

# Essay

## Secession and Self-Determination:

### A Territorial Interpretation

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[T]he phrase [self-determination] is simply loaded with dynamite. It will raise hopes which can never be realized.<sup>1</sup>

Ethnic violence pervades the news, from Eastern Europe and the Soviet Republics to Sri Lanka, Eritrea, and India. Although some ethnic struggles concern issues of domestic political fairness, many involve secessionist claims. Secessionist demands, unlike claims about domestic political fairness, cannot be satisfied through domestic political reforms. Instead, they aim to redraw the political boundaries. Because secessionist movements call for international recognition of the states they seek to create, they necessarily concern the world community. The right to secede is a matter of international law.

International law provides no easy answer to the problem of separatist movements. Instead, as in so many other areas, opposing principles seem to come in complementary pairs. Two inconsistent themes run throughout the academic discussions, one supporting a right of secession and the other denying it. On the one hand, the principle of self-determination of peoples suggests that every "people" has a right to its own nation-state.<sup>2</sup> While the positive law status of this norm and its applicability to the secessionist context are debatable,<sup>3</sup> on a rhetorical level few deny the principle's ap-

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1. R. LANSING, THE PEACE NEGOTIATIONS, A PERSONAL NARRATIVE 97 (1921).

2. Some United Nations documents supporting a right of self-determination are set out in note 5 below, and in the accompanying text.

3. Michla Pomerance, for example, doubts that there is a "right" to self-determination. M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 71 (1982) ("The suggestion that self-determination is a principle of *jus cogens* is thus seen to be without any firm legal foundation"). Others claim that there is a legal right to self-determination. See, e.g., H. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 78 (1988). Wilson, it should be noted, does not argue that there exists a legal right of secession. *Id.* at 88. Indeed, it is quite possible to argue that a right to self-determination exists but not to support a right of secession.

peal. Unfortunately, it seems directly contrary to another, equally venerable, principle of international law, which upholds the territorial integrity of existing states.<sup>4</sup> In secessionist struggles, it seems, one principle or the other must give way. Where a secessionist movement establishes that its people do not currently possess a nation-state of their own, the first principle would require that the existing territorial boundaries be redrawn, but this redrawing would violate the territorial integrity of the existing state. If, conversely, territorial integrity takes priority, then minority groups within the existing state will be denied their cherished claims to independence.<sup>5</sup> Or at least, so goes the standard account.<sup>6</sup>

I argue here that, contrary to popular assumptions, the difficult normative issues arising out of secessionist claims do not involve an incompatibility of the territorial integrity and rights of peoples arguments. In fact, these arguments do not pose the inconsistencies normally assumed of them.<sup>7</sup> Secessionist claims involve, first and foremost, disputed claims to territory. Ethnicity primarily identifies the people making the disputed territorial claim. The two supposedly competing principles of people and territory actually work in tandem.

This reinterpretation of secessionist movements alters the equities somewhat. The plausibility of a separatist claim does not depend primarily on the degree to which the group in question constitutes a distinct people in

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4. Some United Nations norms concerning territorial integrity are set out in note 6, *infra*.

5. The opponents of secession are probably correct as a matter of positive law. Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT'L & COMP. L.Q. 867 (1989). Even if one accepts a right of self-determination in some contexts, this does not entail acknowledging a right of secession. The principle of territorial integrity often explicitly qualifies United Nations declarations recognizing self-determination. *See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, 67, U.N. Doc. A/4684 (1960) [hereinafter G.A. Res. 1514] ("Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the U.N.*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 124, U.N. Doc. A/8028 (1970) ("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 colour").

6. For examples of arguments concerning the opposition between territorial integrity and a self-determination right of secession, see Knight, *Territory and People or People and Territory? Thoughts on Postcolonial Self-Determination*, 6 INT'L POL. SCI. REV. 248 (1985); A. COBBAN, *THE NATION STATE AND NATIONAL SELF DETERMINATION* 136 (1969); M. POMERANCE, *supra* note 3, at 12. *But see* C. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 109 (1979).

7. The apparent inconsistency arises because two competing versions of the principle of territoriality can be discerned. Territoriality might be understood to require protection of the existing territorial status quo. However, it might also include territorial arguments about why existing national boundaries should be redrawn.

accordance with relevant international norms. The normative force behind secessionist arguments derives instead from a different source, namely the right to territory that many ethnic groups claim to possess. Secession typically represents a remedy for past injustices. This historical territorial analysis contrasts sharply with the traditional analysis of ethnic differentiation. The currently accepted interpretation of self-determination claims poses the wrong questions in evaluating the merits of particular secessionist claims. It overlooks an important normative ingredient of the arguments that secessionists make, and for this reason understates their claims.

In addition, the current rhetoric about self-determination in one respect treats secessionists' arguments too generously. It suggests that the right to secede flows naturally from principles of self-government such as those embodied in the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen.<sup>8</sup> This distinguished lineage affords secessionist claims an undeserved opportunity to stake out the high moral ground. Focusing secessionist disputes instead on disputed claims to territory puts the competing groups on a more even rhetorical par. The mere fact that the secessionist group constitutes a distinct people does not by itself establish a right to secede. To be persuasive a separatist argument must also present a territorial claim.

In fact, even upon cursory review, one finds that current separatist claims include, as they must, claims to particular territory. Surprisingly, existing norms of international law do not highlight the territorial claim but focus instead on whether the aggrieved group constitutes a distinct people. The phrase self-determination frames the separatist question in a misleading way; it obscures the territorial aspects of the dispute. At issue is not a relationship between peoples and states, but a relationship between people, states, and territory. Separatist arguments make little sense unless interpreted in a territorial light.

### I. THE STANDARD ACCOUNT

The standard account bases claims to secede upon principles of self-determination of peoples, according to which every nation or people has a right to determine its own destiny.<sup>9</sup> This notion of self-determination can be traced to the American Revolution (and in particular to the Declaration of Independence), but the development of the idea is more often attributed

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8. See *infra* note 10 and accompanying text.

9. This is reflected in the fact that the relevant international instruments refer to the self-determination rights of "peoples." See *supra* note 5.

to the French Revolution.<sup>10</sup> Although this diffusionist and Euro-centric view of the origin of the norm of self-determination remains subject to criticism,<sup>11</sup> many scholars assume that the idea of self-determination spread during the revolutionary turmoil in Europe from one state to another, and from there to the colonized areas now part of the Third World.

How might the ideals of the French Revolution give rise to claims to secession? The apparent answer is that the concept of popular sovereignty can be understood to encompass the right to rebel against rule by another national or ethnic group just as it includes a right to rebel against one's own government. The principle of popular sovereignty seemingly justifies both sorts of rebellion because both reject the theory that a monarch legitimately has power over citizens by virtue of where they are situated rather than by virtue of their consent. One author explains the relevance of the ideals of the French Revolution to the problem of international self-determination as follows:

The history of self-determination is bound up with the history of the doctrine of popular sovereignty proclaimed by the French Revolution: government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to which they belong should be able to secede and organise themselves as they wish. This meant that the territorial element in a political unit lost its feudal predominance in favour of the personal element: people were not to be any more a mere appurtenance of the land.<sup>12</sup>

Both the right of secession and the right to rebel against nonrepresentative local leaders derived from the rejection of a supposedly feudal, territorial sovereignty principle. The territorial principle was supplanted by a principle of government by the consent of the governed.

