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INTERNATIONAL RESPONSES TO SEPARATIST CLAIMS: ARE DEMOCRATIC PRINCIPLES RELEVANT?

DIANE F. ORENTLICHER

Although a perennial feature of global politics, separatist movements had scant prospect of success for nearly half a century after World War II. And so the recent proliferation of new states has shattered settled expectations. In the 1990s, Yugoslavia fractured into five states, the Soviet Union split into fifteen, Eritrea separated from Ethiopia, Czechoslovakia divided into the Czech Republic and Slovakia, and East Timor won independence from Indonesia. The success of breakaway movements from Slovenia to Eritrea has given new impetus to a raft of other separatists across the globe.¹ And small wonder: the surge in state making in the 1990s marked a new departure.² Outside the context of decolonization, international law has long regarded separatist claims with disfavor. To be sure, international law and state practice remain deeply skeptical of separatist movements; few are likely to succeed. Even so, the recent success of several signifies the possibility of a broader realignment of law and policy.

An important barometer of change has been the nature of diplomatic responses to contested separatist claims. The breakup of the former Yugoslavia drew mediation efforts by the European

Community (EC), the Conference on Security and Co-operation in Europe, the United Nations, the five-nation Contact Group, and, finally, the United States. These and other mediation efforts have been shaped by and in turn are reshaping international law concerning recognition of new states.³ With relevant principles now in flux, the question today is, What principles should guide international responses to separatist claims?

In this essay I explore an aspect of this question that has recently assumed special importance—the relevance of democratic principles. By focusing on this question, I do not mean to suggest that principles of self-government are the only—or even the most important—values that should be brought to bear in assessing separatist claims. Far from it. For good reason, concerns relating to international security and stability, as well as a core commitment to the territorial integrity of states, have long dominated international law's bias against separatist movements. That same bias is reinforced by the humanitarian aims of international law, whose antipathy toward ethnic separatism can be captured in a simple syllogism: If national groups enjoyed a presumptive right to statehood, national minorities would inevitably be captured within the boundaries of another nation's state—and would be vulnerable to repression. Equally important, postwar human rights law is imbued with the values of civic nationalism, which conceives citizenship not in terms of ethnic or national identity but in terms of equal protection of all citizens before a common law and shared institutions of governance.

Even so, recent developments in legal doctrine and state practice make clear, as I contend in the next section, that principles of self-government have already become relevant, both legally and practically, to the resolution of contested separatist claims. Much less clear, however, is the question I address in this essay: What, precisely, are the implications of democratic principles for assessments of separatist claims?

I. THE TRAJECTORY OF "SELF-DETERMINATION" IN INTERNATIONAL LAW

Although this question has at times loomed large in political theory and state practice, it has only lately become a substantial issue of in-

ternational law. To appreciate the significance of this development, it is helpful briefly to recall how international law has treated separatist claims in the past.

A. The Interwar Period

The law governing separatist movements before World War I can be briefly stated: once a national movement secured independence, other states would acknowledge the established facts of statehood. International law did not, however, regard any type of self-determination claim as legitimate *ex ante*.

The Paris Peace Conference marked a significant, if limited, departure from the classic view. Although not yet considered a legal right, self-determination was a guiding principle for statesmen who remapped central and eastern Europe following World War I. To the extent consistent with other objectives, they gave effect to the "principle of nationalities": the boundaries of new and reconfigured states were to be drawn along national lines. The peacemakers also gave limited effect to another conception of self-determination, which supports the resolution of key political questions—including core questions of statehood—through democratic processes. For example, the fate of certain disputed territories, including Upper Silesia and Schleswig, would be determined by internationally supervised plebiscites.

It remained to be seen whether a general principle of law would emerge from the foundation laid at Versailles or whether, instead, the Peace Conference would remain a case-specific exercise of Great Power diplomacy. The answer came quickly. A proposal by Woodrow Wilson to incorporate the principle of self-determination in the Covenant of the League of Nations⁴ was defeated.

If there was any lingering doubt about the legal status of "self-determination," it was put to rest in the reports of two commissions appointed by the League of Nations in connection with a dispute over the status of the Åland Islands.⁵ Both bodies concluded that international law did not recognize a right of national self-determination.⁶ But their reports hinted at possible exceptions in circumstances implicating the rights of minorities. Most explicitly, the Commission of Rapporteurs suggested that secession might be available as a "last resort when the State lacks either the will or the

power to enact and apply just and effective guarantees" of minority rights.⁷

The Aaland Islands remained in Finland, where their inhabitants now enjoy substantial autonomy. But the concept of remedial secession hinted at by the Commission of Rapporteurs continues to resonate in legal doctrine and political philosophy. As elaborated in the section that follows, in more recent incarnations the notion of a remedial right to secede has expanded to include situations in which a defined subpopulation is persistently excluded from full political participation.

B. Postwar Law: Decolonization

In the postwar period, self-determination was transformed from a principle into a legal right. With this, its meaning also changed. Now self-determination meant the right of colonized peoples freely to determine their political status. For a time, this meant that the postwar right of self-determination would have scant relevance beyond the context of decolonization. But in the view of many commentators, this generalization has long been subject to a key qualification: groups persistently denied meaningful participation in national political processes might be entitled to secede.

This view derives above all from the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations ("Declaration on Friendly Relations"), adopted by the UN General Assembly in 1970.⁸ The declaration made clear that the core meaning of the principle of self-determination enshrined in the UN Charter was the right of "the people of a colony or non-self-governing territory" freely to determine its political status.⁹ Outside the special context of decolonization, established states would enjoy the right to territorial integrity. But the declaration famously hinted that this right might be forfeited if a state's government did not represent "the whole people belonging to the territory without distinction as to race, creed or colour."¹⁰

This language has been interpreted implicitly to confer the right of self-determination, exceptionally entailing secession, "only on *racial* or *religious* groups living in a sovereign State which are denied access to the political decision-making process; *linguistic* or *national*

groups *do not* have a concomitant right" (italics in original).¹¹ But recent iterations of the principle enunciated in the Declaration on Friendly Relations have removed its restrictive terms. Where the 1970 declaration affirms the right of territorial integrity with respect to states whose government represents "the whole people belonging to the territory without distinction as to race, creed, or colour," UN declarations of 1990s vintage affirm the same right with respect to states "possessed of a Government representing the whole people belonging to the territory *without distinction of any kind*" (italics added).¹² The Supreme Court of Canada has characterized views to the effect that these instruments support an exceptional right of secession this way: "[W]hen a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession."¹³ In this view, secession is a remedy of final recourse that may come into play when it is the sole means by which a substate group can exercise its right of political participation on a basis of equality.

