidetis*, the Commission managed to validate the dismemberment of the SFRY into its component republics without any resort to the principle of self-determination, thereby avoiding sticky questions about the right to self-determination on the part of Serbs within Croatia and Bosnia-Herzegovina. Whatever might be said for the latter—to which the Commission spoke in the vaguest possible terms—this right could not be implemented through forcible changes in the Republics’ boundaries.⁴⁸ Croatia’s Serbs might well have wondered why, if Croatia could be supported in its secession from Yugoslavia, a Croatian Serb republic (Republika Srpska Krajina) could not be equally supported in its effort to secede from Croatia.⁴⁹ The answer given—a masterpiece of bloodless formalism—was that Croatia was not seceding, but rather *succeeding* to a share, demarcated by the republic borders, of the legal personality of the dissolved Yugoslav federation.⁵⁰

In reality, the Commission’s judgments were responsive to situational considerations of morality, policy, and politics that were orthogonal to the doctrinal considerations on which the Commission purported to rely. As the Croatian conflict had by late 1991 already demonstrated, an internal war to carve out new territorial units on an ethno-national basis would entail, as an almost inevitable concomitant, the phenomenon of mass expulsions and associated atrocities that has come to be known by the failed euphemism, “ethnic cleansing.”⁵¹ If an ethno-national project could establish an internationally recognized claim to territory by seizing and holding effective control over it, there would be a natural motivation to purge the territory of populations presumptively loyal to a rival project (and indeed, even to encourage rivals’ expulsions of one’s own co-ethnics, who could then be settled in the carved-out territory, completing its demographic transformation). As applied to the case at hand, the Commission’s approach seemed well calculated to stem a kind of violence, however “internal,” that the international order came to perceive as beyond the pale.⁵²

⁴⁷ See JOVANOVIĆ, *supra* note 36, at 107.

⁴⁸ Badinter Commission Opinions, *supra* note 19, at 1497–1500, Nos. 2 & 3.

⁴⁹ For a summary of the Serb grievances against the emergent Croatian state, see Robert M. Hayden, *Nationalism in the Formerly Yugoslav Republics*, 51 *SLAVIC REV.* 654, 657–58 (1992).

⁵⁰ Badinter Commission Opinions, *supra* note 19, at 1495–96, No. 1, para. 1(e).

⁵¹ See *Prosecutor v. Martić*, *supra* note 31, paras. 161–336.

⁵² Whereas the international system had once accepted “population transfer” as a legitimate means of sorting out rival self-determination claims, see, for example, Timothy William Waters, *Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing*, 47 *VA. J. OF INT’L LAW* 63 (2006). That system was now coming to understand both the end and the probable means of such transfer as “crimes against humanity.” See, e.g., UN

Yet in broad structural terms, the Badinter Commission judgments represented simply a reallocation of licenses to establish and maintain order by force. Underscoring this point is Croatia's 1995 Operation Storm, which forcibly asserted Croatia's sovereignty over the Republic's breakaway territories, and which is widely characterized as having entailed "ethnic cleansing" in the reverse direction.⁵³

As to both Croatia and Bosnia-Herzegovina, the Commission invoked referendum results as a guide to popular will in those republics in a manner that begged the question: The democratic will of majorities within pre-established territories was credited, whereas the democratic will of the (more or less geographically-concentrated) Serb populations of those territories—either to remain within one Yugoslavia or, alternatively, to secede prior to the pre-established territories' emergence as sovereign states—was expressly disregarded. Whereas artifacts of Yugoslav constitutionalism were invoked where favorable to separation, the consociational aspects of the federation's constitutional traditions—according political status to constituent ethnic communities as well as to territorially-defined populations—were conveniently forgotten.⁵⁴ The Badinter Commission solution's overall emphasis on the republics' boundaries at the expense of ethno-national claims for self-determination served, not to thwart ethno-nationalism throughout the

Doc. A/CONF. 183/9, Rome Statute of the International Criminal Court, Art. 7 (1998) (enumerating crimes against humanity: A "widespread or systematic attack . . . against [a] civilian population"); Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, ¶ 595 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005) ("[D]isplacements within a state or across national borders, for reasons not permitted under international law, are crimes punishable under customary international law.").

⁵³ See, e.g., HUMAN RIGHTS WATCH, *Croatia: Impunity for Abuses Committed During 'Operation Storm' and the Denial of the Right of Refugees to Return to the Krajina*, 8 REPORTS 13 (1996), <http://www.hrw.org/reports/1996/Croatia.htm> ("The offensive . . . resulted in the . . . displacement of an estimated 200,000 who fled in the immediate aftermath. . . . These abuses by Croatian government forces, which continued on a large scale even months after the area had been secured by Croatian authorities, included summary executions of elderly and infirm Serbs who remained behind and the wholesale burning and destruction of Serbian villages and property.").

⁵⁴ On October 14, 1991 Bosnia's Parliament declared the Republic's sovereignty, with the support of parties associated with the Bosniak plurality (an estimated 44% of Bosnia's population) and the Croat minority (17%), albeit without the participation of the parties associated with the Serb minority (31%). In its January 11, 1992 Opinion (No. 4), the Commission concluded that "the will of the peoples of Bosnia-Herzegovina to constitute the [Republic] as a sovereign and independent State cannot be held to have been fully established. . . ." Badinter Commission Opinions, *supra* note 19, at 1503, No. 4. But then, curiously, it added: "This assessment could be reviewed if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of all the citizens of the [Republic] without distinction, carried out under international supervision." *Id.* The *non sequitur* was entirely overlooked: the first sentence invoked "the will of the peoples" severally, whereas the second evidently eschewed peoplehood as a relevant category, indicating that the will of a simple majority of individual citizens can override a dissenting "people," however cohesive.