The notion of self-determination of peoples increased in prominence after the end of the First World War. President Woodrow Wilson analogized the principle to American ideals of democracy, promoting self-determination of peoples as the foreign extension of American norms of political fairness.<sup>13</sup> Redrawing the map of Europe after the War, the victors tried to respect ethnic boundaries -- at least with regard to the empires of the defeated nations. Self-determination had virtually no impact on the colonial empires of the victorious powers.<sup>14</sup>

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10. Sources linking the notion of self-determination to the American and French Revolutions include D. RONEN, *THE QUEST FOR SELF-DETERMINATION* 1 (1979); H. WILSON, *supra* note 3, at 55-56.

11. See generally J. BLAUT, *THE NATIONAL QUESTION: DECOLONISING THE THEORY OF NATIONALISM* (1987).

12. A. SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 17 (1973).

13. A. COBBAN, *supra* note 6, at 62-66.

14. Cobban noted this double standard applied by the victorious powers. A. COBBAN, *supra* note 6, at 66-69; See also M. POMERANCE, *supra* note 3, at 5.

Self-determination also found rhetorical support in Marxist-Leninist theory, although Marxism-Leninism employed the concept, in substantial part, merely strategically.<sup>15</sup> The principle of self-determination was used to encourage colonized peoples to throw off alien (and, not coincidentally, capitalist) domination. In particular, promises of local autonomy proved instrumental in achieving support for the Russian Revolution, for the tsars had extended Russian power over a wide range of other nationalities. The manner in which the communist government later reextended Russian power over the newly freed nationalities is well known, and its ramifications are still becoming clear.<sup>16</sup> But, for a while, it seemed that Wilson and Lenin sounded a common theme, namely the freedom of peoples to determine their own states as they pleased.

In its next incarnation, the concept of self-determination had a much greater practical impact. After the Second World War the anti-colonial movements in the Third World succeeded in dismantling imperial structures in Asia, Africa, and elsewhere. Ideals enshrined in the United Nations Charter, which recognized the goal of self-determination of peoples, along with other United Nations instruments, lent important rhetorical support to this process. Articles 1(2) and 55 of the United Nations Charter, for example, both list "self-determination of peoples" as goals of the United Nations.<sup>17</sup> Since the adoption of the United Nations Charter, the United Nations has adopted several legal instruments significantly endorsing the right of self-determination. For example, General Assembly Resolution 1514 states that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>18</sup>

Six years later, the United Nations International Covenant on Civil and Political Rights was adopted, stating that:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>19</sup>

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15. See W. CONNOR, *THE NATIONAL QUESTION IN MARXIST-LENINIST THEORY AND STRATEGY* 45-46 (1984).

16. *Id.* at 392-407.

17. U.N. CHARTER art. 1, para. 2; *Id.* at art. 55.

18. G.A. Res. 1514, *supra* note 5, at 66.

19. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, art. 1, para. 1, 999 U.N.T.S. 171, 173.

The International Covenant on Economic, Social, and Cultural Rights makes the identical statement.<sup>20</sup> Additionally, General Assembly Resolution 2625 states that:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.<sup>21</sup>

These norms played an important rhetorical role in the decolonization process. With time, however, the concept's inadequacies became more apparent. The anti-colonial movements relied upon the ideal of self-determination in their struggles for independence, but some of the newly established states showed little inclination to extend to their own minority groups those same self-determination rights.<sup>22</sup> The self-determination norm, if taken at face value, seemed to require that states be willing to subdivide indefinitely into an infinitely larger number of infinitely smaller political entities.

The divergence between the new states' attitudes toward colonial powers and toward local secessionist groups did not pass unnoticed by Western nations. Belgium proposed to specify that the self-determination norm applied to both cases equally.<sup>23</sup> The United Nations rejected this proposal and adopted in its place a "salt water" theory of colonialism.<sup>24</sup> Inclusion of unwilling nationalities was illegitimate only if the state and its colony were geographically separated. The Organization of African Unity (OAU) took the position that existing territorial boundaries in Africa were to be respected -- even though they constituted remnants of previous colonial empires drawn with little respect for the distribution of ethnic groups.<sup>25</sup> Although some find this hypocritical, international law currently supports the position that anti-colonial movements can invoke the right of self-deter-

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20. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 1, para. 1, 993 U.N.T.S. 3, 5.

21. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 123, U.N. Doc. A/8028 (1971).

22. In some cases, this led to protracted fighting, as in the attempted Biafran secession. *See generally* J. STREMLAU, *THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967-1970* (1977).

23. Thornberry, *supra* note 5, at 873.

24. *Id.* at 873-74.

25. Friedlander, *Self-Determination: A Legal-Political Inquiry*, in *SELF DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS* 317 (Y. Alexander & R. Friedlander eds. 1980) [hereinafter *SELF DETERMINATION*] (citing Ethiopian Emperor Haile Selassie, member of the OAU Consultative Committee, on the Biafran secession movement). *See also* Mojekwu, *Self-Determination: The African Perspective*, *id.* at 230; Mayall, *Self-Determination and the OAU*, in *NATIONALISM IN THE HORN OF AFRICA* (I. Lewis ed. 1983); Tiewul, *Relations between the United Nations Organization and the Organization of African Unity in the Settlement of Secessionist Conflicts*, 16 *HARV. INT'L. L.J.* 259 (1975).

mination, but not groups seeking to secede from established states.<sup>26</sup> Once free of colonial rule, the newly established states become entitled to territorial sovereignty.

While international law does not provide a right of secession, separatists have nonetheless relied on particular provisions of international law in making their secessionist claims. They have focused on the United Nations' clear recognition of self-determination, while disregarding the accompanying caveats that the principle does not supersede a state's territorial integrity.<sup>27</sup> But the self-determination argument potentially supports an unlimited right to withhold individual consent to state authority. Proponents of secession therefore face a very slippery slope in formulating a right to secede that does not open the door to complete anarchy. One way to limit the right of self-determination is to claim that self-determination is appropriate for nations or peoples, but not for minorities.<sup>28</sup> The issue then becomes whether the separatist group is a nation or a people.<sup>29</sup> Another is to emphasize that the right extends only to those groups subject to "alien" domination.<sup>30</sup> Effectively, these strategies require an inquiry into the extent to which would-be secessionists constitute a true nation, especially whether they are racially, linguistically, religiously, or ethnically distinct from the dominant group in the existing state.<sup>31</sup> In particular, self-determination claims have often turned on questions of race or pigmentation.<sup>32</sup>

The debate over the validity of particular claims to secede is thus framed in terms of the two generally recognized values of self-determination and territorial integrity. The difference between proponents and opponents of particular secessions lies in the relative priority they accord these apparently competing values within specific contexts. The appeal of a secessionist argument lies in the importance of self-determination, the links between that principle and the concept of democratic self-government, and the alleged moral superiority of self-determination over the preservation of territorial boundaries. Ethnic distinctiveness plays an important role in these arguments because the secessionist needs to limit the number of

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26. See generally Thornberry, *supra* note 5, at 876, 887-89. Pomerance is among those who call this a double standard. M. POMERANCE, *supra* note 3, at 42 (citing Emerson, *The Fate of Human Rights in the Third World*, 27 *WORLD POL.* 201, 224 (1975)).