This view rests upon an implied assertion: everyone is entitled to participate, on a basis of full equality, in the political life of his or her nation. When the UN General Assembly adopted the Declaration on Friendly Relations in 1970, this claim was the sort of bromide from which few, if any, states would publicly dissent. But outside the special context of global concern with apartheid and decolonization, states were not prepared to back up this claim with the sanction of legal entitlement. And so any corollary right of secession had much the same force as a resolution proclaiming a definitive determination of the number of angels who could dance on the head of a pin. In this setting, there was scant reason for practitioners of statecraft to wrestle with the vexing questions bound up in a remedial right of secession: What manner of inequality in the exercise of political rights would justify remedial secession? How persistent must the shortcoming be? Are there measures short of secession that must be exhausted before the last-resort remedy can plausibly be claimed?

C. The Democratic Entitlement

But in the last decade of the twentieth century, the implied claim underlying the asserted last-resort remedy of secession—that

everyone is entitled to participate, on a basis of equality, in self-government—gathered substantial support.¹⁴ In addition to its external dimension, we were reminded, self-determination has an internal dimension, embodied above all in principles of democratic governance.¹⁵

This aspect of the right to self-determination received unprecedented attention beginning in the 1990s, but its core claim was already established in two widely ratified treaties. Common Article 1 of the International Covenant on Civil and Political Rights¹⁶ and of the International Covenant on Economic, Social and Cultural Rights¹⁷ asserts the right of “[a]ll peoples” to self-determination. The drafting history and text make clear that, while this provision encompasses the familiar right of peoples living under colonial rule to attain independence,¹⁸ it has an internal dimension as well.¹⁹

Even so, rights relating to democratic government did not occupy a significant place in the domain of statecraft until recently. Now they occupy a pride of place. “Democracy,” Thomas Franck wrote in 1992, “is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.”²⁰ The emerging law, Franck argued, “requires democracy to validate governance.”²¹

The evidence supporting Franck’s claim was impressive in 1992 and has become even stronger. In 1994, for example, the UN Security Council authorized a military intervention in Haiti for the express purpose of restoring “the legitimately elected President,” who had been deposed in a coup.²² These and other developments signal an unprecedented commitment by states to principles of democracy.

In the remainder of this essay, I explore the implications of that commitment for separatist movements. First, it might be helpful to highlight two possibilities latent in the preceding account of international law and state practice. One builds upon the plebiscite principle applied by statesmen at the Paris Peace Conference. The future status of several disputed territories, it will be recalled, was put to a vote of the territories’ inhabitants. This conception of self-determination naturally raises vexing issues, which I want to set aside for now. Here I simply wish to note that diplomatic practice has at times affirmed the view that contested territorial claims

should be resolved through a particular type of democratic process, balloting.

The second possibility latent in established legal doctrine is that a general right to democratic governance carries with it the right of a national subgroup to secede if this is the only means available to secure its members' right to self-government. In this view, secession is not a general entitlement for any particular type of collectivity but rather an extraordinary exception to the universal right of self-government. The latter right is conceived in terms that contemplate full realization *within* established states and not through withdrawal *from* them—except, that is, as a last-resort remedy.

In sum, then, international law has long disfavored separatist claims. But alongside this general disapproval, international instruments and other relevant sources have long reserved a possible exception: implicit in international law's core commitment to basic human rights and democratic principles is recognition of a last-resort, remedial right for a subnational group to secede when these rights are denied its members.²³

II. DEMOCRATIC PRINCIPLES AND SEPARATIST CLAIMS

A. The Relevance of Democratic Principles in Assessing Separatist Claims

Apart from the two possibilities just noted, to which I shall return later, does the international community's newly invigorated commitment to democracy have implications for separatist claims?²⁴ For many political and legal theorists, the answer is unambiguously "no." Questions of boundary, it is often said, stand wholly outside theories of democratic government.²⁵

But this seems plainly wrong. An appeal to common sense suggests why. Suppose that, instead of opposing Quebec separatists, the rest of Canada overwhelmingly voted in support of their claim. In this counterfactual, Canadians outside Quebec simply would not wish to be politically yoked to Quebec any longer. Suppose also that a vast majority of Quebec's citizens, including all of its significant minority populations, voted for secession. If, with Professor Franck, we believe that an emerging body of international law "requires democracy to validate governance," most of us would conclude that

the mutual desire of Canada's citizens to divide should be honored—perhaps *must* be honored—in the absence of overriding considerations.

We may not readily agree, however, on the reasons behind this intuition. For some, the key point may be that, like any issue that has a significant impact on our lives and that therefore seems an appropriate subject of self-government, questions of boundary ought to be subject to democratic determination if they become substantial subjects of dispute. For others, a deeper principle may be at stake—the consent of “the people” to be governed by the political authority that exercises sovereign power over them. As Jamin Raskin has written, “[T]he very heart of the democratic idea” is “that governmental legitimacy depends upon the affirmative consent of those who are governed.”²⁶ If, then, every substantial sector of Canadian society supported the independence of Quebec, this core principle might seem to be violated with respect to *all* of them—Quebecers and other Canadians—if they were forced to remain co-citizens.

Although its implications may seem radical, the second view is hardly novel. For some eighteenth-century nationalists—the intellectual progenitors of the emerging democratic entitlement—it seemed obvious that the right to self-government implied the right to choose one's fellow citizens.²⁷ The point seemed equally plain to John Stuart Mill. Affirming that “the question of government ought to be decided by the governed,” Mill continued: “One hardly knows what any division of the human race should be free to do, if not to determine with which of the various collective bodies of human beings they choose to associate themselves.”²⁸

Again, an appeal to common sense clarifies the claim. It has long been settled that alien states may not lawfully impose their rule upon nonconsenting peoples. Put differently, international law no longer abides colonization or forcible annexation. But if these forms of nonconsensual rule cannot be reconciled with principles inherent in the right of self-determination, surely those same principles are challenged by a state's continued assertion of sovereignty over a defined population that has unambiguously rejected its authority. For if a significant, territorially bounded, national subgroup unambiguously expresses its will to secede, the legiti-

macy of the state's sovereignty over the rebel population is placed in question.²⁹

The bald claim that democratic principles are beside the point in these circumstances seems to rest on several false assumptions. One is that to recognize the relevance of democratic principles in assessing separatist claims is to open up the boundaries of established states to perennial challenge. Yet the assumption that citizens provide ongoing, if tacit, consent to the boundaries of their state underpins the daily practice of democracy.

A more substantial fallacy is to equate the view that democratic principles may be relevant in judging separatist claims with the manifestly untenable claim that the will of any and every group that challenges established boundaries is entitled to prevail over that of others. The claim that principles of self-government may have *implications* for the resolution of boundary disputes does not imply that democratic values *generally privilege* separatist claims.