SFRY, but to realize exclusively those ethno-national aspirations that happily coincided with constitutionally-established boundaries.⁵⁵

Jure Vidmar (among others) contends provocatively that it was not the constitutional basis, but the historical “pedigree” of the particular internal boundaries, that was the decisive consideration in the Commission’s assessment of the Yugoslav dissolution.⁵⁶ The problem with that explanation—which the Commission nowhere invoked—is the ineluctable contentiousness of this and any such proposition, in the Yugoslav case and beyond. The history can be read in different ways, emphasizing different historical baselines. It is ahistorical to imply that six independent states, possessed of these borders, consensually united to form the Yugoslav federation.⁵⁷ Moreover, while there is historical “pedigree” to boundaries that left Croatian and Bosnian Serbs separate from Serbia and subject to non-Serb territorial majorities, this was one of the problems to which the Yugoslav federation was supposed to have been a solution; the federation was conceptualized as a union of constituent nations, and Serb assent to the legitimacy of the internal boundaries presupposed, and was contingent on, the continued existence of the union.⁵⁸

Nonetheless, there was a distinct sense in which the Badinter Commission had ample basis for adjudging that “the essential organs of the federation . . . no longer meet the criteria of participation and representativeness inherent in a federal state.” There was not simply a

⁵⁵ See, e.g., Peter Radan, *The Badinter Arbitration Commission and the Partition of Yugoslavia*, 25 NATIONALITIES PAPERS: J. NATIONALISM & ETHNICITY 537, 543 (1997).

⁵⁶ VIDMAR, *supra* note 9, at 234.

⁵⁷ According to notions predominant in Slovenia and Croatia, the federation represented a historically contingent agreement of its several constituent territorial republics, the boundaries of which conceptually preceded rather than derived from the union; in this view, each republic maintained, as an inherent right of self-determination, a latent sovereign capacity to exit the arrangement with its borders intact. Support for that position might be drawn from leading SFRY jurist Edvard Kardelj’s Socialist-era understanding of self-determination in the Yugoslav context. For Kardelj, “the legitimacy of Yugoslavia [was] only derivative and tentative”—a mere epiphenomenon of the socialist project that subsequently disappeared. Zoran Oklopčič, *Beyond Empty, Conservative, and Ethereal: Pluralist Self-Determination and a Peripheral Political Imaginary*, 26 LEIDEN J. INT’L L. 509, 518–19 (2013). Yet Kardelj’s conception—however popular with his fellow Slovenes—did not have the field to itself. More importantly, there was still less accord on the alternative. As Oklopčič indicates, “While all Yugoslav constitutions affirmed the various nations’ right to self-determination, including the right of secession, a fundamental ambiguity remained as to whom exactly this right belonged—to South-Slavic Yugoslav *ethnoi*, or the *demoi* of Yugoslavia’s component republics.” *Id.* at 520. The distinction, while appearing to set an ethnic against a civic brand of nationalism, in reality merely determines which ethno-national aspirations will be satisfied or frustrated once secessionism seizes the agenda.

⁵⁸ Serb nationalists would likely express the point in a one-word rejoinder: “Jasenovac,” the concentration camp in the World War II-era Independent State of Croatia (NDH)—an entity that encompassed roughly the combined territories of present-day Croatia and Bosnia-Herzegovina—in which an extraordinary number of Serbs perished (along with Jews, Roma, and others). See JASENOVAC MEMORIAL SITE, *List of Individual Victims of Jasenovac Concentration Camp*, <http://www.jusp-jasenovac.hr/Default.aspx?sid=6711>.

crisis of federal institutions (which ordinarily would call for non-interference); there had been, in effect, an undemocratic *coup d'état*, and further, a *coup d'état* that constituted a hijacking of multinational Yugoslavia by a plurality (but not majority) ethno-national movement. Milošević's Yugoslavia could not be perceived to represent the self-determination of "the whole people . . . without distinction." Moreover, the Serb minority's "recourse to force" in Croatia (and later, in Bosnia-Herzegovina), which might conceivably have been regarded as a defensive effort to forestall majority domination, was not so regarded, because of the actual character of the violence on the ground. Whatever the ideological neutrality of the post-decolonization UN peace and security order, the UN system's neutrality had never extended to the Axis-era fascism of which the Serb nationalist movement appeared reminiscent, in both rhetoric and behavior.⁵⁹

The Badinter Commission's real assessment, albeit operating beneath the surface, was undoubtedly a substantive assessment of the relative justness of the contending communities' recourse to force. The Commission took sides in the conflict, not by neutral application of procedural norms, but in an effort to thwart the Serb nationalist cause. Although reflecting normative considerations embedded in the foundations of the international order—as evidenced by the international community's swift action to follow the Commission's lead in according recognition to the emergent states⁶⁰—the judgments were ad hoc, neither reflective of existing legal doctrines nor generative of new ones likely to be applied going forward.