27. See *supra* notes 5 & 11.

28. T. MASARYK, *THE MAKING OF A STATE* 386 (1927). These arguments are challenged in M. POMERANCE, *supra* note 3, at 15.

29. M. POMERANCE, *supra* note 3, at 14.

30. See, e.g., G.A. Res. 1514, *supra* note 5 (declaring that subjection of peoples to alien domination violates UN Charter).

31. M. POMERANCE, *supra* note 3, at 16. See also M. SHAW, *TITLE TO TERRITORY IN AFRICA* 98 (1986); Nanda, *Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect* in *SELF DETERMINATION*, *supra* note 25, at 202-03.

32. Mazrui, *Consent, Colonialism, and Sovereignty*, 11 *POL. STUD.* 36 (1963).

groups entitled to claim a right to secede. Whether or not a positive law right to secede can be established, such arguments have undeniable rhetorical force.

Two important problems mark the way in which separatists frame their claims. First, a straightforward appeal to principles of consent and self-government cannot justify secession. Second, the alleged tension between self-determination and territorial integrity rests on a misconception of the principle of self-determination. These arguments overlap because both concern the importance of territory to political governance. I will first criticize the supposed link between secessionist claims and consent theory, for this argument is far less controversial than the latter.

## II. CONSENT, SELF-GOVERNMENT AND SELF-DETERMINATION

Traditionally, the self-determination norm on which secessionists base their claims is thought to turn on democratic principles of consent and popular sovereignty.<sup>33</sup> According to this argument, self-determination represents a liberal democratic value (with secession as the liberal democratic alternative), while the principle of territorial integrity remains feudal, undemocratic, and oppressive. The idea that government must stem from the consent of the governed seems to allow a disaffected group the right to opt out of an existing state. If consent is the keystone of legitimacy, then a non-consenting individual must be allowed to leave. In this way, principles of democratic government translate into a right of secession. The only countervailing principle, that of the territorial integrity of existing states, suffers from a suspect historical association with monarchy and feudalism. Therefore, so the argument goes, territoriality must give way to liberal democratic principles and the right of self-determination.

The apparent simplicity of this position is misleading in at least one important way; it places too much weight upon consent as the cornerstone of state legitimacy. Despite the rhetoric of liberal democracy, actual consent is not necessary to political legitimacy. Indeed, theorists have never thought that a refusal to consent exempts an individual from state authority. In the domestic context, actual consent rarely exists, and for this reason political philosophers have fallen back on theories of tacit consent, arguments which are fictitious.<sup>34</sup> Tacit consent theories do not crumble in the face of a citizen's loud protest that a government cannot legitimately represent him or her. Consent makes up an important part of democratic rheto-

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33. See, e.g., D. RONEN, *supra* note 10, at 6-9. This was also President Wilson's idea. A. COBBAN, *supra* note 6, at 63.

34. See A. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 79 (1979).



ric, but philosophers have managed to justify state power quite nicely without actual consent. Separatists cannot base their arguments upon a right to opt out because no such right exists in democratic theory.

Government by the consent of the governed does not necessarily encompass a right to opt out. It only requires that within the existing political unit a right to participate through electoral processes be available. Moreover, participatory rights do not entail a right to secede. On the contrary, they suggest that the appropriate solution for dissatisfied groups rests in their full inclusion in the polity, with full participation in its decision-making processes.

Two lines of reasoning explain why one might erroneously link theories of democratic participation with a right of secession. First, in some cases in which secession is sought, the members of the separatist group are also denied democratic participation rights. For example, inhabitants of most colonies were denied both independence and electoral influence on the decision-making processes of the colonizing state. This is not always the case. In some contemporary secession movements, the polity accords members of the minority group the same democratic rights as other citizens.<sup>35</sup> Yet separatists typically would not find satisfaction in rights of democratic participation. What makes them separatists is their desire to leave and form a new state. The fact that some states deny certain groups the right to participate does not explain why secession, rather than full participation, is the appropriate remedy.

The second line of reasoning linking consent to secession proposes that denying a right of secession is directly contrary to the wishes of the separatist group, and thus a violation of the principle of popular sovereignty. If one were to consult the secessionists, in many cases one would find a desire to secede. How then can it be consistent with democracy to deny a right to secede? The fallacy of this argument is obvious; it assumes that the relevant individuals to consult are the members of the secessionist group. In consulting the population of the entire state, one might find that a majority overall wished to remain a single country. What has not been explained is why only the separatists need be consulted. However, this cannot be explained in terms of popular sovereignty or consent. As one author has put it, who is the "self" in self-determination?<sup>36</sup> Is it the minority group, or is it the state as a whole?

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35. For example, the Québécois arguably possess the same democratic rights as other Canadians. They presently enjoy the same rights to free expression, voting, and education. *See THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, §§ 2, 3, pt. I, Constitution Act of 1982, sched. B, Canada Act 1982, ch. 11 (U.K. 1982).

36. M. POMERANCE, *supra* note 3, at 14-23.

The separatist would argue that the relevant wishes are clearly those of the secessionists themselves. Because it is their preferences that matter, they have a right to withhold consent if they choose and, if they do, then they have a right to secede. A separatist would probably concede that individuals in the dominant ethnic group do not have a right to opt out. They cannot escape political obligations by withholding consent from the government, but if some minority ethnic group withholds consent then it cannot be bound. The argument must be, in other words, that tacit consent can be attributed to members of the dominant ethnic group in the state, but not to members of the secessionist group. As to the latter, only actual consent will suffice.

This raises an argument about the proper unit within which democratic government should operate, for the secessionists have assumed that there are properly two governmental units, while opponents of secession assume that there is only one. Both sides agree that a state has substantial power to infer tacit consent from all those within the governmental unit, but has no such power over those outside the unit. They disagree, however, over how that unit should be defined.

The separatist argument seems to propose that the governmental unit ought to be defined in terms of ethnic or national groupings rather than territory. This view defines political boundaries in terms of peoples. This argument does not follow directly from democratic theory, for the secessionist definition of governing units is no more democratic than the territorial view. Neither argument is based on consent. Indeed, as Professor Cobban argues, ethnic groupings are, if anything, less liberal and consensual than territorial. While, for the most part, a person's residence remains subject to choice, her ethnicity is fixed at birth.<sup>37</sup> Under a territorial view, one can, at least theoretically, withdraw consent simply by leaving the territory. One's geographical location is more nearly voluntary than one's ethnic identity. Democratic theory does not therefore compel the secessionist definition.