Earlier, I tried to make the point that an emerging democratic entitlement may have significant implications for separatist claims by invoking the proverbial easy case, a hypothetical situation in which all affected citizens would support such a claim. But few cases are easy; most separatist claims are contested. In this respect, the situation involving the Serbian province of Kosovo is typical: although a majority of Kosovars favor independence, most citizens of Serbia, including the minority Serb population in Kosovo, oppose independence for Kosovo. Plainly, in situations where the will of the affected polity is divided, democratic theories do not neatly dispose of contested separatist claims.

Even so, theories of democratic government point to considerations that may be relevant to the legitimacy and resolution of contested separatist claims, in part because some resolutions may promote democratic values better than others. By way of illustration, let us briefly consider the implications of two strands of democratic theory, utilitarianism and republicanism.

A utilitarian justification for democracy claims that self-government is more likely than its alternatives to secure the interests of the greatest number of persons subject to governmental authority. For eighteenth-century utilitarians like Jeremy Bentham and James Mill, democracy was desirable not as an end in itself but as a means

for maximizing the realization of individuals' desires through the aggregation of private preferences. But this justification may begin to fray if a polity is divided along fault lines that entail profound differences in political choices.³⁰

Under some conditions the republican tradition may also offer support for separatist claims—or at least it may seem to at the proverbial first blush. More particularly, values central to republicanism might be furthered by political divorce resulting in two or more states whose citizens were significantly better able than citizens of the previous, unified state to consider the common good in their democratic deliberations. Core principles of republicanism include citizen participation in the deliberative process, made possible by civic virtue; the equality of political actors; and a commitment to the common interest or good.³¹ Republicanism not only tolerates but assumes some measure of diversity within the self-governing polity. As Cass Sunstein has written, republicanism rests on “a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue” and sees disagreement as a creative force that promotes political deliberation.³² Through deliberation, initial preferences change and political outcomes promote a common good rather than the preferences of the majority alone. This requires not only “a commitment to political empathy, embodied in a requirement that political actors attempt to assume the position of those who disagree,”³³ but also the ability to empathize with citizens whose interests are different than one's own. That capacity may be in short supply, however, when disagreements among citizens are rooted in profoundly different group identities.³⁴

Similar considerations led John Stuart Mill to conclude that “it is in general a necessary condition of free institutions that the boundaries of government should coincide in the main with those of nationalities.”³⁵ Indeed, the capacity to empathize was central to Mill's conception of nations: “A portion of mankind may be said to constitute a Nationality,” Mill wrote, “if they are united among themselves by common sympathies which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively.”³⁶

There is no reason to suppose, however, that republicanism *tends* to favor separatist claims. Like other visions of democracy, republican principles are consistent with arrangements designed to resolve fundamental disagreements among disparate groups of citizens without changing national borders. Democratic institutions can be—and often have been—designed to foster interethnic accommodation within the boundaries of established states through such institutional devices as proportional representation and power-sharing arrangements.

So far I have tried to show how democratic principles might be relevant in assessing separatist claims through examples that may favor those seeking separation. And so I want to make clear that, in my view, democratic principles would be thwarted by a rule of international law generally favoring independence for state-seeking groups.³⁷ To begin, the very possibility of secession may subvert democratic deliberation by diminishing incentives for opposing groups to seek accommodative solutions. When secession is believed possible, minorities can distort the outcome of political processes by threatening to secede if their views do not prevail.³⁸ And as Abraham Lincoln argued, if a secessionist movement opposed by a majority of a state's citizens ultimately prevailed, its triumph would vitiate the principle of majority rule.³⁹

Further, to the extent that separatist claims are fueled by nationalist sentiment, their success may result in the creation of states prone toward authoritarian social arrangements. Lord Acton had this in mind when he warned: "In a small and homogeneous population there is hardly room . . . for inner groups of interests that set bounds to sovereign power."⁴⁰ In his view, the multiethnic state "provides against the servility which flourishes under the shadow of a single authority, by balancing interests, multiplying associations."⁴¹ If, with Locke, we believe that the principle of self-government follows from the intrinsic and equal worth of people, the authoritarian arrangements associated with ethnonational states imperil core values that democracy is meant to secure.

*B. Democratic Processes for Resolving
Contested Separatist Claims*

My argument so far has aimed at supporting a modest claim—that states' newly robust commitment to democracy has significant implications for separatist claims, even if those implications cannot be captured in a simplistic formula prescribing a uniform approach to all state-seeking movements. To illustrate, I have noted various ways in which democratic values might appear to favor one or another potential outcome of disputes arising out of separatist claims. Thus far, however, I have not addressed the distinct question of how these largely substantive considerations might be brought to bear in practice. The answer is hardly self-evident; after all, there is no standing body entrusted with the task of assessing separatist claims that might usefully be guided by the considerations explored in the previous section. Nor does my previous analysis touch on the related question of whether principles of democracy have more direct implications for the processes used to resolve disputes surrounding separatist claims. It is to these questions that I now turn.

My point of departure is the claim that, under virtually any vision of democracy, achieving a mutually consensual outcome is the preferred way to resolve disputes over separatist claims. In a utilitarian calculus, for example, a mutually consensual outcome suggests that the political preferences of all major segments of a divided polity have been realized to a degree that is acceptable to each of them. A mutually accepted outcome also affirms the republican faith in citizens' capacity to resolve their differences through dialogue aimed at promoting the common good. Thus democratic values, as well as other central commitments of international law, are best served when separatist claims are resolved through negotiation rather than by unilateral fiat.

Democratic values are placed in special peril when secession is accomplished without any meaningful input, through balloting or otherwise, by citizens left behind by successful separatist movements. In these circumstances citizens would be significantly—perhaps profoundly—affected by a decision in which they had no opportunity to participate.⁴² Indeed, secession has at times had a tragic impact on groups stranded in the rump state. The effect of Croatia's and Slovenia's secession from the Socialist Federal Re-

public of Yugoslavia (SFRY) exemplifies the point. Until the two former SFRY republics seceded in 1991, multiethnic Bosnia and Hercegovina had no interest in seeking independence. To the contrary, it had a strong interest in preserving Yugoslav unity.⁴³ With no ethnic group forming a majority in Bosnia, its Muslim and Croat citizens feared for their welfare in a diminished Yugoslavia that did not include Croatia, while most Bosnian Serbs wished to remain attached to Serbia. Apprehensions about Bosnia's fate in a rump Yugoslavia proved to be justified, as I elaborate shortly. On the other hand, if the consent of all substantial substate groups were required before secession was allowed, any group opposing a proposed change in borders could block secession, even when separation would be the most prudent or democratically legitimate outcome of a dispute.

