

For Better or for Worse: The Forced Marriage of Sovereignty and Self-Determination

Nora Y.S. Ali

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For Better or For Worse? The Forced Marriage of Sovereignty and Self-Determination

Nora Y.S. Ali†

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Introduction

A young girl is shot in the face, leaving a gaping hole in her cheek for over 25 years.¹ A four-year old girl is born with an exposed bladder.² Seven

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1. *Australia Approves Ayaan’s Visa!*, EDNA ADAN UNIVERSITY HOSPITAL, <http://www.ednahospital.org/2014/01/australia-approves-ayaans-visa/> (last visited Aug. 8, 2014).

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children have hydrocephalus, causing their brains to swell with fluid that needs to be drained through sophisticated procedure.³

These are just a few of the patients seen in the only maternity hospital in Somaliland. It is the only maternity hospital in the nation, due in part to limited funding opportunities for maternal and child health. Each of these stories ends in success, but not because of international organizations that donate directly to foreign governments. Why are international organizations not part of this success?

Somaliland does not have access to foreign aid because it has not been recognized by the international community as a state.⁴ Somaliland is a semi-autonomous region in the Horn of Africa,⁵ which was under the British Protectorate until June 26, 1960, when the nation declared its independence.⁶ For the next five days, the United Nations and thirty-five countries—including the United States—recognized Somaliland as an independent nation.⁷ On July 1, 1960, Somaliland united with its neighbor to the south, Italian Somalia.⁸ With unification came the fulfillment of a decades-long campaign for a “Greater Somalia.” It became immediately clear, however, that although the majority of the unified population shared the same ethnicity, religion, and language, these were sharply distinct nations.⁹ Despite stark differences, there still was promise for “Greater Somalia” until 1969, when President Sharmarke was assassinated in an otherwise bloodless coup.¹⁰ The Siyad Barre regime that followed led to a devastating Civil War that left 250,000 to 300,000 people—mostly marginalized Somalilanders, such as the Bantu, Digil, Bravani, and Rahanweyn—dead.¹¹ In May of 1991, Somalis residing in the North convened in the Grand Conference of the Northern Peoples.¹² At the conference, Somaliland revoked the Act of Union that had legitimized the unionization of British Somaliland and Italian Somalia, and declared its

2. *Edna Assists Baby Hoodo*, EDNA ADAN UNIVERSITY HOSPITAL, <http://www.ednahospital.org/2013/08/edna-assists-baby-hoodo/> (last visited Aug. 8, 2014).

3. *Recent Achievements at Edna Hospital*, EDNA ADAN UNIVERSITY HOSPITAL, <http://www.ednahospital.org/2011/03/recent-achievements-at-edna-hospital/> (last visited Aug. 8, 2014).

4. Ed Stoddard, *Somaliland blessed by dodging aid ‘curse’*: minister, REUTERS (Feb. 4, 2014, 12:05pm), <http://www.reuters.com/article/2014/02/04/us-africa-mining-somaliland-idUSBREA1316Y20140204> (last visited Aug. 8, 2014).

5. MARK BRADBURY, *BECOMING SOMALILAND* 4 (2008).

6. *Id.* at 32.

7. Peter J. Schraeder, *Why the United States Should Recognize Somaliland’s Independence*, CTR. FOR STRATEGIC & INT’L STUDIES, <https://csis.org/print/13836> (last visited Apr. 10, 2014).

8. *Id.*

9. See, e.g., BRADBURY, *supra* note 5, at 32 (“The former colonies had developed different administrative systems, police forces, taxes, currencies and education systems, and they conducted official affairs in different languages.”).

10. See *id.* at 35.

11. See *id.* at 47. Somalia’s government led a counter-offense attack in Hargeisa and Burco, the two major cities of Somaliland that killed “tens of thousands of civilians [and] forced hundreds of thousands to seek refuge in Ethiopia.” *Id.* at 45-46.