Are governmental units better defined in terms of peoples, or in terms of territory? This rephrasing of the separatist argument demonstrates the oft-noted tension between people and territory. In the next section, I wish to argue that the supposed tension is misconceived. Properly understood, the principle of territorial sovereignty accommodates a right of secession perfectly well, and indeed provides a better account of secessionist claims than a self-determination principle defined in terms of the rights of peoples. The reason is that the territorial principle does not necessarily give a state

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37. A. COBBAN, *supra* note 6, at 115.

power when its exercise of territorial sovereignty is illegitimate. If secessionists argue that the current exercise of territorial power is illegitimate, and that territorial sovereignty in fact belongs to the minority group rather than to the majority, then the secessionists can base a right to secede upon a territorial claim, rather than on a personalistic one. In other words, tacit consent can be attributed to a state's inhabitant's only when the state has legitimate power over its territory.<sup>38</sup> I next illustrate the territorial version of the separatist argument indirectly by comparing separatists with refugees.

### III. SEPARATISTS AND REFUGEES

Separatists are different from refugees, although both share a desire to escape from a political system they find intolerable.<sup>39</sup> Both wish to cut the political ties that bind them to their current states, but they differ on the method with which to cut those ties. Refugees seek to leave the state geographically. Secessionists also seek to leave the state, but mean to do so without leaving physically for another location. Refugees abandon the land that they currently inhabit. Secessionists intend to abandon their current state, and in so doing, to take with them the land on which they live.

Intuitively, one views refugees very differently from secessionists. The states that refugees abandon often are glad to see them leave. In some circumstances states try to prevent an exodus,<sup>40</sup> but ordinarily refugees find it much easier to leave than do secessionists, who seek to take a tangible asset -- territory -- with them. Refugees generally do not have to show that they constitute a people in order to justify to the world community their desire to leave. The crucial question turns instead on whether they can find another state willing to accept them.<sup>41</sup> The refugees' choice alone provides sufficient justification for cutting the political tie; their lack of consent to their own government is the relevant issue.

Secessionists do not wish to leave their territory behind. They instead typically seek to establish an independent state dominated by their own culture, language or religion. This requires a new territorial base, both in order to gain freedom from the dictates of some other culture and to com-

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38. For further development of this argument, see L. BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989); see also Brilmayer, *Consent, Contract, and Territory*, 39 *MINN. L. REV.* 9 (1989).

39. The word refugee is used here in a non-technical sense; it is not limited to persons who would qualify as such under international law, but also includes those driven out by economic pressures.

40. For many years the Soviet Union restricted the emigration of Soviet Jews. For a general discussion of Soviet restrictions on Jewish emigration, see P. STERN, *WATER'S EDGE* (1979).

41. For a discussion of the right to emigrate, see generally A. DOWTY, *CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* (1987).

pel visitors to respect the secessionists' way of life. In addition, secessionists often hold close attachments to particular parcels of land. Refugees often flee to save their lives and in many cases are glad simply to escape. However, the lives of secessionists are not generally in danger, and exit in itself is not the objective. Although secessionist rhetoric may focus on freedom from domination by an alien culture, it does not achieve this goal simply by abandoning land. An important element of the goal is the continued possession of a particular piece of land within which political rights can be enjoyed.

For example, the three Baltic states of the Soviet Union -- Latvia, Lithuania, and Estonia -- currently seek to leave the U.S.S.R. to establish independent states.<sup>42</sup> While many citizens of these republics desire freedom from Soviet domination, they do not intend to purchase it at the cost of leaving their homelands. The central government in Moscow vigorously objects to their claims. Secession would do more than remove the citizens of these three states from Soviet control; it would remove one of the most economically productive areas of the Soviet Union and limit strategic access to the Baltic Sea.<sup>43</sup> In practice, the local languages and cultures of the three Baltic states could not be protected through mass emigration. For these reasons, their goal is to secede.

By choosing secession rather than emigration, secessionists assume a duty of justification that refugees need not bear. Secessionists must somehow establish a claim to the territory on which they would found their new state. Such claims to territory do not flow automatically from ethnic distinctiveness. Groups that are ethnically distinct, but possess no independent territorial claims, have very poor chances of convincing anyone of their right to secede. Imagine, for example, a group of recent immigrants coming to a particular state in order to engage in commerce or to find jobs. Even if this group is ethnically quite distinct, it cannot establish the requisite claim to territory simply by migrating to an already inhabited area and settling there. Indian nationals in East Africa and Turkish workers in Germany may have much to complain about but, despite their differentiation from the surrounding culture, they cannot claim that this gives them a right to secede. This is not to say that maltreatment is justified because these groups lack a territorial base. But the remedy for maltreatment is better treatment by the current government, not permission to set up a new state in the same location. Maltreatment alone does not give rise to a territorial claim; such claims must be independently established.

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42. For a discussion of the political situation in the Baltic states, with primary focus on Lithuania, see Olcott, *The Lithuanian Crisis*, 69 FOREIGN AFF. 30 (1990).

43. *Id.* at 46.

The rhetoric of consent obscures the importance of territorial claims. Consent theory seems to suggest that the only important factor is whether an individual chooses to be part of the existing state. This rhetoric does not distinguish, however, between those who may avoid state authority only by leaving and those who may avoid state authority while remaining where they are. By failing to acknowledge explicitly the importance of territory, the self-determination principle projects this error into the international arena. Groups are said to have a right to popular sovereignty in that they should not be subject to domination by an alien culture. But popular sovereignty fails to explain why a minority group may avoid alien domination by taking a portion of the existing state's territory with it as it escapes state power. This territorial remedy for alien domination must be justified by territorial arguments.

#### IV. THE HISTORICAL GRIEVANCE

Most secessionist movements claim that a territorial justification exists. They argue that they have a right to the particular piece of land on which they seek to establish their nation-state. My point is not to disagree with this claim. To the contrary, I simply argue that this territorial right represents an important part of their claim that must be made explicit, and that its relevance should be recognized under international law.

The typical secessionist claim couples an argument about ethnic distinctiveness with an historical claim to a particular piece of land. As a theoretical matter, other approaches may establish territorial claims. As Professor Allen Buchanan has argued, one can imagine territorial claims not founded upon an historical grievance.<sup>44</sup> But the most intuitively appealing and direct territorial claims that one encounters typically have historical origins. The land properly belongs to the secessionist group, so the argument goes, and only came under the dominion of the existing state by way of some unjustifiable historic event.