II. Kosovo Independence: Deciding Not to Decide the Remedial Secession Question

On 17 February 2008, after almost nine years of limbo as a de facto UN protectorate, Serbia's erstwhile autonomous province of Kosovo—as represented by the full membership of the Assembly set up as part of the UN-orchestrated "Provisional Institutions of Self-Government of Kosovo" (PISG)—unilaterally declared independence.⁶¹ Although substantial parts of the international community continue to withhold official recognition—including, notably, European Union members Cyprus, Greece, Romania, Slovakia, and Spain, as well as such leading non-European states as Brazil, China, India, Mexico, Russia, and South Africa—108 UN member states have officially recognized Kosovo. This qualified success is very rare in cases where a territory seeking separation

⁵⁹ See, e.g., ROBERT D. PAXTON, *THE ANATOMY OF FASCISM 189–90* (2004) ("[P]inning the epithet of *fascist* on Milosevic . . . seems appropriate").

⁶⁰ Ironically, while the Commission's early judgments sought to establish the legal status of the entities in question, the Commission advised the withholding of diplomatic recognition to Croatia, pending reform of its legal standards regarding the treatment of minorities. Contrast Badinter Commission Opinions, *supra* note 19, at 1503, 1505, No. 5, with *id.* at 1507, 1517, No. 7. However, the crucial question of legal status having been taken as resolved, this further advice was ignored.

⁶¹ Kosovo Advisory Opinion, *supra* note 8, paras. 74–76.

does not (by whatever means) obtain the consent of the non-dissolved state to which it has theretofore been integral.⁶²

The Kosovo case naturally raises the issue of “remedial secession”: whether a state may forfeit its sovereignty over an integral territorial unit within which it has engaged in a pattern of prolonged and serious human rights abuses. The Milosevic government’s 1989 withdrawal of Kosovo’s autonomy and the ensuing pattern of harsh discrimination against the province’s large majority (over eighty-five percent) of ethnic Albanians precipitated a serious crisis by the late 1990s, as an ethnic-Albanian insurgency was met by ever more ruthless counterinsurgent efforts.⁶³ After the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY) rebuffed Security Council demands that it desist from its norm-offending actions in that territory⁶⁴ and refused to accede to the comprehensive solution proposed by Western powers in the Rambouillet “accords,”⁶⁵ the Security Council deadlocked on the question of forcible imposition, setting the stage for the famously unauthorized seventy-nine-day NATO air campaign.⁶⁶ Although the Security Council never affirmed the lawfulness of the NATO intervention, it adopted that intervention’s fruits in Resolution 1244, precluding the FRY’s exercise of territorial control and placing Kosovo under, in effect, an international trusteeship.⁶⁷

Resolution 1244, “Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,” purported to operate without prejudice to Kosovo’s formal status as an integral part of the FRY (succeeded by Serbia following the 2006 negotiated independence of Montenegro) pending a negotiated settlement.⁶⁸ Yet the negotiation process dragged on in manifest futility, with Serbia

⁶² Non-Self-Governing Territories are, by definition, non-integral to the sovereign states that govern them. See, e.g., G.A. Res. 1541 (XV), *supra* note 4.

⁶³ See generally INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000) (“Goldstone Commission Report”).

⁶⁴ See S.C. Res. 1160 (Mar. 31, 1998); S.C. Res. 1199 (Sept. 23, 1998); S.C. Res. 1203 (Oct. 24, 1998) (invoking Chapter VII powers in addressing the Kosovo situation).

⁶⁵ Interim Agreement for Peace and Self-Government in Kosovo (Feb. 23, 1999), http://peacemaker.un.org/sites/peacemaker.un.org/files/990123_RambouilletAccord.pdf [hereinafter Rambouillet Accords].

⁶⁶ See Press Release, Security Council, U.N. Press Release SC/6659 (Mar. 26, 1999) (reflecting that Russia, China, and Namibia support draft Security Council resolution, defeated 3-12-0, characterizing NATO’s “unilateral use of force” as “a flagrant violation of the United Nations Charter” and demanding “an immediate cessation”).

⁶⁷ S.C. Res. 1244 (June 10, 1999) (demonstrating a vote of 14-0-1, with China abstaining).

⁶⁸ See *id.* The Resolution speaks of “the people of Kosovo” enjoying “substantial autonomy within the Federal Republic of Yugoslavia. *Id.* at para. 10. It also speaks of “[p]romoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords.” *Id.* at para. 11(a). The annex, in turn, discusses a “political process towards the

unwilling to yield formal sovereignty and the Kosovars unwilling to accept anything less than full independence. Meanwhile, the indefinite perpetuation of provisional arrangements was widely perceived to impede the territory's economic and social development.⁶⁹

Thus arose the Kosovars' *Unilateral Declaration of Independence* (UDI) and Serbia's ensuing request to the UN General Assembly—approved by a vote of seventy-seven to six, with seventy-four abstentions—for an ICJ Advisory Opinion on the following question: "Is the *Unilateral Declaration of Independence* by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"⁷⁰ Remarkably, the resolution did not speak of the "legal consequences" of the UDI,⁷¹ thereby omitting expressly to oblige the Court to address the legal status of Kosovo and the legality of recognitions that foreign states had already conferred (forty-eight of them by the date of the resolution, and sixty-nine by the date of the issuance of the Advisory Opinion).⁷²

Serbia's formulation appears to have been a studied effort to avoid a diplomatic affront to states that had already recognized Kosovo, while at the same time indirectly to induce the Court to speak to the declaration's overall implications. That effort appears, in retrospect, to have been too clever.