12. *Id.* at 80.

independence.¹³

Since 1991, Somaliland has flourished with the emergence of a strong democratic government¹⁴ and economic growth.¹⁵ Despite Somaliland's high-functioning government, Somaliland is not recognized as an independent state within the international community; instead, the international community recognizes Somalia as the territorial sovereign of Somaliland.¹⁶ Somalia, however, has not been able to exert any semblance of control over Somaliland because of Somalia's status as a failed state.¹⁷ For over twenty years, the international community has hesitated to recognize Somaliland as an independent state due to narrow conceptualizations of self-determination and sovereignty.

Traditional notions of sovereignty and self-determination are not easily applicable to unique claims for independence, such as those at issue in Somaliland. Classic definitions describe sovereignty as "the absolute and perpetual power of a commonwealth."¹⁸ Sovereignty, at its core, goes to the rights of a state. In contrast, self-determination goes to a people's right to decide which state governs them.

Self-determination in international law is the legal right for a "people" to attain a certain degree of autonomy from its sovereign.¹⁹ Traditionally, the right to self-determination is available to all colonized groups.²⁰ By 1970, many states had attained international recognition as the conclusion

13. *Id.* at 82.

14. *See, e.g., id.* at 184. Since 1991, Somaliland has held two democratic elections that were observed by the international community. *See also id.* at 192-93. Furthermore, the U.S.-based International Republican Institute and the National Endowment for Democracy highlighted Somaliland's democratic success, stating "Somaliland's embrace of democracy, its persistence in holding round after round of elections, both winners and losers abiding by the rules, the involvement of the grassroots, the positive role of traditional authorities, the culture of negotiation and conflict resolution, the temperance of ethnicity or clan affiliation and its deployment for constructive purposes, the adaptation of modern technology, the conservative use of limited resources, and the support of the diaspora and the professional and intellectual classes are some of the more outstanding features of Somaliland's political culture that are often sorely lacking elsewhere." *See* Schraeder, *supra* note 4, at 2.

15. *See, e.g.,* Nicholas Eubank, *Taxation, Political Accountability, and Foreign Aid: Lessons from Somaliland*, JOURNAL OF DEV. STUDIES (forthcoming Mar. 26, 2011), at 7.

16. *See, e.g.,* BRADBURY, *supra* note 5, at 5 ("Most fundamentally, after a decade and a half Somaliland's sovereignty claim remains unrecognized by Somalis in Somalia or any foreign government, and is contested by a significant proportion of the people populating eastern Sanaag and Sool regions of Somaliland.").

17. *See, e.g.,* Brian Jones, *The Worst Place in the World: See What Life is Like in Somalia*, BUS. INSIDER (Jul. 19, 2013, 11:09 AM), <http://www.businessinsider.com/somalia-is-the-most-failed-state-on-earth-2013-7?op=1>. However, Somalia's government was recently recognized as functional by the United States. *See, e.g.,* Tom Watkins, *After More Than 2 Decades, U.S. Recognizes Somalia*, CNN (Jan. 17, 2013, 5:31 PM), <http://www.cnn.com/2013/01/17/us/somalia-recognition/>.

18. RICHARD JOYCE, *COMPETING SOVEREIGNTIES* 47 (2013).

19. *See, e.g.,* *Self-Determination (International Law)*, LEGAL INFO. INST. (Mar. 23, 2014), http://www.law.cornell.edu/wex/self_determination_international_law.

20. MILENA STERIO, *THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW* 9 (2013).

to the decolonization process.²¹ Over time, however, the international community has grown to regard self-determination with suspicion due to frequent attempts by separatist minority groups to challenge a state's territorial integrity.²² To prevent these separatist challenges, limitations to self-determination have developed. Both external and internal limitations to self-determination make it nearly impossible for a non-colonized people to obtain independence, including Somalilanders,²³ due to strict adherence to Somalia's right to territorial sovereignty. But Somaliland has continued to act as an independent state, which has left people in both nations confused. The tension between the traditional notions of sovereignty and self-determination has led the world to ignore Somaliland's democratic and economic achievements. For reasons that will be explored in this paper, Somaliland's intent to function as an independent state should no longer be ignored.