The Baltic states provide an excellent example of such an historical grievance. In 1939, Nazi Germany and the Soviet Union signed a secret pact, placing the Baltic states within the Soviet Union's sphere of influence.<sup>45</sup> At that time, the three states were independent nations.<sup>46</sup> Shortly

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44. Buchanan, *Toward a Theory of Secession*, 1991 *ETHICS* 362, 370-73.

45. For a discussion of the making of the secret protocol, see I. DEUTSCHER, *STALIN* 435-41 (1967).

46. President Wilson's advocacy of self-determination under the framework of his "Fourteen Points" helped the three nations establish their independence following World War I. For a description of the history of each nation during this period of independence, see LITHUANIA: 700 YEARS 145-313 (A. Gerutis ed. 1969); V. MANGULIS, *LATVIA IN THE WARS OF THE TWENTIETH CENTURY* 18-80 (1983); T. RAUN, *ESTONIA AND THE ESTONIANS* 99-149 (1987).

thereafter, the Soviet Union annexed them. Germany subsequently occupied the states and the Soviet Union recaptured them in 1944.<sup>47</sup> The Soviet Union has now reluctantly acknowledged the role of the secret protocol, but declines to offer complete and immediate independence to the three states.<sup>48</sup> The ultimate resolution of the controversy remains to be determined. For present purposes, the important feature is the close connection between the historical grievance and the current secessionist demands.

At least two types of arguments can be used to demonstrate that current state boundaries are illegitimate and that secessionists have a superior claim to the land they seek. The first proposes that the land was acquired through conquest by the state from which the ethnic group wishes to secede. The example of the Baltic republics illustrates how separatists may base a claim to territory upon a charge of improper annexation. In this type of historical grievance, the currently dominant state from which the separatist group wishes to secede is responsible, it is alleged, for improperly including the group's land base into its own. The wrongdoer is thus the currently dominant state.

A second argument concentrates on a wrongdoing committed by a third party. At some previous point in history, a state with no current stake in the dispute improperly joined the territories of the currently dominant state and the separatist group. This type of wrongdoing occurred when the European colonial powers fixed colonial borders to suit their own convenience, and then left the borders intact when their empires receded. Great Britain, for example, was partly responsible for drawing borders in such a way as to place East Pakistan (present-day Bangladesh) and West Pakistan within one state. However, by the time the war of secession had begun, Great Britain was no longer involved in the dispute and the fighting took place between two other entities, neither one of which had acted illegitimately in the original territorial division. The ethnic diversity of many modern African nations is similarly a vestige of previous colonial divisions.

I argue below that it may matter in some cases which scenario led to the current state of affairs. But in both scenarios, secessionist movements are based upon some sort of historical grievance over territory. Separatists typically tell a story about how their group was wrongfully or mistakenly included in the present state. While the rhetoric of popular sovereignty does not emphasize the importance of territorial claims, such claims are

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47. Soviet historians have preferred to view the events of 1944 not as a recapture, but as a liberation of the three republics from the German invaders. See, e.g., A. VOSS, *LENIN'S BEHESTS AND THE MAKING OF SOVIET LATVIA* 70 (1970).

48. *Upheaval in the East: Soviet Congress Condemns '39 Pact that Led to Annexation of Baltics*, N.Y. Times, Dec. 25, 1989, at A1, col. 2 (late ed.).

clear enough to the participants. Secessionists have strongly held beliefs about the moral imperative of their territorial claims, preferring to stand and fight rather than simply to leave.

This analysis identifies one major defect of the standard account of self-determination, namely its insufficient focus on the history of the dispute.<sup>49</sup> A secessionist claim based on nothing other than the rights of existing peoples to have their own nations would concentrate on the issue of whether an identifiable group constituted a people, and whether the group was subject to alien subjugation. The claim would be based on a snapshot of the existing ethnic map and would take into account little more than the present distribution of ethnic and cultural identity. If United Nations norms are taken literally, then Turkish guest workers in Germany have claims on par with black Africans fighting colonial powers. So static a view of the division of a society into peoples cannot fully capture an important normative feature of separatists' demands, namely that the asserted historical grievance confers on it the right to a particular territory. The standard account neglects the fact that separatists typically seek to right historical wrongs.

#### V. THE CONTINUING ROLE OF ETHNICITY

This interpretation of the typical separatist argument focuses squarely on a feature of the controversy that has no direct bearing on the ethnic, religious, or racial differences between the group that wishes to secede and the majority group that controls the existing state. Does this mean that ethnic claims are irrelevant under a territorial interpretation of secessionist movements? If so, the territorial version of the separatist argument appears inconsistent with current legal statements, which bestow the right of self-determination only on peoples. But ethnic identity is not irrelevant under a territorialist interpretation, for it explains why historical grievances continue to matter. The territorial interpretation recognizes a significant role for claims of ethnic distinctiveness, although not the role suggested by the standard account.

The important function of ethnic identity under the territorial interpretation is to explain how territorial claims survive, and why particular individuals currently feel aggrieved by past events. Unjust historical occurrences do not automatically give rise to contemporary movements to right past wrongs. Individuals are typically motivated to become involved in secessionist movements because they identify in some way with those who were

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49. For example, the United Nations documents cited in note 5 *supra* do not base a right to self-determination upon historical claims.

unjustly treated in the past. Without a reason to identify with the earlier possessors of the territory, the separatists would simply remain disengaged observers. While some might perceive that earlier victims of colonial aggression were unfairly treated, no impetus for action would exist unless a current group identified with those losers and considered itself the heir to their territorial claims. If no such group exists, there are few persons motivated to fight and most probably no one to whom the territory can be returned.

Ethnic identification keeps the historical grievance alive by passing the loss from one generation to the next. Old wrongs will not be forgotten so long as an existing group continues to experience the historical wrongs as its own, as part of its heritage. The usual modes of transmission of this shared sense of wrong are precisely the ones that typically define ethnic communities. Wrongs are passed down by recitation within the family, through educational and religious institutions, and by way of shared culture, such as stories, myths, nationalistic songs, and the like.<sup>50</sup> If at any point an individual should ask, "Why should I care about the past?" the answer follows that "These are your people who were wronged. You are one of us, and we all share this wrong and ought to struggle to make it right." If one were as likely to identify with the winners as the losers, then there would be little reason to feel resentment or to fight. Ethnicity answers the question, "Why do people still care about something that occurred such a long time ago?" It constitutes the barrier to assimilation and the guarantee that historical grievances will continue to be relevant in the present day. It gives the current claimants their standing to protest, not in a technical, but in an emotional sense.