By the operation of traditional doctrine, there is a blanket answer to the question of whether *any* UDI is "in accordance with international law." Apart from cases in which the declarations are intertwined with extrinsic violations of international legal norms (such as

establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia." U.N. Doc. S/1999/648, Annex 2, para. 8 (June 7, 1999). The Rambouillet document itself provides that "national communities" therein recognized "shall not use their additional rights to endanger . . . the sovereignty and territorial integrity of the Federal Republic of Yugoslavia." Rambouillet Accords, *supra* note 65, at Framework, Art. 1(2).

⁶⁹ In 2007, the U.N. Secretary-General's Special Envoy, former Finnish President Martti Ahtisaari, authored a Comprehensive Proposal for Kosovo Status Settlement, expressing the unsatisfactoriness of preserving the status quo indefinitely. Comprehensive Proposal for Kosovo Status Settlement (Mar. 26, 2007), http://www.unosek.org/docref/Comprehensive_proposal-english.pdf; see generally Jean d'Aspremont, *Regulating Statehood: The Kosovo Status Settlement*, 20 LEIDEN J. INT'L L. 649 (2007).

⁷⁰ G.A. Res. 63/3 (Oct. 8, 2008).

⁷¹ Cf., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 36 (July 9).

⁷² The resolution was passed on 8 October 2008. The dates of recognitions of Kosovo can be found, *inter alia*, on the webpage of the KOSOVO'S MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa-ks.net/?page=2,33> (last visited June 18, 2015).

resistance to decolonization or a foreign state's inadmissible use of force), a UDI per se is not subject to international legal regulation.⁷³

The international legal order traditionally seeks neither to reinforce nor to undermine state control over internally disputed territory (notwithstanding its concern with human rights issues relating to these disputes and with humanitarian law issues relating to the internal armed conflicts that the disputes occasion). It regulates external involvement in secession disputes, but it presumptively neither forbids nor validates internal efforts at secession.⁷⁴ Historically, secessionists have assumed the risk of forcible suppression (subject to the constraints of human rights and humanitarian law) and, where successful by their own efforts (without inadmissible foreign assistance) have reaped the reward of international recognition.⁷⁵ The non-regulation of such efforts has not been a mere omission or gap in the law; the consignment of such matters to the domestic jurisdiction has constituted an affirmative norm of the international order. International law ascribes legal consequences to the internal developments as they play out, but the internal decisions to reaffirm or to repudiate the political status quo have traditionally been understood to fall within a *domaine réservé*.⁷⁶

Thus, the phrasing of the question gave the Court an opportunity to give an answer—that the UDI did not violate international law—that left open the central legal controversies. Given the absence of a coherent collective *opinio juris*—as reflected in the clashing memorials that governments from around the world submitted—the Court would have

⁷³ As the Court noted, the “illegality attached to the declarations of independence [of Southern Rhodesia, Northern Cyprus, and Republika Srpska] 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*).” Kosovo Advisory Opinion, *supra* note 8, para. 81.

⁷⁴ In the Court’s words, “[T]he scope of the principle of territorial integrity is confined to the sphere of relations between States.” Kosovo Advisory Opinion, *supra* note 8, para. 80.

⁷⁵ See, e.g., Reference re Secession of Quebec, [1998] S.C.R. 217, 290, para. 144 (Can.), <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do> (“It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.”).

⁷⁶ Judge Simma’s separate opinion ascribes the Court’s presumptive neutrality to “an old, tired view of international law, which takes the adage, famously expressed in the ‘Lotus’ Judgment, according to which restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order.” Kosovo Advisory Opinion, *supra* note 8, para. 2 (separate opinion by Simma, J.). Apart from failing to note that the supposed “Lotus principle” by its nature has no application to sub-state units, Simma’s ascription misconstrues the doctrinal point: The non-judgmentalism stems not from absence of law, but from an affirmative norm regarding (for better or worse) the outcome of such struggles as “matters essentially within the domestic jurisdiction.” See Friendly Relations Declaration, *supra* note 5.

had little basis for an authoritative answer.⁷⁷ The question's wording spared the Court the embarrassment of having to declare as *non liquet* issues of which it was unequivocally seised.

Unfortunately, however, in order to perform this dodge, the Court had to make a rather dubious move, asserting—in what amounts to a disguised tautology—that the declarant body, though established as part of the Provisional Institutions of Self-Government of Kosovo under Security Council Resolution 1244, was acting in a different—and yet somehow, not wrongfully *ultra vires*—capacity.⁷⁸ The Court characterizes the declarants as acting “together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.”⁷⁹ But since the Security Council's intervention to bar Serbia's exercise of police power in the territory was the *sine qua non* of all of the Kosovo Assembly's activities (within or without “the framework of the interim administration”) and since the intervention's mandate forbade prejudice to Serbia's territorial integrity, the Security Council thereby undertook a commitment to avoid allowing the Kosovars to exploit the intervention for secessionist purposes—a commitment that can be presumed to have been indispensable to Russian support for, and Chinese acquiescence in, the authorization of the Mission as a whole.