A commitment to address disputes over separatist claims through negotiated agreement entails two corollary claims. The first is that the negotiating partners must accept the possibility of secession as an outcome of their negotiations. The second is that, in general, disputes over separatist claims should not be resolved *solely* by plebiscite. If a contested separatist claim were resolved by balloting alone, the losing side would be governed by a political authority that it had avowedly rejected.⁴⁴

Balloting may, however, play a legitimate role in resolving disputes within a broader context of negotiations. For example, an overwhelming vote in support of secession by residents of a specific region might be an appropriate way to trigger negotiations with other citizens of the state. A referendum might also be a valid mechanism for resolving disputes over separatist claims if the contending parties agreed in the course of negotiations to hold a referendum and accept its results. In the second situation, the result of balloting would represent a mutually accepted outcome. For similar reasons, balloting leading to political divorce would *prima facie* enjoy democratic legitimacy if the national constitution explicitly provided for secession under the conditions followed in the balloting process, assuming the constitution was adopted in a democratically legitimate fashion.

The Supreme Court of Canada took essentially the approach I have just outlined in a 1998 advisory opinion on the question whether Quebec had a unilateral right to secede. The Court

concluded that a clear expression of the democratic will of Quebecers to secede, presumably through a referendum, would confer legitimacy on their quest—though not a right to secede unilaterally.⁴⁵ In the Court's view, Canada's constitutional commitment to federalism and democracy had crucial implications for separatist claims:

The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. . . . The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying principles already discussed.⁴⁶

Invoking the same constitutional values that informed this conclusion, the Court held that Quebec "could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties."⁴⁷

At the heart of the Court's analysis is its vision of democracy as a deliberative process—a project in which profound differences within the national polity are resolved not through a winner-take-all, one-time vote but through democratic negotiations. This approach provides an appealing strategy for addressing one of the central problems presented by contested separatist claims—the impossibility of satisfying one group's aspirations without thwarting the will of others.⁴⁸

Assuming that the conditions surrounding a separatist bid have not deteriorated to the point where genuine dialogue is impossible, the success of negotiations may turn in part on the institutional context in which they are pursued. In some countries, that context is defined by relevant constitutional provisions. With respect to others, intergovernmental bodies may provide the principal frame-

work for seeking peaceful resolution of boundary disputes. While it is beyond the scope of this essay to explore questions of institutional design in depth, several overarching principles can be derived from the previous discussion.

Ideally, negotiations over disputes relating to separatist claims should be carried out within a framework that simultaneously (1) builds in strong incentives for mutual accommodation, (2) minimizes the risk of deadlock, and (3) presents significant hurdles to secession. The first two interrelated goals are implicit in the goal of fostering mutually accepted outcomes. A key challenge in this regard is to ensure that one side cannot readily preclude a mutually acceptable outcome through intransigence. At the same time, an effective institutional design for negotiations must be able to address situations in which it is not possible to achieve a mutually accepted result, particularly where the very survival of a group is gravely imperiled.

While the third goal—erecting hurdles to secession—serves the same interests as the first two, it also provides insurance against the specter of political divorce resulting, at least in substantial part, from fortuitous political forces. This sort of risk is exemplified in the dissolution of Czechoslovakia. The negotiations that culminated in the division of Czechoslovakia initially were aimed at working out the allocation of power between the central government and the two constituent republics, though the focus of negotiations evolved significantly.⁴⁹ The course of negotiations was profoundly shaped by the two republics' diverging approaches on economic policy⁵⁰ and by the personalities of their respective leaders.⁵¹ Importantly, too, the negotiations played out within a constitutional framework that fostered deadlock.⁵² There were no structures in place to push the parties past impasse. Although less important than other factors, time pressures may have further contributed to the Czech/Slovak disunion.⁵³

In broader perspective, the process that led to political divorce was hardly a model of democratic deliberation. Public opinion was not consulted through referendum. Opinion polls showed, however, that a majority of citizens in both the Czech and Slovak Republics wanted to preserve their state. Even after the division became final, polls showed that a majority in both the Czech Republic and Slovakia supported a unitary state.⁵⁴

III. DEMOCRATIC PRINCIPLES AND INTERNATIONAL MEDIATION

Both Canada and the former Czechoslovakia have addressed separatist challenges without the substantial involvement of third parties. At times, however, external actors have been called upon to mediate disputed separatist claims. There can be little doubt that international mediators will continue to play a significant role in attempting to resolve such disputes.⁵⁵ And so it is worth considering whether insights derived from previous experiences, including those of Canada, Czechoslovakia, and the former Yugoslavia, can enhance the effectiveness of international responses to separatist claims.

Among the most significant recent instances of such mediation was the EC's attempt (later joined by the United Nations) to foster a peaceful resolution of conflicts surrounding separatist claims in the former Yugoslavia. Its efforts proved to be stunningly ineffectual. But like any failure of this order, the European initiative merits consideration for the lessons it offers.

A. *The Badinter Commission*

The EC assumed the leading role in mediating territorial disputes in the former Yugoslavia after the Republics of Slovenia and Croatia declared their respective independence on June 25, 1991. On August 27, 1991, the EC and its member states agreed to convene both a Conference for Peace in Yugoslavia and an Arbitration Commission operating within the framework of that conference.⁵⁶ The latter, known as the Badinter Commission after its chairman, Robert Badinter, was established to help ensure "a peaceful accommodation of the conflicting aspirations of the Yugoslav peoples."⁵⁷ By year's end, the commission would play a central role in implementing the EC's recognition policy for breakaway Yugoslav republics.

Of special interest here is the novel role that democratic principles played in the EC recognition process generally and in the work of the Badinter Commission in particular. That process was established through two declarations adopted on December 16, 1991.

The first, "Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union,"⁵⁸ established a common policy governing recognition by the EC and its member states of new states that might emerge from the former Soviet Union and Yugoslavia. A separate Declaration on Yugoslavia⁵⁹ added further preconditions for recognition with respect to the SFRY.

The EC policy represented a major innovation, establishing conditions for recognition of new states that went substantially beyond the traditional international legal criteria for statehood.⁶⁰ Broadly, candidates for recognition were defined as states that "have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations."⁶¹ As elaborated in the EC declarations, these criteria sought to ensure both that issues arising from the transitions in the former Soviet Union and Yugoslavia would be resolved through negotiations and that the states that emerged through peaceful processes would guarantee respect for the rule of law, democracy, and human rights, with special attention to the rights of minorities.