## VI. TWO ANOMALIES EXPLAINED

My thesis is that every separatist movement is built upon a claim to territory, usually based on an historical grievance, and that without a normatively sound claim to territory, self-determination arguments do not form a plausible basis for secession. Self-determination proves a misleading way to characterize the issue because it focuses attention exclusively on people,

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50. By keeping language and culture alive, nationalists preserve their sense of historical grievance. See, e.g., W. CONNOR, *supra* note 15, at 254-63 (discussing Soviet language policy). In one illustration of this, Poland's Solidarity and Lithuania's nationalist Sajudis movement held a youth rally on both sides of the Polish-Lithuanian border to commemorate the fifty-first anniversary of the secret protocol that relegated the Baltic states and Poland to the Soviet sphere of influence. The Polish and Lithuanian youths went to mass together in the Lithuanian town of Lazdija, and later attended pop music concerts. Old and new culture combined to reaffirm the historical grievance in the minds of the young. *Solidarity and Sajudis Observe Ribbentrop-Molotov Pact*, U.P.I. News, Aug. 23, 1990.



not on places. That is not to say that territorial claims are necessary for every kind of minority claim. If a minority experiences discrimination or suffers human rights violations, then it certainly has a grievance even though it claims no historical right to a particular piece of territory. I argue, however, that the minority cannot justifiably claim the remedy of secession unless it can convincingly assert a claim to territory. What distinguishes separatist from other minority claims is the fact that the group wishes to establish a new state on a particular piece of land.

Furthermore, whether a territorial claim exists may prove a better indicator of intuitively acceptable secessionist claims than either the ethnic identities or the preferences of the inhabitants. What are characterized as self-determination claims are instead sometimes simple territorial disputes. Claims are at times framed in terms of self-determination where there exists no ethnic group aspiring to secession, and secessionist claims are sometimes denied even when such an ethnic group exists. From the perspective of the standard account of self-determination, such cases are anomalous. A claim should stand or fall depending on whether an identifiable people is protesting for the right of self-determination. First let us look at the way that a territorial claim, unaccompanied by a claim on behalf of an aggrieved people, sometimes gives rise to a self-determination argument.

Occasionally, states make self-determination claims on behalf of groups of individuals that have not in fact expressed a wish to exercise their supposed right of self-determination. This anomaly suggests that the self-determination of peoples is not the real issue. For example, India cited the norm of self-determination in ousting the Portuguese from Goa, which Portugal had acquired as a colony.<sup>51</sup> This claim was made despite the fact that the people then inhabiting Goa had not been asked whether they wished to repudiate Portuguese rule. India maintained that the preferences of the people of Goa were simply irrelevant. From the perspective of the standard account, the Indian claim seems puzzling. How can India force the people of Goa to exercise their right of self-determination without first consulting the Goans to determine what they themselves might want? From the territorial perspective, the claim becomes considerably more intelligible. The Indian claim was an historical one about rights to territory. From the Indian government's perspective, Portugal had acquired the land improperly and had no legitimate claim to it. India sought to redress what it saw as an historical wrong, although the rhetoric used to explain its anti-colonial stance proved ill-adapted to the task because it focused on the self-determination rights of the inhabitants.

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51. This and other examples of similar claims are cited in M. POMERANCE, *supra* note 3, at 20.

Self-determination claims that are disguised as territorial claims are not uncommon. When the people of Mayotte indicated a preference to remain with France rather than join the other Comoro islands in forming a separate republic, one might assume that the General Assembly resolution guaranteeing their right of self-determination would have protected that preference; it, unfortunately, did not.<sup>52</sup> Argentina sought to wrest the Falklands (Malvinas) from Great Britain despite the fact that the inhabitants preferred continued British rule.<sup>53</sup> Spain, likewise, has challenged British control over Gibraltar without regard to the wishes of the inhabitants.<sup>54</sup>

Some secessionist groups, furthermore, have slender support from the groups they claim to represent. For instance, only eighteen percent of the Basques are said to support secession from Spain.<sup>55</sup> It would seem that self-determination in such contexts serves as nothing more than a mandate for righting territorial wrongs. As one author notes with regard to Puerto Rico, what seems to matter is not what the people want but whether the situation is tainted with the "original sin" of colonialism.<sup>56</sup>

The problem in conducting plebiscites when the population's ethnic composition has changed over time also suggests that territory, and not the preferences of the people, is the real issue. The French claimed Alsace-Lorraine, for example, on historical grounds, but resisted a plebiscite after the end of World War I because a large number of Germans had replaced French inhabitants while the territory was under German control. Clearly, the French claim was by its nature territorial and the French considered the preferences of the current inhabitants immaterial.<sup>57</sup> A theory of self-determination that focuses on people cannot easily explain this result, but a territorial interpretation explains the French position. Intuitively, a self-determination claim cannot be made against the actual wishes of the in-

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52. M. POMERANCE, *supra* note 3, at 31; M. SHAW, *supra* note 31, at 115. It was argued that the islands formed a single territorial unit, and thus should all be granted independence together. This theory does not explain why the territorial unity of the Comoros mattered, but that of the French Empire did not. The obvious explanation relies on the history of the dispute in that France was seen as a colonial aggressor.

53. See generally L. GUSTAFSON, *THE SOVEREIGNTY DISPUTE OVER THE FALKLAND (MALVINAS) ISLANDS* (1988). In chapter 2, Gustafson discusses the role of self-determination in the dispute, noting how the principle came in conflict with the goal of decolonization. *Id.*

54. M. SHAW, *supra* note 31, at 136-37. See M. POMERANCE, *supra* note 3, at 30 (noting opposition to holding a referendum in Gibraltar).

55. *Moderates Win*, *The Independent*, Oct. 30, 1990, at 10. See also Carter, *Ethnic Minority Groups and Self-Determination: The Case of the Basques*, 20 COLUM. J.L. & SOC. PROBS. 55, 80 (1986).

56. M. POMERANCE, *supra* note 3, at 27.

57. A. COBBAN, *supra* note 6, at 72. Cobban describes the French position sympathetically. One way to describe the problem that seems more in line with the standard self-determination account would be to insist that people matter, but then require that plebiscites include only the "right" people. Unfortunately, the decision about which people it is "right" to include reflects primarily one's intuitions about the ownership rights to territory.

habitants. The problem arises because the issue is misleadingly labelled one of self-determination.

If a territorial grievance alone can create a plausible self-determination claim, then the wish to secede on the part of a distinct people is not a necessary condition of the validity of the claim to secede. The second anomaly under the standard account of self-determination turns on whether status as a people ought to be sufficient. As noted earlier,<sup>58</sup> the usual self-determination norms require that the claimant constitute a distinct people. Otherwise any and all groups would possess a right to secede and the result would be anarchy. But even if some group qualifies as a people, the intuitive distinction between separatists and refugees reveals that some peoples are entitled to territory and others are not. Because the right to secede is a function of a territorial claim rather than the existence of a distinct people, the latter factor is clearly not sufficient.

A second argument supports the conclusion that status as a distinct people may not be sufficient to trigger a right to secede. This approach concerns the position of African states with regard to secessionist movements within their own territory. I noted earlier that many Europeans considered the position of the African states to be hypocritical because these states relied upon self-determination norms to throw off colonial power, but then denied their own minorities a right to break away in turn.<sup>59</sup> From the territorial point of view, however, there is more logic to the African states' position than would first appear.