Having occurred under UN protection, the Kosovars' proclamation of independence fell beyond the bounds of the norm that would have entitled it to be regarded with neutrality. Thus, the Court could not justly spare itself the burden of determining whether the Kosovars had an international legal entitlement, under a doctrine of remedial secession,¹⁸⁰ to effect independence.

⁷⁷ See Kosovo Advisory Opinion, *supra* note 8, para. 82 (showing that states have expressed “radically different views” on the doctrinal issues central to determining Kosovo's status: (1) “Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination, and exploitation, the international law of self-determination of peoples confers upon part of the population of an existing State a right to separate from that state”; (2) “whether international law provides for a right of ‘remedial secession’ and, if so, in what circumstances”; and (3) “whether the circumstances which some participants maintained would give rise to a right of ‘remedial secession’ were actually present in Kosovo”).

⁷⁸ See Kosovo Advisory Opinion, *supra* note 8, paras. 102–09.

⁷⁹ *Id.* at para. 109. To infer any legal conclusions about Kosovar “peoplehood” on this basis would be to overread what Zoran Oklopčić properly calls “a seemingly off-the-cuff remark.” Zoran Oklopčić, *Preliminary Thoughts on the Kosovo Opinion*, EJIL: TALK! (July 26, 2010), <http://www.ejiltalk.org/preliminary-thoughts-on-the-kosovo-opinion/#more-2505>. The use of that the term “people” may refer merely to the declarants' subjective understanding of their “capacity.” *Id.*

⁸⁰ For arguments in favor, see the Statement of Federal Republic of Germany filed with the International Court of Justice in connection with the Kosovo Advisory Proceedings, at 34–37, *available at* <http://www.icj-cij.org/docket/files/141/15624.pdf>. See also Written Statements of Albania, Estonia, Poland, and Ireland, *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1>. *But see*, e.g., Written Statements of Cyprus, Spain, and the Russian Federation. For a study of these submissions, see Marko Milanović, *Arguing the Kosovo Case*, in *THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION* (Marko

Nonetheless, the ICJ can scarcely be blamed for the sleight of hand, any more than the Badinter Commission can be blamed for its pretense that its findings on Croatian and Bosnian statehood followed from the application of established legal norms. In both instances, hyper-formalism furnished an opportunity to defer authoritative consideration of questions that are, in the collective *opinio juris* of states, fundamentally unsettled. In both instances, the apparently predominant moral reaction of the international community to the particular cases was allowed to prevail without any acknowledged alteration to existing doctrine. And in both instances, perhaps not coincidentally, the losers were Serbs, whose legal interests—whether or not otherwise worthy—effectively incurred a penalty for transgressions committed in the name of the Serb nation that, even if doctrinally immaterial, had poisoned the well.

D. Self-Determination of Peoples in a Pluralist Global Order

As noted at the outset above, self-determination plays a paradoxical role in the international legal order. That concept establishes the very foundation of the system's operative norms: The UN Charter is notionally established by the "Peoples" of the member states through their "respective Governments," and its premier "Principle"—the "sovereign equality" of states (Article 2(1)), from which is deduced the system's default peace and security norms—is grounded in the "purpose" of developing "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" (Article 1(2)). Precisely because this is transparent hypocrisy—precisely because the effective authority of governmental apparatuses is being rationalized as a manifestation of the will of respective peoples in the absence of the slightest indication of accountability—self-determination's role in the content of operative norms is necessarily indirect. As La Rochefoucauld teaches, "Hypocrisy is the tribute that vice pays to virtue."⁸¹ A system nominally predicated on the principle of self-determination is constrained to produce operative norms that can be rationalized as manifesting that consideration, even while that system functions in practice as a working arrangement among participants who owe their standing more to their control over than to approval by the "peoples" that they presume to represent.

Milanović & Michael Wood eds., 2014), <http://ssrn.com/abstract=2412219>. As Milanovic reports: "Perhaps the most remarkable item from the first round is that one state in the pro-Serbia camp *did* explicitly endorse the right to remedial secession—Russia—while claiming that Kosovo did not satisfy its requirements on the facts. It was indeed the only member of the P-5 to do so." *Id.* at 25.

⁸¹ JEREMY LOTT, IN DEFENSE OF HYPOCRISY 60 (2006).

I. Self-Determination in Colonial Territories and Integral Territories

In 1960, the UN General Assembly authoritatively reinterpreted the self-determination principle as applied to the “Non-Self-Governing Territories” previously accommodated by Article 73, thereby expiating the UN system’s “original sin” of acquiescence in colonialism.⁸² The Declaration on the Granting of Independence to Colonial Countries and Peoples affirmed that “[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”⁸³ There was no ambiguity about what it meant for peoples to “freely determine their political status” in Trust and Non-Self-Governing Territories: “immediate steps” were to be taken “to transfer all powers to the peoples of those territories.”⁸⁴ An accompanying resolution, aimed at the stubborn Portuguese insistence on the integral nature of overseas territories that were “known to be of the colonial type,” defined as Non-Self-Governing any “territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it” and which is subject to “administrative, political, juridical, economic, or historical” factors that “arbitrarily place it in a position or status of subordination.”⁸⁵ Territorial populations could decline the independence option in favor of “Free association with an independent State” or “Integration with an independent State,” but only after clearing procedural hurdles designed to verify the authenticity of the decision to forsake independence.⁸⁶

The Charter and the decolonization resolutions left unclear whether a “people” was implicitly defined as the whole territorial population of any given state or Trust or Non-Self-Governing Territory.⁸⁷ There was perfect clarity, however, about the inadmissibility of any invocation of the self-determination principle in aid of external efforts to fragment either existing sovereign states or entities entitled to an option of sovereignty: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the

⁸² See generally W. OFUATEY-KODIOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* (1977).