The Declaration on Yugoslavia established a process pursuant to which Yugoslav republics seeking independence had to request recognition by December 23, 1991. The Badinter Commission was to take a decision by January 15, 1992.⁶² Under circumstances prevailing at that time, these requirements effectively forced Bosnia to seek independence and to hold what proved to be a provocative plebiscite. As noted earlier, Bosnia had no interest in seceding until Croatia and Slovenia withdrew from the former Yugoslavia. Once this happened, however, a majority of Bosnian citizens believed they would enjoy greater security in an independent Bosnian state than in a rump Yugoslavia.

By letter dated December 20, 1991, Bosnia requested EC recognition. In an opinion rendered on January 11, 1992,⁶³ the Badinter Commission noted that although Bosnian authorities had made the commitments required by the EC recognition policy, "the Serbian members of the [Bosnian] presidency did not associate themselves with those declarations and undertakings" and that Bosnian Serbs had taken a number of measures to dissociate themselves from the independent state whose recognition was sought.⁶⁴ The

commission therefore concluded that "the will of the peoples of Bosnia-Herzegovina to constitute the [Socialist Republic of Bosnia-Herzegovina (SRBH)] as a sovereign and independent State cannot be held to have been fully established."⁶⁵

The commission suggested, however, that its 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 SRBH without distinction, carried out under international supervision."⁶⁶ Heeding this suggestion, Bosnia held a referendum on March 29 through April 1, 1992. Bosnian Serbs, who constituted 31 percent of the republic's population, boycotted the ballot. With a turnout of 63.4 percent, the vote in favor of independence exceeded 99 percent.⁶⁷

Believing that recognition would help avert in Bosnia the kind of violence that had been triggered by Croatia's declaration of independence, the EC and United States issued a joint statement on March 10, 1992, expressing their willingness to recognize the Republic of Bosnia and Herzegovina. The EC issued a statement on April 6 indicating its intention to recognize Bosnia the following day, and on April 7 the United States issued a statement reflecting the (first) Bush administration's belief that Bosnia, Croatia, and Slovenia met "the requisite criteria for recognition."⁶⁸ Recognition by other countries quickly followed.

The results were disastrous. On April 6, 1992, in anticipation of EC recognition the next day, Bosnian Serb rebels attacked the Holiday Inn of Sarajevo, signaling the onset of the armed conflict that would ravage Bosnia for three and one-half years. Without a commitment to help defend Bosnia's borders militarily, Western recognition of Bosnia exacerbated rather than mitigated the risk of armed conflict.

In effect, the EC recognition process forced Bosnia to seek recognition under the gun. As noted, the declaration establishing that process required Yugoslav republics seeking recognition to apply within a week. The Badinter Commission precipitated another disastrous development when it suggested that Bosnia hold a referendum. The EC's ill-considered deployment of democratic processes was, proverbially, like pouring kerosene onto a fire. This is not to suggest that the EC process was the principal or even a pri-

mary cause of conflict in Bosnia. The question is whether a different strategy could have been more effective.

B. Lessons of the Badinter Commission

Key aspects of the EC's recognition policy, including opinions of the Badinter Commission, were deservedly controversial. It may therefore be tempting to dismiss this precedent as a manifest failure. But if the Badinter Commission was flawed,⁶⁹ the underlying model of an intergovernmental institution that can assist in resolving disputed territorial claims may serve a useful role.⁷⁰

This is not to suggest, however, that states should create a new institution whose sole mandate is to mediate contested separatist claims. The notion of such a body would be anathema to most states confronting separatist challenges. States may be more inclined to utilize the services of an institution whose mandate is to help mediate ethnic tensions broadly defined⁷¹ than to turn to a body established to address separatist claims as such. Also, a more broadly gauged approach would improve prospects for addressing the concerns of ethnic minorities within the framework of existing states rather than at a point when the logic of separation has become inexorable.⁷²

Even so, more effective use should be made of processes in which issues relating to recognition (or its functional equivalent) *cannot* be sidestepped. Of particular relevance in this regard are processes relating to new membership in intergovernmental organizations (IOs). Some IOs, including the European Union (EU) and Council of Europe, already condition membership on applicant states' meeting basic standards relating to human rights and democracy.⁷³ The EU and its precursor, the EC, have at times effectively used the accession process to encourage applicant states to democratize and ensure minority rights.⁷⁴ But the EU has neither consistently used this leverage nor used it to maximum effect.⁷⁵

Ideally, more rigorous enforcement of rights-related preconditions to membership in IOs would induce established states to improve their treatment of minorities while creating an expectation among secessionists that there would be a protracted period before their claims for recognition might even be considered.⁷⁶ This

might be especially useful in volatile situations, producing a cooling-off period during which mediators could attempt to head off secession by securing effective assurances of minority rights. After all, grievances underlying separatist aspirations sometimes *can* be assuaged through effective assurances of group autonomy and other minority rights.⁷⁷

At the very least, intergovernmental institutions that include in their membership criteria conditions relating to democratic principles and human rights, such as the EU, should treat these criteria as seriously as other conditions of membership.⁷⁸ Insistence on such conditions is no guarantee that new member states will operate in accordance with democratic principles. But a political community that has already demonstrated respect for democratic values and human rights is surely a better risk than one that has done no more than pledge to respect them.

If enforced wisely, this approach could make it possible to sidestep the vexing questions latent in the notion of a remedial right to secede. In the view of one scholar, remedial secession is justified only when "it is clear that all attempts to achieve internal self-determination have failed or are destined to fail."⁷⁹ Yet this proposed test begs hard questions: How severe does a state's denial of participatory and other rights have to become before the victim group is entitled to secede? How long must the repression persist before it is "clear that all attempts to achieve internal self-determination" would be futile? Whether a government satisfies international standards of political participation rarely lends itself to a straight up or down determination; forecasting the future of a nation's democratic path is more perilous still.

CONCLUSION

Principles of self-government are scarcely the only considerations that should guide responses to separatist claims. But they have recently assumed unprecedented relevance. In some circumstances, they may weigh in favor of separatist claims. Still, international law's deepening devotion to democracy remains what it has long been—a commitment above all to full participatory rights within established states. Emerging norms recognizing a right to self-government lend support to separatist claims principally when those same

norms have already been profoundly, irrevocably breached. And so it is trite but useful to remind ourselves that the most successful policy toward secessionist movements is one that dampens separatist aspirations—and that is implemented well before intrastate tensions reach the breaking point.

NOTES

1. The ranks of separatists have lately included northern Italians; Crimeans in the Ukraine; Tamils in Sri Lanka; Kashmiris in India; Abkhazians and South Ossetians in Georgia; Corsicans in France; Armenians in Nagorno-Karabakh; Hungarians in Slovakia; Tibetans; residents of Somaliland in Somalia; non-Muslims in southern Sudan; Basques in Spain; Taiwanese; residents of Irian Jaya, Aceh, and several other regions in Indonesia; Montenegrins and Albanian Kosovars in Yugoslavia; and Kurds in Turkey and Iraq. Closer to home, Quebec separatists continue to press their cause; so do secessionists in Hawaii. A 1992 study identified active movements seeking their own state or substantial autonomy in over sixty states. Timothy D. Sisk, *Power Sharing and International Mediation in Ethnic Conflict* (New York: Carnegie Corporation, 1996), 1.