This Note argues that Somaliland's commitment to independence highlights an inability to reconcile traditional notions of sovereignty with self-determination. This tension can be resolved through a flexible, nuanced approach to both concepts that still preserves the spirit of sovereignty and self-determination. Part I discusses the history of Somaliland, including its independence from the British, unification with Italian Somalia, and reassertion of independence in 1991. Part II discusses the traditional definitions of sovereignty and the shift to a modern understanding of sovereignty. Part III discusses the evolution of the right to self-determination and the underlying theories that motivate international support for the right of a people to choose who governs them. Part IV discusses the tension between sovereignty and self-determination. Part V provides a potential remedy to alleviate the tension with an analysis of the emerging doctrine of earned sovereignty as applied to Somaliland.

I. The Struggle for Independence in Somaliland

A. Creation of "Greater Somalia"

Prior to 1960, Somaliland (North) and Somalia (South) were two distinct nations.²⁴ Beginning in the late nineteenth century, Great Britain began to occupy the coastal regions of Somaliland.²⁵ Initially, Britain's interest in Somaliland was limited to commercial and geopolitical interests, primarily the protection of valuable trade routes to Asia.²⁶ After twenty years of uprisings by Somalis, the British began to expand their control inland.²⁷ Despite expansion, Britain maintained a system of indirect rule, which limited the "resistance to colonialism by reinforcing traditional

21. *Id.* at 11-12.

22. *Id.* at 18.

23. *See id.*

24. *See, e.g.,* BRADBURY, *supra* note 5, at 32.

25. *Id.* at 25.

26. *Id.*

27. *Id.* at 27-29. Even though Great Britain expanded further into Somaliland, Great Britain was not interested in making Somaliland a formal colony. Britain's use of "indi-

forms of authority.”²⁸ The British maintained this system by working within Somaliland’s clan-based hierarchy and elevating clan elders to positions with state authority.²⁹

While limited investment in British Somaliland left rural society largely untouched and did not significantly alter the country’s political structure, Italy engaged in a brutal assault on Somalis living in Italian Somalia.³⁰ As the Italian government established its sphere of influence in Italian Somalia, World War II broke out.³¹ The Italians briefly occupied British Somaliland in 1941, but were pushed back into Italian Somalia and Ethiopia. In 1948, Somaliland became a British Protectorate while Italian Somalia was placed under U.N. Trusteeship.³²

After World War II, a rise in Somali nationalism took over the region. The concept of a “Greater Somalia” was pursued vigorously with blind faith, overshadowing the underlying historical, political and economic differences between the two regions.³³ The goal of a “Greater Somalia” was to unite the predominantly Somali regions of East Africa.³⁴ However, there was no agenda for addressing the distinct problems regarding underdevelopment in both nations, nor did anyone consider the mechanics of integrating the two territories.³⁵ Simply put, no one paid attention to merging the two regions’ separate institutions. For example, British Somaliland and Italian Somalia had different administrative systems, police forces, taxes, currencies and education systems, and they conducted official affairs in different languages.³⁶ This dual colonial heritage led to further fragmentation of the legal system, which was tasked with unifying and reconciling four distinct legal traditions.³⁷

Ultimately, political actors ignored these cracks in the “Greater Somalia” scheme. Intellectual and political elites in British Somaliland and

rect rule” in Somaliland was yet another reason why Somaliland and Italian Somalia clashed; Italian Somalia was governed more aggressively by Italy. *See id.* at 28.

28. *Id.* at 28-29. “[O]ne legacy of indirect rule in Somaliland was to reinforce indigenous political institutions in a way that has proved vital to the ability of people in Somaliland to reconstitute a polity in the aftermath of the civil war.” *Id.* at 29.

29. *Id.* at 28-29. (“As new forms of wealth accumulated in the state, the role of clan leadership changed from managing kinship relations and entitlements to pastoral resources to also managing access to the political and economic benefits of the state, such as the right to export [licenses], the collection of taxes or the ownership of wells.”).

30. *Id.* at 29. For example, an Italian company was accused of perpetuating slavery in 1900. Italy wanted to both create a colony as a source of primary goods and a place for settlement.