⁸³ G.A. Res. 1514 (XV), *supra* note 4, at para. 2. The Security Council reaffirmed the statement in S.C. Res. 183, paragraph 4 (Dec. 11, 1963), and the language is repeated verbatim in Common Article 1 of the 1966 Human Rights Covenants. ICCPR, *supra* note 2, art. 1. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, art. 1.

⁸⁴ G.A. Res. 1514 (XV), *supra* note 4, at para. 5.

⁸⁵ G.A. Res. 1541 (XV), *supra* note 4, Annex, Principles I, IV, V.

⁸⁶ See *id.* at Principles II, VI VII, VIII, IX.

⁸⁷ *Id.* (containing at some points plural references (e.g., “the territory and its peoples”) thereby implying that a single Non-Self-Governing Territory can contain more than one people, though this plurality is given no operative significance).

United Nations.”⁸⁸ This point is reiterated in the 1970 Friendly Relations Declaration, though in a curious way:

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.*⁸⁹

On the one hand, this “safeguard clause” must be understood in the decolonization context; it was written to encompass Rhodesia and South Africa, where the “subjection of peoples to alien subjugation, domination, and exploitation” was intra-territorial. The qualifying language evinced no intent to extend the right of populations to sovereign independence beyond the role of corrective to colonialism and its vestiges; the widest variety of authoritarian and ethnically unbalanced regimes, “representing” their populations within the terms established by their prevailing ideologies, were intended to pass this test.⁹⁰

On the other hand, the safeguard clause is the UN system’s most revealing authoritative statement of the rationale on which the territorial integrity norm hinges. (Moreover, subsequent iterations have broadened the last clause of the qualifier to speak of “a government representing the whole people . . . without distinction of any kind.”)⁹¹ The animating rationale inevitably suggests, however abstractly, some threshold at which it would be admissible to “dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States;”⁹² being a statement of general principle, it further suggests that vestiges of Western European “salt water colonialism” cannot be for all time unique in meeting this threshold.

⁸⁸ G.A. Res. 1514 (XV), *supra* note 4, at para. 6.

⁸⁹ Friendly Relations Declaration, *supra* note 5 (emphasis added).

⁹⁰ See, e.g., ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 115–18 (1995) (discussing the preparatory work to the safeguard clause, which reveals concessions to non-liberal-democratic states).

⁹¹ See G.A. Res. 50/6, *supra* note 7; United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, *supra* note 7.

⁹² Friendly Relations Declaration, *supra* note 5.

Thus, however open-textured the interpretation of governmental conduct “in compliance with the principle of equal rights and self-determination of peoples,” the doctrine’s foundations cannot altogether preclude the possibility of a legal justification for external assistance to secession. Moreover, the extent of the international order’s tolerance for heterogeneity of internal governing arrangements has not remained frozen. The dynamic nature of what I have elsewhere termed “bounded pluralism” is reflected in the very fact that what was once dignified as “population transfer” is now authoritatively abominated as “ethnic cleansing”—conduct that authoritative documents have, however qualifiedly, identified with forfeiture of sovereign prerogative.⁹³ Even so, the international order, while occasionally validating external action against a manifestly illegitimate effective government,⁹⁴ has rarely validated externally-sponsored fracturing of the territorial units.⁹⁵

II. Presumptive “Trial by Ordeal” and the Emerging Doctrine of “Remedial Secession”

Long after—and paradoxically, as a concomitant of—the collective renunciation of cross-border uses of force, the international system continued to dignify the internal use of force as a basis for setting the terms of territorial public order. The 1933 Montevideo Convention⁹⁶—best read in conjunction with a contemporaneous Latin American treaty, the 1929 Civil Strife Convention (an early articulation of the non-intervention norm)⁹⁷—and

⁹³ G.A. Res. 60/1, para. 139 (Sept. 16, 2005) (affirming the Security Council’s authority to intervene forcibly in the internal affairs of sovereign states, in furtherance of the “responsibility to protect,” where “national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity”).

⁹⁴ For example, coups in Haiti in 1994 and Sierra Leone in 1997 drew not only international condemnation, but also continued recognition of the ousted government-in-exile, leading ultimately to a forcible restoration. In these cases, there had been a landslide victory of the ousted President in a very recent, internationally-monitored election, as well as notorious brutality and demonstrable unpopularity on the part of the forces involved in the coup. As a result, a vast diversity of international actors, cutting across the international system’s plurality of interests and values, were able to perceive in common a population’s manifest will to restore an ousted government. See BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 366–87, 405–09 (1999).