The logic depends on the existence and extent of an historical grievance. Clearly, in the eyes of many observers, colonialism is perceived as an unqualified evil; it represents a generally accepted violation of the self-determination norm. In contrast, greater controversy surrounds the question of rights of separation in noncolonial situations.<sup>60</sup> From the perspective of the rights of peoples, however, it is not clear why this should be the case. Why should it matter whether the majority group exercising dominion over an ethnically distinct people is or is not a colonial power? I suggest, as an explanation, the fact that the historical grievance is particularly clear in colonial situations.

The standard international norms of self-determination cannot explain the distinctive status of colonialism because they fail to take into account the fact that liberation movements seek to right past territorial wrongs. Colonialism represents a special case because the colonial powers were

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58. See *supra* note 5 and accompanying text.

59. See *supra* note 25 and accompanying text.

60. M. POMERANCE, *supra* note 3, at 28 ("[I]f there is a *jus cogens* in matters of self-determination, it consists of decolonization").

particularly lacking in justification for their original territorial conquest. Colonial powers possessed no colorable claims to the territories they conquered. Once conquered, the colonies were not incorporated into the nation but were retained as overseas possessions.<sup>61</sup>

Mere ethnic distinctiveness cannot by itself explain why colonialism is worse than cases in which minorities are subject to majority rule. If self-determination claims are interpreted as claims about territory, however, then it is clear that a colonial power should always yield to such claims. The same cannot be said when a self-determination claim is raised against a noncolonial power. Noncolonial powers sometimes come to have physical power over territory by means other than conquest. Indeed, the emerging nations of Africa and Asia inherited power over their territories through methods that might be considered entirely legitimate, even though the territories included ethnically diverse groups. Often a wide variety of people banded together to fight the colonial power, and joined forces voluntarily in the formation of the newly independent state. Consider as an example the history of India, Pakistan, and Bangladesh.<sup>62</sup> As the British colonial period drew to a close, Muslim inhabitants of the area came to insist upon partition from India, which was largely Hindu. At independence, the land was divided into two states, namely India, and East and West Pakistan. The East Pakistanis became increasingly dissatisfied with domination by the West Pakistanis, from whom they were linguistically and culturally distinct. After wide-spread human rights abuses and a brief civil war (in which India intervened), East Pakistan successfully broke away from West Pakistan to form the independent state of Bangladesh.

The Bengali's claim against West Pakistan, while phrased in terms of self-determination, in fact differed from the claims Indians and Pakistanis had raised against Great Britain. Great Britain was a colonial power and it was impossible to create a colorable argument that its territorial sovereignty over the subcontinent was legitimate under international law. Pakistan's dominion over East Pakistan was of a different order. The process by which Pakistan was created was not tainted by conquest in the same way as Britain's acquisition of the subcontinent. Indeed, East Pakistan actively participated in the formation of Pakistan by joining in the resistance against Great Britain and the partition of the subcontinent into two separate nations. None of this, it should be added, necessarily denies the East Pakistanis' claims to secede. They had suffered serious human rights abus-

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61. Although the French policy of assimilation accorded citizenship to some inhabitants of conquered territories, the privilege was hard to acquire and without much practical value. *See, e.g.,* E. MORTIMER, *FRANCE AND THE AFRICANS 1944-1960*, 36-39 (1969).

62. On the problem of Bangladesh, see generally Nanda, *supra* note 31.

es and had little prospect of a better life in the future. But this constitutes an additional factor above and beyond usual secessionist arguments; it would not have been necessary to show this if the situation had been a colonial one.

Many African nations currently experiencing ethnic strife came to hold dominion over their ethnic minorities in a similar manner. Upon independence, the minority group was simply included within the territorial jurisdiction of the newly created state. This did not necessarily involve any injustice by the dominant ethnic group. Indeed, in some cases the minority itself welcomed inclusion in the new nation as part of the process of independence. It is not due to prejudice against the colonial powers that self-determination claims have been more persuasive in an anti-colonial context. The historical grievance is different when the state from which separation is sought was responsible for wrongfully including the minority in the first place. This is true whether we are speaking of colonial powers, such as the European states in Africa, or of other states that acquired territory through conquest, such as the Soviet Union in its acquisition of the Baltic states.

Self-determination claims can be ranked on a spectrum, depending upon the extent to which inclusion of the claimants' territory was wrongfully brought about by the current majority group. While it may be difficult to know where on the spectrum to draw the line between normatively valid and normatively invalid claims, a fair amount of agreement would likely emerge about where to place particular cases, and colonialism would probably be at one extreme of the spectrum. Noncolonial situations, such as Bangladesh, need additional arguments to support secessionist claims, such as the existence of widespread human rights abuses. For this reason, it is not hypocritical for newly emerging nations to regard colonialism differently than other secessionist problems.

### VII. COMPARING THE KEY ISSUES OF THE SELF-DETERMINATION AND TERRITORIAL APPROACHES

What difference does it make whether one adopts a standard version of the self-determination argument or the territorial interpretation? Under the standard account, certain questions are determinative. Under the territorial interpretation, a different set of questions must be addressed in order to evaluate the merits of a separatist movement. Both sets of questions are difficult to resolve. However, they focus on different issues, so we should compare the relevant issues under one approach to the relevant issues of the other.

I have already alluded to the most important question under the standard account: whether the group in question really constitutes a separate people or whether it is merely a minority group within the state. Only in the former case is the separatist movement justified. But on what does this question of nationality turn? Nationality has proven notoriously difficult to define. In part, it is assumed to be a subjective characteristic.<sup>63</sup> In other words, a group constitutes a nationality because it perceives itself as such. While there may be something important to this insight, in practice this standard proves elusive. One reason is that it is not clear whether potentially self-serving descriptions of subjective beliefs ought to be taken at face value. The perception of ethnic distinctiveness may simply flow from inflamed passions. In addition, it remains unclear what to do when the inhabitants disagree.

Another problem is that the subjective approach does not help individuals determine for themselves the legitimacy of their desire to secede. For example, assume that French Canadian voters are trying to decide whether they ought to support separatism. Under a subjective theory, their decision depends on whether they believe they constitute a separate people and are therefore entitled to secede. A definition of peoples that places too much weight on subjective beliefs about national distinctiveness is unhelpful because the voters' problem is precisely that they are attempting to determine whether or not to believe they have a right to secede. A theory of whether secession is appropriate ought to help the participants themselves evaluate whether they constitute a "mere" minority or a distinct nationality. A subjective definition cannot fulfill this function, because it tells individuals to consult their own subjective beliefs when the issue is precisely what beliefs the individuals ought to have.

The more objective factors that have been considered in ascertaining nationality include racial differences (e.g., differences of color), religious differences, economic differences, and linguistic and cultural differences.<sup>64</sup> Although these differences are somewhat objective, the importance attached to them varies from one situation to another. What seems like a minor difference in one situation may loom larger in another. In pre-colonial Africa, local groups were often willing to unite to fight colonial powers, only to fight among themselves as soon as the colonials were driven out and ethnic rivalries resurfaced. Such problems with defining nationality

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63. According to Cobban, "[t]he best we can say is that any territorial community, the members of which are conscious of themselves as members of a community, and wish to maintain the identity of their community, is a nation." A. COBBAN, *supra* note 6, at 107.