31. *Id.* at 30 (noting that for a brief time during World War II, Italy occupied Somaliland, but the British managed to reclaim Somaliland in 1941).

32. *Id.* at 31 (granting independence was scheduled for 1960).

33. *Id.* at 32.

34. *Id.* at 24 (“Aspirations of Somalis to re-unite the ‘lost’ Somali territories in a Greater Somalia have subsequently driven national politics and regional conflicts.”). Greater Somalia would have united five regions: Djibouti, Ogaden in Ethiopia, North-eastern Kenya, British Somaliland, and Italian Somalia. *Id.*

35. *Id.* at 32.

36. *Id.*

37. *Id.* (“The new Republic had four distinct legal traditions: British common law, Italian law, Islamic shari’a and Somali customary law.”).

Italian Somalia discussed unification as early as April 1960.³⁸ On June 26, 1960, Somaliland obtained independence from Great Britain.³⁹ Five days later, Italian Somalia also declared independence.⁴⁰ That same day, in a rush towards unification, the two nations became Somalia.⁴¹

After unification, the two nations tried to bridge the gap between their respective political and administrative frameworks only to find resistance from the other nation. A day after decolonization from the British, Somaliland drafted and signed an Act of Union, thus validating unification with Italian Somalia.⁴² To legally bind both states, representatives of the South needed to sign the document as well;⁴³ instead, the South passed the Atto di Unione, which differed significantly from the North's Act of Union.⁴⁴ In response, Northerners declared that the Atto di Unione did not carry the force of law because the document had never been ratified by the Somaliland legislature.⁴⁵ The North's dissatisfaction was ignored. The North registered its discontent when more than half of the Northern electorate voted against the provisional constitution.⁴⁶ Later that same year, British-trained Northern officers attempted a coup to end the Union and failed.⁴⁷ The North only began to accept the Union when Mohamed Ibrahim Egal, an Isaaq and Somaliland's former Prime Minister, was appointed Prime Minis-

38. *Id.*

39. *Id.*

40. *See id.* The schedule of U.N. trusteeship declared Italian Somalia would decolonize by July 1, 1960.

41. *Id.* But, unlike half the marriages in the U.S., this unification could not be annulled. *See National Marriage and Divorce Trends*, CDC.ORG, (last visited Apr. 9, 2014), http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm.

42. BRADBURY, *supra* note 5, at 33.

43. *See id.*

44. Ibrahim Hashi Jama, *Somaliland & Somalia: The 1960 Act of Union - An Early Lesson for Somaliland*, SOMALILAND LAND (2006), http://www.somalilandlaw.com/Somaliland_Act_of_Union.htm ("Thus, although the clear plan and agreement between Somaliland and Somalia was that the same Act of Union will be signed by both states, the legal formalities, as agreed, were not completed properly and, according to [author Paolo] Contini, 'the Union of Somaliland and Somalia Law did not have any legal validity in the South (Somalia) and the approval "in principle" of the Atto di Unione was not sufficient to make it legally binding in that territory.'" *See also* Dimitrios Lalos, *Between Statehood and Somalia: Reflections of Somaliland Statehood*, 10 WASH. U. GLOBAL STUD. L. REV. 789, 792 (2011).

45. *See* BRADBURY, *supra* note 5, at 33. *See also* Jama, *supra* note 44 ("[Author Eugene] Cotran comments that the legal validity of the legislative instruments establishing the union were 'questionable' and he summarizes the reasons as follows: (a) The Union of Somaliland and Somalia Law and the Somalia Act of Union were both drafted in the form of bilateral agreements, but neither of them was signed by the representatives of the two territories. (b) The Union of Somaliland and Somalia purported to derogate in some respects from the Constitution of the Somali Republic. (c) The Somalia Act of Union was approved 'in principle' but never enacted into law. (d) The decree law of July 1, 1960, did not come into effect since it was not converted into law in accordance with the Constitution."