⁹⁵ The establishment of Bangladesh as a result of India’s 1971 intervention in East Pakistan is a rare instance of such fracturing. Even there, the initial U.N. General Assembly indirectly repudiated the external use of force that enabled Bangladesh’s independence. G.A. Res. 2793 (XXVI) (Dec. 7, 1971) (calling “upon the Governments of India and Pakistan to take forthwith all measures for an immediate cease-fire and withdrawal of their armed forces on the territory of the other to their own side of the India-Pakistan borders”).

⁹⁶ See Montevideo Convention, *supra* note 19.

⁹⁷ Convention on Duties and Rights of States in the Event of Civil Strife, May 21, 1929, 134 L.N.T.S. 45, art. 1 (codifying an Inter-American treaty forbidding “the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied”).

“the rule against premature recognition”⁹⁸ were invoked to validate the outcome of any contest untainted by inadmissible foreign assistance to separatist forces. States were licensed to crush internal efforts at territorial fragmentation; only when they proved confessedly unwilling or decisively unable to do so did they lose their legal claim to territorial integrity.

In effect, independence forces demonstrated their legitimacy by winning a civil war against the odds, odds made longer by the asymmetry of non-intervention norms, which imposed an absolute ban only on assistance to the separatists. While not precluding secessionists from taking their best shot,⁹⁹ the doctrinal formula presumptively forbade external assistance to local forces challenging¹⁰⁰—but not to local forces bolstering¹⁰¹—the existing territorial boundaries fixed at the inception of the current peace and security order.

Such a “trial by ordeal” doctrine is not as completely bereft of moral logic as it may initially appear. External assistance to separatist forces has been a notorious means of both great power predation and regional mischief. Moreover, however arbitrary state boundaries may be, settled bases for reconfiguration tend to be elusive. Territories—whether of whole states or of the entities for which secession is sought—frequently lack demographic coherence (though such coherence can, as we have lately seen, be ruthlessly imposed). Given the conundrum of delimiting political communities with inter-mixed populations and overlapping historical claims, an alternative doctrine would be difficult to design.

⁹⁸ See, e.g., MALCOLM SHAW, *INTERNATIONAL LAW* 383 (5th ed. 2003); HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 45–46 (1947) (“[T]he sovereignty of the mother country is a legally relevant factor so long as it not abundantly clear that the lawful government has lost all hope or abandoned all effort to reassert its dominion.”).

⁹⁹ “Successful revolution sooner or later begets its own legality.” STANLEY A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 66–67 (3d ed. 1977).

¹⁰⁰ 1981 Non-Intervention Declaration, *supra* note 6, Annex, art. 2(f) (affirming “[t]he duty of a state to refrain from the promotion, encouragement, or support, direct or indirect, of rebellious or secessionist activities within other States, *under any pretext whatsoever*, or any action which seems to disrupt the unity or to undermine or subvert the political order of other States” (emphasis added)).

¹⁰¹ A complicated question arises when insurgent forces achieve such efficacy as to achieve the status of “belligerent,” thereby establishing the existence of a full-fledged “civil war.” Since a government’s standing traditionally hinges on its maintenance of effective control through internal processes, the inability of a regime to maintain control by its own devices calls that standing into question, thereby arguably triggering an obligation of foreign states to observe neutrality. See, e.g., Institut de Droit International, *Resolution: The Principle of Non-intervention in Civil Wars* (Aug. 14, 1975), http://www.idi-iiil.org/idiE/resolutionsE/1975_wies_03_en.pdf; see generally Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 *BRITISH Y.B. INT’L L.* 189 (1986). For a recent assessment of this issue, see Dapo Akande & Zachary Vermeer, *The Airstrikes Against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars*, *EJIL: TALK!* (Feb. 2, 2015), <http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/> (last visited June 18, 2015).

An international validation of secessionism would risk incentivizing ethno-nationalist mobilizations in majority-minority regions—which, *inter alia*, rarely augurs well for the ethnic groups that are minorities within such regions. Such validation might even incentivize local political entrepreneurs to commit acts calculated to provoke a ruthless backlash, which could then be invoked to make a case for “remedial secession.”¹⁰² The traditional rule is a harsh rule, but it is designed to avert scenarios that can be harsher still.

And yet, this “trial by ordeal” doctrine seems highly unsatisfactory in an international system that purports to subject exercises of power to the rule of law. In an international system in which statehood is rationalized as a manifestation of the self-determination of “the whole people belonging to the territory without distinction,” there must be some limit—even apart from the expressly designated contexts of “colonial domination, alien occupation, and racist (*apartheid*) regimes”—to the domination that the international order can rationalize.

Any narrow exception will be grounded neither in the inherent rights of an ethnically-delimited political community nor in the “democratic” will of a population delimited by such internal boundaries as a domestic political order may have established at a given time. It will be grounded, rather, in the future-oriented concern that whereas statehood in principle represents the self-determination of the territorial population as a whole going forward, a particular existing delimitation may doom a territorially concentrated ethnic minority to subordination and predation within an inalterably adverse political community. Only such extreme circumstances might justify relaxation of a rule that is needed to pre-empt endless controversy and bloodletting.