2. For nearly half a century following World War II, Bangladesh stood alone as a state created by virtue of an armed separatist movement. Donald L. Horowitz, "Self-Determination: Politics, Philosophy, and Law," in *Ethnicity and Group Rights*, NOMOS XXXIX, ed. Ian Shapiro and Will Kymlicka (New York: New York University Press, 1997), 426.

3. See Timothy William Waters, "Indeterminate Claims: New Challenges to Self-Determination Doctrine in Yugoslavia," *SAIS Review Journal of International Affairs* 20 (Summer-Fall 2000): 113. For present purposes, the influence of legal principles on mediation efforts is more noteworthy than the fact that the breakup of Yugoslavia attracted international mediators. The violence surrounding the breakup of Yugoslavia made its dissolution first and foremost a matter of international security. Thus it is no surprise that a succession of intergovernmental organizations and states tried to secure a peaceful resolution of the conflict. Less predictable were the ways in which mediators addressed the dissolution of the former Yugoslavia through novel applications of international law.

4. Wilson proposed a draft provision that would commit the Contracting Powers to effect "such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to

the principle of self-determination." Woodrow Wilson, "Covenant (Wilson's First Draft)," in David Hunter Miller, *The Drafting of the Covenant*, vol. 2 (New York: G. P. Putnam's Sons, 1928), 12.

5. Representatives of the Aaland Islands, which were under the jurisdiction of Finland, had sought annexation to Sweden at the Versailles Peace Conference, invoking the "right of peoples to self-determination as enunciated by President Wilson." *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919*, vol. 4 (Washington, D.C.: Government Printing Office, 1943), 172. The Aaland Islands had belonged to Sweden until 1809, when they were surrendered to Russia as a result of conquest. Finland, too, was incorporated into Russia in 1809, and the Aaland Islands were, in the words of a League of Nations Commission of Jurists, "undoubtedly part of Finland during the period of Russian rule." "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question," *League of Nations Official Journal*, supp. 3 (1920): 9. With the outbreak of the Russian revolution, Finland declared its independence from Russia, and the population of the Aaland Islands expressed their desire to be separated from Russia and reattached to Sweden. See "Report of the International Committee," 7, 10. Finland took the position that the Aaland Islands had been incorporated in the state of Finland, which had attained independence in 1918. "Report of the International Committee," 10. While Sweden proposed that the islanders be allowed to determine their status through a plebiscite, Finland insisted that this would constitute interference in a matter that, under international law, was solely within its domestic jurisdiction. The League appointed a Commission of Jurists to examine whether the League was competent to consider this petition. A Commission of Rapporteurs was appointed to assess the merits of Sweden's petition.

6. In a widely cited portion of its report, the Commission of Jurists asserted that although the principle of self-determination of peoples played "an important part in modern political thought" and had been recognized in some international treaties, the latter "cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations." "Report of the International Committee," 5. A report by the League-appointed Commission of Rapporteurs (see n. 5) agreed that the principle of free determination "is not, properly speaking, a rule of international law." *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7.21/68/106 (1921), 27.

7. *The Aaland Islands Question*, 28. The commission further suggested that it "should not have hesitated to consider" the solution of allowing the

Aaland Islands to separate from Finland and become part of Sweden if this were "the only means of preserving its Swedish language for Aaland" (29). The Commission of Jurists left open the possibility that "a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose," bring an international dispute arising from the situation within the competence of the League. "Report of the International Committee," 5.

8. General Assembly Res. 2625, UN GAOR, 25th sess., supp. no. 28, 121, UN Doc. A/8018 (1970).

9. Ibid.

10. Ibid. The full sentence of this quotation is:

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.

11. Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (New York: Cambridge University Press, 1995), 114.

12. *United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/24 (part I), para. 2 (1993), 20–46; *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, General Assembly Res. 50/6, para. 1 (1995), UN Doc. A/RES/50/6 (1995). The relevant text of the latter provides that UN member states will

[c]ontinue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

13. *In the Matter of Section 53 of the Supreme Court Act (Reference re Secession of Quebec)*, 1998, 2 S.C.R. 217, para. 134.

14. See Gregory H. Fox, "Self-Determination in the Post-Cold War Era: A New Internal Focus?" *Michigan Journal of International Law* 16 (1995): 733; Thomas Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law* 86 (1992): 46; Hurst Hannum, "Re-thinking Self-Determination," *Virginia Journal of International Law* 34 (1993): 57-63.

15. International lawyers often use the term *external self-determination* to refer to the right of people inhabiting a defined territory that is subject to colonial rule or foreign occupation freely to determine their political status.

16. Dec. 16, 1966, 993 United Nations Treaty Series 171 (entered into force Mar. 23, 1976).

17. Dec. 16, 1966, 993 United Nations Treaty Series 3 (entered into force Jan. 3, 1976).

18. Of particular relevance in this regard is the third paragraph of Common Article 1, which provides: "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

19. On the basis of his review of the text and the *travaux préparatoires*, Judge Cassese concludes that Article 1(1) "requires that the people choose their legislators and political leaders free from any manipulation or undue influence from the *domestic* authorities themselves" (italics in original). Cassese, *Self-Determination of Peoples*, 53. He also writes: "As far as the internal self-determination of *peoples living in sovereign States* was concerned, the drafting history of Article 1 shows that self-determination was generally considered to afford a right to be free from an authoritarian regime" (59-60; italics in original).

20. Franck, "The Emerging Right," 46.

21. *Ibid.*, 47.

22. Security Council Res. 940 (1994).

23. As I note later, the contours of this concept are ill defined.

24. My arguments in this section draw upon a previously published article. See Diane F. Orentlicher, "Separation Anxiety: International Responses to Ethno-Separatist Claims," *Yale Journal of International Law* 23 (1998): 44-60.

25. In the view of one writer, "Boundaries comprise a problem . . . that is insoluble within the framework of democratic theory." Frederick G. Whelan, "Prologue: Democratic Theory and the Boundary Problem," in

Liberal Democracy, NOMOS XXV, ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1983), 16. Richard Briffault writes that "the concept of self-government says nothing about who is the 'self' that does the governing." Richard Briffault, "Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination," *Columbia Law Review* 92 (1992): 800. Robert Dahl takes a more nuanced approach. He seems to side with the views just cited when he observes that "we cannot solve the problem of the proper scope and domain of democratic units from within democratic theory." Robert A. Dahl, *Democracy and Its Critics* (New Haven, Conn.: Yale University Press, 1989), 207. But he adds that "it would be a mistake to conclude that nothing more can be said" (207). He goes on to develop criteria, rooted in democratic principles, for assessing claims as to the proper scope and domain of democratic units (207–9).