46. BRADBURY, *supra* note 5, at 33. The vote, however, was carried by a majority in the South although the legitimacy of the vote is questionable. *Id.*

47. *Id.* "Charges of treason against them were dismissed by a judge on the grounds that, in the absence of an Act of Union, the court had no jurisdiction over Somaliland. The rejectionists [of the Atto di Unione] took this as vindication of their case." *Id.*

ter of Somalia in 1967.⁴⁸ Unfortunately this moment of acceptance was all too brief. In October of 1969, President Sharmarke was assassinated and Siyad Barre took over Somalia in a bloodless coup.⁴⁹ Somalia's unified democracy lasted only nine years.⁵⁰

B. Collapse of Somalia and Rise of Somaliland

Barre hoped to fulfill the promise of "Greater Somalia" through the creation of a military state which, at its peak, emphasized nationalism and loyalty.⁵¹ Barre promoted nationalism by getting the international community invested in the "Greater Somalia" movement.⁵² Somalia received support from the Soviet Union, China, and the Middle East to recapture all five regions.⁵³ After losing the Ogaden War, Somalia lost these benefactors, but soon gained the support of the United States, Italy, and other Western donors.⁵⁴ The ideology behind a "Greater Somalia" began to disintegrate due to both the loss of the war with Ethiopia over Ogaden and the decision of the people in Djibouti to seek independence rather than unite with Somalia.⁵⁵

The loss of nationalism combined with the creation of a military state led to the formation of rebel groups. In 1981, the Isaaq clan that resided in the North formed the Somaliland National Movement (SNM).⁵⁶ The crisis between the North and South escalated in May of 1988 when the South signed a peace agreement with Ethiopia.⁵⁷ Fearing that the North would soon lose its military bases after Somalia's new alignment with Ethiopia, the SNM attacked the Somali army in the Northern cities.⁵⁸ To undermine support, Barre directed offensive military strikes at the North's two major cities: Hargeisa and Burco.⁵⁹ Barre sent pilots to bomb civilians throughout the North as well. Over 50,000 Northerners were killed in major

48. *Id.* at 34.

49. *Id.* at 35 (stating that a military regime governed Somalia for the next 21 years under the Somali Revolutionary Council. Major-General Siad Barre was the leader of the coup, and the next President of Somalia).

50. *Id.* at 33-35.

51. *Id.* at 36 (saying Barre also promoted loyalty by campaigning against tribalism by, among other means, ceremonial burning of effigies of tribalism, elimination of blood compensation, and the stripping of marriages of their clan significance). *See also* I.M. LEWIS, *A MODERN HISTORY OF THE SOMALI* 209-11 (4th ed. 2002).

52. *See, e.g.*, BRADBURY, *supra* note 5, at 42.

53. *Id.*

54. *Id.* at 42, 44-45 (noting that motivations for Western involvement was, in part, due to concerns that the Soviet Union, Ethiopia, Libya and some of the Gulf States (such as Iran and Yemen) could prevent access to Middle East oil).

55. *See id.*

56. *Id.* at 39.

57. *Id.* at 45-46.

58. *Id.*

59. *See* Brad Poore, *Somaliland: Shackled to a Failed State*, 45 *STAN. J. INT'L L.* 117, 129 (2009) (quoting 417 Parl. Deb., H.C. (6th ser.) (2004) 273WH (statement of Tony Worthington)). Hargeisa and Burao are now the primary and secondary capitals of Somaliland respectively. Interview with Yusuf Xasan, Somaliland citizen, in Hargeisa, Somaliland (May 1, 2009).

Northern cities alone,⁶⁰ and hundreds of thousands died throughout the rest of the former Protectorate.⁶¹ Those who survived the bombings were subsequently rounded up and shot to death.⁶²

Despite the serious losses, the SNM recaptured all of the major Northern cities in 1991.⁶³ Somalia could not continue its widespread atrocities as it lost funding from Western nations.⁶⁴ Later that year, the SNM convened in the Great Conference of the Northern Peoples,⁶⁵ and on May 18, 1991, Somaliland revoked the Atto di Unione and declared independence from Somalia.⁶⁶

The international community is unsure how to treat Somaliland's second declaration for independence. Somaliland has argued that it has always maintained its independence.⁶⁷ Furthermore, Somaliland's borders reflect its old colonial borders.⁶⁸ Thus, its second independence constituted "the dissolution of a voluntary union between sovereign states."⁶⁹ The international community, however, is hesitant to intrude on Somalia's right to sovereignty and has therefore denied Somaliland's right to self-determination.⁷⁰ Somaliland's unique situation calls for a deeper understanding of sovereignty and self-determination in order to resolve whether Somaliland should be recognized as an independent state.