III. The Inapplicability of Self-Determination to Crimea and Eastern Ukraine

The implications for the Ukraine Crises of 2014–2015 are clear. Even if the Kosovo example is taken to reflect the international community’s tacit acceptance of a principle of remedial secession, such a principle would validate external assistance to secessionist efforts only where the predations suffered by the territorially concentrated ethnic minority are so grave and prolonged as to establish clearly the futility of any alternative that preserves the territorial integrity of the existing state. Whatever merit may be ascribed to the Crimean (and Donetsk and Luhansk) secessionists’ suspicions about the future behavior of the newly established government in Kiev, no *prima facie* case has been made that the ethnic Russian populations in Crimea and in Eastern Ukraine had actually been subjected to such severe and long-term adverse treatment as to render their condition irremediable within the context of the Ukrainian state.

¹⁰² See Zoran Oklopčic, *Constitutional (Re)Vision: Sovereign Peoples, Constituent Powers and the Formation of Constitutional Orders in the Balkans*, 19 CONSTITUTIONS: INT’L J. CRITICAL & DEMOCRATIC THEORY 81, 95 (2012).

Still less does any effort to ascribe “peoplehood” to the populations of the regions—whether on the basis of historical ties, ethnic linkages, pre-existing constitutional status, or plebiscite—furnish Crimea or any other breakaway region with a lawful competence to invite foreign support. Whereas a manifest deprivation of “virtual” representation might establish a deprived community as a distinct “people” with an unsatisfied right to self-determination, none of the recent developments in international law facilitate an affirmative case that leads from the community’s inherent characteristics to a right to aided secession. The self-determination principle is beset by the ineluctable reality that most genuine affective communities lack the territorial coherence that would be needed for the self-governance of those communities and only those communities. The territorial political community is necessarily an artificial community, to the configuration of which its disparate members need to be reconciled based on its functions going forward.¹⁰³

Nothing about the Russian-speaking fifty-eight percent of Crimea’s residents, or the region’s seemingly arbitrary 1954 conferral from the Russian Soviet Federated Socialist Republic to the Ukrainian Soviet Socialist Republic (a fellow unit of what was then a single sovereign state for purposes of international law), or the special constitutional status of Crimea within Ukraine, or even the ostensible desire of referendum voters to form an independent polity establishes an international legal personality capable of vitiating Ukraine’s right to territorial integrity. However doctrinally confused the international response to the “non-consensual dissolution” of the Socialist Federal Republic of Yugoslavia, it calculatedly produced no innovation that applies in any direct way beyond the unique circumstances of that case.

E. Concluding Thought: The Dangers of Doctrinal Uncertainty Exceed Those of Modification

The United Nations Charter-based international order has sought to reconcile the self-determination of peoples with the inviolability of state boundaries by presuming sovereign states to be manifestations of the self-determination of the entirety of their territorial populations. This presumption, albeit notionally rebuttable, has traditionally prevailed even where states could only by a feat of ideological imagination be characterized as “possessed of a government representing the whole people belonging to the territory without distinction.” But the international reaction to fragmentation in the former Yugoslavia—regarding both the initial “dissolution” and the subsequent struggle over Kosovo—has called into question the rigid doctrines of the past, and opened the door to

¹⁰³ It is telling that the Canadian Supreme Court’s decision in *Reference re Secession of Quebec*, *supra* note 75, perhaps the most elaborate contemporary judicial opinion anywhere on the topic, pointedly sidestepped the question of what counts as a “people,” jumping ahead conceptually to the non-violation of self-determination. The Court thus avoided having to determine whether the relevant “people” was comprised of (a) the entire Quebec population, (b) the entire Quebec population minus the indigenous communities; (c) Francophone Quebecois, or (d) all Francophone Canadians, let alone (e) all Canadians. *Id.* at 282, para. 125.

secessionist claims theretofore dismissible as beyond the pale. Although no vindication of Russian intervention in Ukraine can properly be drawn from the Yugoslav cases, the Ukrainian crises help to surface the hidden dangers of an emerging jurisprudence that would allow heretofore inadmissible considerations—whether ethnic, historical, constitutional, or “democratic”—to compromise the territorial inviolability norm.

Thus far, the international system has allowed only for implicit and unacknowledged relaxations of its traditional resistance to external support for secession. Authoritative legal actors, fearing the consequences of overt doctrinal change, have validated irregular outcomes through well-intentioned exercises in intellectual dishonesty. But these exercises work a long-term harm in undermining the principled foundations of legal constraint on cross-border exertions of coercion and force. Rather than thwarting destabilizing influences, the failure to articulate modifications to once-rigid standards merely invites the invocation of partisan rationales based on principles—such as ethno-national coherence or domestic constitutionality—that are alien to the structure of the international order. Such principles, while often attractive in the context of domestic political orders, are incapable of grounding a normative framework of peace and security in world beset by conflicting interests and values—not to mention the former disguised as the latter.

It is not, however, necessarily fruitless to articulate doctrinal modifications that appeal to the international community’s least-common-denominator moral sensibilities. The UN Charter-based order, for all of its counterintuitive rigidities, is predicated not on an amoral deal among effective ruling apparatuses, but on a moral vision that brackets ideological difference while insisting on an expandable (and demonstrably expanding) range of cross-cutting imperative precepts. Whatever else it may contestably mean for a state to be “possessed of a government representing the whole people belonging to the territory without distinction,” no one can be heard to claim its compatibility with “ethnic cleansing.”

If the Yugoslav cases are not given an express narrow reading, the alternative is that they will be exploited to destabilize the international order as a whole. Apologists for Russia’s intervention in Ukraine are showing the way.