26. Jamin Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," *University of Pennsylvania Law Review* 141 (1993): 1444.

27. As Alfred Cobban explained, "The revolutionary theory that a people had the right to form its own constitution and choose its own government for itself easily passed into the claim that it had a right to decide whether to attach itself to one state or another, or constitute an independent state by itself. The effect of revolutionary ideology was to transfer the initiative in state-making from the government to the people." Alfred Cobban, *The Nation State and National Self Determination*, rev. ed. (New York: Thomas Y. Crowell, 1969), 41.

28. John Stuart Mill, "Considerations on Representative Government" (1861), in *Utilitarianism, On Liberty, Considerations on Representative Government* (London: Everyman, 1993), 392.

29. See Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colo.: Westview Press, 1991), 4 ("Surely a political philosophy that places a preeminent value on liberty and self-determination . . . and holds that legitimate political authority in some sense rests on the consent of the governed must either acknowledge a right to secede or supply weighty arguments to show why a presumption in favor of such a right is rebutted").

30. Robert Dahl makes much the same point—though he does not frame it in terms of a utilitarian justification—when he suggests that, all other things being equal, "one set of boundaries is better than another to the extent that it permits more persons to do what they want to do." Dahl, *Democracy and Its Critics*, 208. In Dahl's view, this approach "reasserts the value of personal freedom" (208).

31. My discussion here draws upon and reflects contemporary liberal versions of republicanism rather than more conservative traditional renderings.

32. Cass R. Sunstein, "Beyond the Republican Revival," *Yale Law Journal* 97 (1998): 1554 (footnote omitted).

33. *Ibid.*, 1555 (footnote omitted).

34. A similar argument could be framed in terms of deliberative democracy, a close cousin of contemporary versions of civic republicanism. A core claim of deliberative democracy is that "when citizens or their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions." Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Harvard University Press, 1996), 1. In this conception of democracy, citizens deliberate by appealing to "reasons or principles that can be shared by fellow citizens" who share a basic commitment to "finding fair terms for social cooperation" (55). When these conditions do not exist, citizens may be unable to resolve their differences through persuasion.

35. Mill, "Considerations on Representative Government," 394.

36. *Ibid.*, 391.

37. As noted earlier, other values central to international law and politics would also be imperiled by such a rule. In light of the limited focus of this essay, my discussion here focuses on concerns relating to democratic principles.

38. This risk can be mitigated somewhat by constitutional provisions that set a high bar for secession.

39. See Abraham Lincoln, "First Inaugural Address" (Mar. 4, 1861), in *A Compilation of the Messages and Papers of the Presidents 1789-1897*, vol. 6, ed. James D. Richardson (n.p.: U.S. Congress, 1898), 9.

40. Lord Acton, "Nationality," in *Essays on Freedom and Power* (1862; reprint, New York: Meridian, 1972), 165.

41. *Ibid.* A potential strategy for mitigating these risks is to insist that territorially bounded communities seeking independence demonstrate their commitment to human rights, including minority rights, as a precondition to their admission as members in intergovernmental organizations. See Section III.B.

42. Here I am relying on a variation of what Robert Dahl calls the Principle of Affected Interests: "Everyone who is affected by the decisions of a government should have the right to participate in that government." Robert A. Dahl, *After the Revolution?* (New Haven, Conn.: Yale University Press, 1970), 64. In the version on which I rely, the principle would be stated this way: "Everyone who is significantly affected by a decision should have the right to participate in making it." This is not to say, however, that

everyone affected by a decision is entitled to an equal vote. Elsewhere I have argued that the relative weight of different citizens' interests should be taken into account when boundary disputes are resolved. Orentlicher, "Separation Anxiety," 59–60.

43. As one writer observed, Bosnia cannot "belong to either Croatia or Serbia—it can act as a bridge between the two but its relationship with both republics must be equal." Misha Glenny, *The Fall of Yugoslavia: The Third Balkan War*, 3d ed. (New York: Penguin Books, 1996), 144.

44. My discussion here focuses on claims of groups wishing to secede from a lawfully established political authority and is not fully relevant to circumstances in which a territory is unambiguously entitled to exercise the right of external self-determination under international law. In the latter context, citizens of the imperial or invading power do not have a legitimate right to determine the political status of the territory in question.

45. *In the Matter of Section 53 of the Supreme Court Act (Reference re Secession of Quebec)*, 1998, 2 S.C.R. 217.

46. *Ibid.*, para. 88.

47. *Ibid.*, para. 91.

48. This kind of zero-sum game not only is suboptimal in terms of democratic values but also has profound security implications. In the tense environment surrounding contested separatist claims, winner-take-all plebiscites are almost sure to inflame nationalist passions. Worse, they may provoke sweeping violence—as happened when the United Nations administered a plebiscite to determine the status of East Timor in 1999.

49. The set of negotiations that culminated in political rupture was instituted following elections in 1992 with the limited object of forming a federal government and drafting its program for approval by competent federal institutions. See Eric Stein, *Czecho/Slovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (Ann Arbor: University of Michigan Press, 1997), 197, 221.

50. Václav Klaus, the Czech prime minister, was intent on adopting a market structure. His Slovak counterpart, Vladimír Mečiar, and much of the Slovak public were reluctant to abandon the Soviet-style economy.

51. It is widely believed that Mečiar pressed a number of claims that he knew the Czech side would not accept as a bargaining ploy rather than as part of a strategy aimed at securing Slovak independence. In the view of informed observers, Mečiar did not actually want the negotiations to lead to the division of Czechoslovakia. See Stein, *Czecho/Slovakia*, 222. Once Klaus concluded that accepting the Slovak position would endanger his economic policy objectives, "he refused 'to play' further" (223).

52. Relevant constitutional provisions are described in Lloyd Cutler and Herman Schwartz, "Constitutional Reform in Czechoslovakia: E Duobus Unum?" *University of Chicago Law Review* 58 (1991): 519.

53. See Stein, *Czecho/Slovakia*, 326.

54. See "Czech Republic: Most Czechs Think Partition Was Unnecessary," Reuter News Service-CIS and Eastern Europe, Feb. 24, 1993; and "Slovakia: Most Slovaks Want to Rejoin Czechs," Reuter News Service-CIS and Eastern Europe, June 3, 1994.