II. Sovereignty

A. Origins of Sovereignty

The work of Jean Bodin is one of the earliest sources for the modern idea of sovereignty. Bodin defined sovereignty as the "absolute and perpet-

60. Poore, *supra* note 59.

61. *Id.* See also DEON GELDENHUYS, *CONTESTED STATES IN WORLD POLITICS* 131 (2009) ("By the time the SNM had finally defeated central forces in Somaliland in early 1991, between 50,000 and 100,000 people may have died in the hostilities and another 500,000 displaced. [Hargeisa] was roughly 90 per cent destroyed.").

62. See Poore, *supra* note 59, at 130.

63. *Id.*

64. See, e.g., BRADBURY, *supra* note 5, at 44. The publicity of human rights violations led many Western donors to withdraw their financial support from Somalia. For example, in January 1990 the US Congress passed the "Brooke Amendment," which halted any non-humanitarian aid to Somalia. "Bilateral aid was cut from US\$30 million in 1988, to \$740,000 for 1990." *Id.*

65. *Id.* at 80.

66. *Id.* at 82.

67. See GELDENHUYS, *supra* note 61, at 132.

68. E.W., *Somaliland: Can't Get No Recognition*, *THE ECONOMIST* (Jan 9, 2014, 7:50am), <http://www.economist.com/blogs/baobab/2014/01/somaliland>.

69. See GELDENHUYS, *supra* note 61, at 135. In fact, Somaliland's argument is not unique. Senegal, Gambia, Mali and Egypt all were allowed to regain their sovereignty upon the dissolution of unsuccessful unions. *Id.* See also Schraeder, *supra* note 7, at 1 (citing East Timor, Eritrea, and successor states of the former Soviet Union and Yugoslavia as additional examples).

70. See GELDENHUYS, *supra* note 61, at 143 ("One reason, especially pertinent in Africa, was a dogmatic commitment to the sanctity of inherited colonial borders and hence a deep-seated antipathy to secession.").

ual power of a commonwealth.”⁷¹ Sovereignty is unlimited in power, function, and length of time; Bodin claimed that an absolute sovereign “recognizes nothing after God that is greater than himself.”⁷² This traditional notion of sovereignty has faced challenges as the world has increasingly globalized.⁷³ Anne-Marie Slaughter notes that “[t]o exercise [sovereignty as a supreme authority and control over policy] in a world that has become so interconnected that people, politics, and pathogens are virtually able to disregard borders requires institutionalized cooperation and intervention.”⁷⁴ Going further, Raustiala believes that the shift in sovereignty from domestic authority and control to authority and control from *outside* institutions represents a loss of sovereignty.⁷⁵

B. Modern Approach to Sovereignty in Globalized World

To redefine sovereignty in the context of globalization, Stephen Krasner offers four frameworks for conceptualizing sovereignty in the modern world.⁷⁶ Krasner first identifies “legal sovereignty,” where states recognize one another as independent territories.⁷⁷ Second, Krasner identifies “interdependence sovereignty,” in which a state controls the movements across its borders.⁷⁸ Third, Krasner identifies “domestic sovereignty” as the standard definition of sovereignty.⁷⁹ “Domestic sovereignty” refers to the effectiveness of governmental authority and control within the state’s territory.⁸⁰ Fourth, Krasner identifies “Westphalian sovereignty,” where states have the right to separately determine their own domestic authority structures without external interference.⁸¹ In addition to his four views on sovereignty, Krasner provides four situations where sovereignty is trumped in favor of outside intervention: (1) religious toleration; (2) minority rights; (3) human rights; and (4) international stability.⁸²

In contrast to Krasner, Abram Chayes and Antonia Handler Chayes have argued that sovereignty has a new meaning as our world becomes increasingly interdependent:

71. See JOYCE, *supra* note 18, at 47.

72. *Id.*

73. Former U.N. Secretary-General Boutros Boutros-Ghali said, “It is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory.” Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 *DENV. J. INT’L L. & POL’Y* 373, 373 (2004).

74. Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *STAN. J. INT’L L.* 283, 288 (2004).

75. See Kal Raustiala, *Sovereignty and Multilateralism*, 1 *CHI. J. INT’L L.* 401, 417 (2000).

76. See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 3 (1999).

77. See *id.*

78. *Id.* at 13 (explaining this as an eroding mechanism of sovereignty due to aspects of globalization (such as capital flows, migration, and ideas) as a way in which the power of sovereignty in states is being increasingly lessened.)

79. *Id.* at 11.

80. *Id.*

81. *Id.* at 20-21.

82. *Id.* at 46; see also Slaughter, *supra* note 74, at 283.

Our argument . . . is that[] for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in good standing in the regimes that make up the substance of international life. To be a player, a state must submit to the pressures that international regulations impose. . . . Sovereignty, in the end—is status—the vindication of the state’s existence as a member of the international system.⁸³

This “new sovereignty” measures a state’s sovereignty through the ability and capacity for a state to participate in the international institutions that allow their members to accomplish tasks that, under Bodin’s notion of sovereignty, a state could once accomplish alone.⁸⁴ Chayes’ conceptualization of “new sovereignty” can be classified as status, membership, a connection to the rest of the world, and the political ability to be an actor within it.⁸⁵ For example, a state that is a member of the United Nations (U.N.) signifies that the state accepts the right of its fellow U.N. members to intervene in its domestic affairs if the state has failed in its obligation to protect its own citizens. Chayes’ concept of “new sovereignty” represents centuries of evolution within the doctrine of sovereignty to accommodate globalization; in contrast, the right to self-determination has barely altered in form and function since its inception in the early 20th century.

III. Right to Self-Determination

A. Development of the Right to Self-Determination

Prior to World War I, self-determination was not a matter of concern for the international community. When a group or national movement gained independence from its mother states, the rest of the world would simply acknowledge the group’s statehood.⁸⁶ Self-determination as a human right gained momentum post-World War I as Austria-Hungary broke into different states.⁸⁷ Leaders such as Vladimir Lenin and Woodrow Wilson were advocates for self-determination; Lenin advocated violent secession to liberate people from bourgeois governments, and Wilson advocated the exercise of free will through the democratic process.⁸⁸ Wilson believed that the essence of the right to self-determination stems from the general democratic principle of people consenting to be governed.⁸⁹

Self-determination acquired the status of a legal right after World War II.⁹⁰ The U.N. first discussed self-determination as a protected interest in

83. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995).

84. *See Slaughter, supra* note 74, at 286.

85. *Id.*

86. *See STERIO, supra* note 20, at 21-22.

87. *Id.*; *See also* SIMONE F. VAN DEN DRIEST, *REMEDIAL SECESSION* 16 (2013).

88. *See* ALEKSANDAR PAVKOVIC, *CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION* 19-20 (2007).

89. *Id.*

90. VAN DEN DRIEST, *supra* note 87, at 16.

the U.N. Charter.⁹¹ While establishing a general right to self-determination, the U.N. Charter did not specify the criteria necessary for a state to gain the right.⁹² Instead, the U.N. Charter proposed that member states should allow minority groups the opportunity to separate from their mother state, or the right for colonized peoples to achieve independence.⁹³ Two decades later, the U.N. Covenant on Economic, Social and Cultural Rights as well as the U.N. Covenant on Civil and Political Rights (Covenants) reaffirmed the right of people to self-determination.⁹⁴ These two treaties brought new meaning to self-determination by creating an obligation for member states to “respect a people’s right to . . . democratic self-governance.”⁹⁵ The treaties also expressed self-determination within two frameworks based on colonization.⁹⁶ Colonized peoples had a less steep hill to climb to gain independence compared to non-colonized peoples. Colonized peoples acquired the right to self-determination automatically once the Covenants were ratified, whereas non-colonized people did not automatically acquire the right to seek independence from their mother states.⁹⁷