64. Nanda, *supra* note 31, at 205, analyzes the claim of East Pakistan to independence in terms of racial, cultural, linguistic, and economic differences. See also Friedlander, *supra* note 25, at 315.

are obvious and well documented,<sup>65</sup> and they bode ill for attempts to define a quantum of ethnic difference that would justify secession.

A territorial analysis focuses, in contrast, on territorial equities. A theory of secession necessarily depends upon a theory of legitimate sovereignty over territory. Separatists are typically motivated by a perceived historical injustice, in which land that was rightfully theirs was taken by another group. The land was seized either by the dominant group in the current state, or by a third group which then conveyed the territory to the currently dominant group. In evaluating the persuasiveness of separatists' arguments, it is necessary to investigate these historical claims. This may be no easy matter, for in many cases the facts will be in dispute. In few cases will the equities point unambiguously in one direction.<sup>66</sup>

Even if an historically sound evaluation is possible, this will not end the inquiry. A key remaining issue is the extent to which the status quo should be altered to rectify past wrongs. This could be called the problem of "adverse possession." Few would say that the status quo deserves no weight at all. Even a separatist is likely to concede (albeit reluctantly) that the status quo is sometimes important. The separatist group may itself have come by the territory in question through dubious means. By raising its historical claim the group may be relying upon a previous status quo and ignoring still earlier historical wrongs that had been committed. Even where this is not the case because the separatist group is indigenous to the area, it would seem quite impossible to put everything up for grabs. Hardly a territorial boundary anywhere in the world would survive an effort to correct all historical misdeeds. If protecting the status quo must be balanced against rectifying past injustices, then the obvious question is how much weight to assign each concern. Here, I can only suggest a few of the factors that might be taken into account in determining whether the status quo is currently settled enough to give rise to a defense of "adverse possession."

One obvious factor might be the immediacy of the historical grievance. The further in the past the historical wrong occurred, the more likely that it is better now to let things remain as they are. At one extreme, if an illegitimate annexation occurred only a few months earlier, the proper remedy would be to return the territory to its rightful inhabitants. Certainly, the Kuwaitis would suggest as much. Separatists, undoubtedly, are willing to

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65. See, e.g., E. GELLNER, *NATIONS AND NATIONALISM* 53-62 (1983); A. COBBAN, *supra* note 6, at 107.

66. For discussions of the difficulties in establishing a theory of territory, see generally L. BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* 52-78 (1989); Khatchadourian, *Criteria of Territorial Rights of Peoples and Nations*, and Reiman, *Can Nations Have Moral Rights to Territory?* in *THE TERRITORIAL RIGHTS OF NATIONS AND PEOPLES* (J. Jacobson ed. 1989).

go back a good deal farther in time. The question is, how long an historical reach is warranted?

Another factor might be the extent to which the separatist group has kept the claim alive. Some groups have managed to keep their controversy alive in world public opinion. In such cases, there has been no adverse possession because the minority group has never acquiesced in the loss of its territory. Expectations cannot become settled around new state boundaries when there are constant reminders of the historical illegitimacy of the annexation. The primary problem with including this factor is that it penalizes groups that have been unable to keep their protest alive because of severe repression. Perhaps in such circumstances, where continued struggle is virtually impossible, the lack of public efforts should not be held against the separatist claim. Another problem with relying on this factor is that publicity is often sought through rather dubious methods, such as bombing airplanes; it might be undesirable to reward such activities.

A third factor, also controversial, is the extent to which the territory has now been settled by members of the dominant group. It is a common strategy to attempt to solidify conquest by moving loyal citizens of the victorious state into the new territory. In the Baltic states, for instance, only twenty percent of the residents of Lithuania are non-Lithuanians, but the analogous percentages for Latvia and Estonia are forty-eight and thirty-nine, respectively.<sup>67</sup> I mentioned this strategy earlier as causing problems with plebiscites under the standard account, but it also generates problems under a territorial analysis. From the point of view of separatists, such new settlement ought to have no significance whatsoever. They did not ask for these new inhabitants. Had the secessionists' territory not been improperly annexed, the newcomers could have been excluded entirely. Taking the newcomers' presence into account compounds the original injury. Yet, as a practical matter, the new settlers tend to legitimize the territorial status quo. The reason that members of the separatist group often resist such migration is precisely because they realize that it undercuts their claim in the forum of world opinion.

Finally, the nature of the historical grievance may itself figure in determining whether a right of secession still exists. As suggested earlier, there are degrees of wrongfulness. The determination is neither black nor white. It is probably no coincidence that the one case on which most people can agree is the decolonization of the empires of the European powers. The European powers' acquisitions lacked even colorable justification. In contrast, some territorial disputes involve uncertain territorial claims in which

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67. Olcott, *supra* note 42, at 43.



a genuine dispute exists over the proper ownership of the land. If the "wrong" state wins the contest through use of force, this is an historical grievance. But such victory is qualitatively different than naked conquest, and for this reason might be thought to establish a claim of adverse possession once a period of time goes by. Good faith may also matter. The degree to which the prevailing party has a sincere belief in a right to the territory may perhaps be inferred from its behavior once the territory is annexed. The European powers, of course, treated their colonies as colonies, giving them a distinct political status and treating the inhabitants as subjects rather than as fellow citizens. One would expect that if a victorious state believes it has a pre-existing claim to the territory, then in annexing the territory it will treat the new land in the same way that it treats other parts of its domain.

### VIII. CONCLUSION

Clearly, the territorial interpretation of separatist movements does not supply easy answers to the problem of secession. The question of what amounts to a good claim for maintaining the existing status quo seems especially difficult. Adverse possession claims are hard to evaluate.

I would submit, however, that under the territorial view we would at least be asking more of the right questions. Separatist movements cannot be understood or evaluated without reference to claims to territory. Groups do not seek to secede merely because they are ethnically distinct, and if they did, they would probably not get much support. It is hard even to understand what a separatist group would demand absent historical claims to territory. When a group seeks to secede, it is claiming a right to a particular piece of land, and one must necessarily inquire into why it is entitled to that particular piece of land, as opposed to some other piece of land -- or to no land at all.

The standard account pits the principle of self-determination against the principle of territorial integrity. The first assumes government is defined as a collection of individuals; the latter, as an area of land. Defining government in terms of land better explains what secessionists are trying to accomplish. When individuals seek to secede, they are making a claim to territory. They wish a piece of land for their future, a piece of land on which they will be able to make *their own* claims of integrity of territorial borders. Their claim is typically centered on a piece of land that they possessed in the past, and upon which they claimed territorial integrity.

Territorial integrity properly understood accommodates the principle of self-determination. Whatever conflict exists is not between principles, but over land.