55. I am using the term *international mediators* broadly to include mediators representing a state other than the one in which subunits have asserted separatist claims, as well as mediators representing an intergovernmental organization.

56. In August 1992, the EC Peace Conference on Yugoslavia was replaced by the joint UN-EC International Conference on the Former Yugoslavia. See Michla Pomerance, "The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence," *Michigan Journal of International Law* 20 (1998): 35 n. 11.

57. *Extraordinary Meeting of the Foreign Ministers (Brussels, August 27, 1991)*, *EPC Declaration on Yugoslavia*. The declaration of August 27, 1991, urged the parties to the conflict in Croatia to accept both a peace conference and the establishment of "an arbitration procedure" and provided that "[t]he relevant authorities will submit their differences to an Arbitration Commission." The commission's terms of reference were supplemented in September 1991, and the body was reconstituted under new terms of reference and with a partially new composition in January 1993. See Pomerance, "The Badinter Commission," 32 n. 3, 35, 35 n. 11.

58. European Community, "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," *I.L.M.* 31 (1992): 1486-87.

59. "Declaration on Yugoslavia," *I.L.M.* 31 (1992): 1485.

60. In fact, the policy entailed the application of recognition criteria that effectively supplanted the traditional criteria for statehood. Notably, recognition of both Bosnia and Hercegovina and Croatia did not depend upon their meeting all of the traditional criteria for establishing statehood, such as having a government in effective control of the country's territory. See Roland Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union," *European Journal of International Law* 4 (1993): 43.

61. European Community, "Guidelines on the Recognition of New States," 1487.

62. Evidently the key reason underlying this rapid timetable was that the EC hoped to maintain the facade of a common policy in the face of

Germany's announced intention to recognize Croatia and Slovenia unilaterally if the EC did not recognize them in the near future. See Laura Silber and Allan Little, *Yugoslavia: Death of a Nation*, rev. ed. (New York: TV Books, 1997), 199–200.

63. Conference on Yugoslavia, Arbitration Commission Opinion no. 4, *I.L.M.* 31 (Jan. 11, 1992): 1501.

64. *Ibid.*, 1502–3, para. 3. These measures culminated in the proclamation by an "Assembly of the Serbian people of Bosnia-Herzegovina" of the independence of a "Serbian Republic of Bosnia-Herzegovina" on January 9, 1992 (1502–3, para. 3).

65. *Ibid.*, 1503, para. 4.

66. *Ibid.*

67. See Rich, "Recognition of States," 49–50.

68. *Ibid.*, quoting White House press release, Washington, Apr. 7, 1992.

69. While criticism has focused on the decisions taken by the Badinter Commission, some critics have also faulted the body for adopting decisions that were treated as having authority "bordering on binding" even though its competence to render binding decisions had been established neither by the consent of the relevant parties nor through the enforcement powers of the UN Security Council. See, for example, Pomerance, "The Badinter Commission," 48.

70. As Thomas Franck has observed, the notable "failure of peaceful conflict resolution" in recent years may be due in part "to the inadequacy of procedures, institutions and principles equal to the contemporary zeitgeist." Thomas M. Franck, "Friedmann Award Address," *Columbia Journal of Transnational Law* 38 (1999): 5.

71. One such mechanism already in existence is the Office of the High Commissioner on National Minorities of the Organisation for Security and Co-operation in Europe. The High Commissioner attempts to mediate disputes involving national minorities with the aim of averting conflict. See "Mandate of the CSCE High Commissioner on National Minorities," reprinted in Arie Bloed, ed., *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents, 1972–1993* (Dordrecht, the Netherlands: Kluwer Academic Publishers, 1993), 715.

72. A key factor behind the EC's failure to achieve a peaceful resolution of the Yugoslav crisis was that the EC process was activated well beyond the point where mediation could have been most effective. Knowledgeable observers believe that as late as December 1990 it might have been possible to broker a new constitutional arrangement that would have accommodated the respective concerns of Slovenian, Croatian, and Serb nationalists within Yugoslavia, thereby averting its violent dismemberment. Yet the EC did not adopt its common recognition policy until six months after armed

conflict had erupted in Slovenia and seven months after one of the worst massacres in Croatia occurred.

73. In 1993 the European Council adopted the following political criteria for EU accession by central and eastern European countries: "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." *European Council in Copenhagen, 21–22 June 1993: Conclusions of the Presidency*, SN 180/93, 12.

74. The prospect of EC membership was a positive inducement to political liberalization in Greece, Portugal, and Spain. See Laurence Whitehead, "International Aspects of Democratization," in *Transitions from Authoritarian Rule: Comparative Perspectives*, ed. Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead (Baltimore: Johns Hopkins University Press, 1986), 22–23. More recently, both the EU and the North Atlantic Treaty Organization (NATO) warned Slovakia that its accession to these two organizations would be imperiled if Vladimir Mečiar, the ultra-nationalist former prime minister, were elected to Parliament in elections slated for September 2002. See Peter S. Green, "Slovak Voters May Offer Ousted Leader a 4th Chance," *New York Times*, Mar. 10, 2002. Mečiar's party did not receive enough votes to participate in the new government, an outcome that may have been influenced by EU and NATO policy. See Robert G. Kaiser, "Moderate Reformers Win Slovak Election; U.S. Had Warned Loss Could Sink Bid to Join NATO, EU," *Washington Post*, Sept. 23, 2002. Recent developments also highlight more direct implications of the EU accession process for separatist claims. The EU foreign policy chief, Javier Solana, used the prospect of EU membership to broker an accord between Serbia and Montenegro that would avert Montenegro's secession from the rump Yugoslavia. See Daniel Williams, "Yugoslavia Nears End, at Least in Name; After a Decade of Disintegration, Last Two Republics Agree to Form New Entity," *New York Times*, Mar. 15, 2002; Jonathan Steele, "Montenegro to Drop Aim of Independence," *Guardian (London)*, Feb. 19, 2002.

75. In recognition of this, in 2000 the Open Society Institute established an EU Accession Monitoring Program to promote effective use of the accession process to foster compliance with the EU's political criteria by candidate countries.

76. These goals should not, of course, be pursued at the expense of a population's immediate security. If recognition is withheld from a vulnerable entity such as Kosovo for a protracted period, there is heightened responsibility to ensure its security in the interim.

77. Finland's assurance of generous minority rights protections has apparently gone a long way toward quelling the Åland Islanders' desire to separate from Finland and rejoin Sweden.

78. The EC was widely faulted for recognizing Croatian independence despite the fact that the Badinter Commission expressed reservations about whether Croatia met EC recognition conditions relating to respect for minority rights. See Orentlicher, "Separation Anxiety," 67.

79. Cassese, *Self-Determination of Peoples*, 120.