The right to self-determination continued to be widely accepted in the 1950s with the prevalence of colonialism.⁹⁸ States recognized that oppressed colonized groups ought to have the right to choose their political status.⁹⁹ People living within a colonial territory have a right to self-determination as a unit; if various ethnic groups live in a single colony, the colony has to exercise the right to self-determination as a whole.¹⁰⁰ All ethnic groups have to unite as a single “self” that corresponded to the

91. Article 1(2), U.N. Charter provided that one of the purposes of the organization was “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” The UN Charter did not define self-determination. U.N. Charter art. 1, para. 2.

92. STERIO, *supra* note 20, at 10.

93. *Id.*

94. United Nations Covenant on Economic, Social and Cultural Rights, Art. 1, 993 U.N.T.S. 3, 1966; United Nations Covenant on Civil and Political Rights, Art. 1, 999 U.N.T.S. 171, 1966. Article 1 of both covenants provide that: “[a]ll people have the right to self-determination. . . . The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

95. STERIO, *supra* note 20, at 11. A distinguishing feature of the two covenants is that the ICESCR used stronger language towards self-determination, by stating that “all peoples have the right of self-determination” whereas the ICCPR calls for “immediate respect.” Thomas D. Grant, *Review Article: Between Diversity and Disorder: A Review of Jori C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, 12 AM. U.J. INT’L L. & POL’Y 629, 634 (1997).

96. STERIO, *supra* note 20, at 11.

97. *Id.* The Covenants granted peoples of dependent territories (colonies and trusts) the right to freely decide their political fate by allowing them “to form an independent state or to remain a part of their existing colonizer or to associate with another state.” *Id.* Colonized states could rely on the Covenants to seek a legally binding separation from their colonizer. *Id.*

98. See VAN DEN DRIEST, *supra* note 87, at 29, 32.

99. *Id.* at 31.

100. *Id.* at 31-32.

entire territory of the colony.¹⁰¹ The one drawback for a colonized group is that once a colonized people have exercised their right to self-determination that right expires.¹⁰² Once a colonized people form an independent state, they are classified as non-colonized people. They are then entitled only to a form of internal governance within their new state.¹⁰³

Because this right to self-determination expires, self-determination has lost substantial support.¹⁰⁴ Separatist minority groups throughout the world began challenging the concept of state territorial integrity by calling for a right to self-determination for their groups.¹⁰⁵ A general fear that numerous minority groups will claim a right to self-determination became prevalent within the international community.¹⁰⁶ In response, nations have found ways to limit the definition of self-determination through different theories of recognition.

B. Theories of Recognition

The ultimate success of a state's secession is dependent on recognition by the international community.¹⁰⁷ Other nations may recognize the legitimacy of secession based on several geopolitical factors.¹⁰⁸ There are two main theories of recognition: the declaratory theory and constitutive theory.¹⁰⁹ A state's recognition is based on an analysis through the frameworks of one or both theories.

The declaratory theory of recognition is premised on the objective criteria for statehood outlined under the Montevideo Convention. Signed in 1933, the Montevideo Convention outlined the criteria required for a state to become recognized: the state must have (1) a permanent population; (2) a defined territory; (3) effective government; and (4) the capacity to enter into relations with other states.¹¹⁰ If the four requirements are met, recog-

101. This concept flows from the principle of *uti possidetis*, leading toward the respect of colonial borders and their elevation to the status of international frontiers. *Id.* at 21.

102. *Id.* at 13.

103. *Id.* at 11.

104. The popularity of self-determination declined as the prevalence for colonial states decreased dramatically after the 1970's. *Id.* at 13-14. In fact, Professor Van Nanda, a leading scholar in the self-determination debate, has argued that claims to self-determination by non-colonial groups would rise quickly, so the international community should propose a new method of determining the right to self-determination. See, e.g., Ved. P. Nanda, *Self-Determination in International Law - The Tragic Tale of Two Cities - Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321, 322 (1972).

105. STERIO, *supra* note 20, at 1.

106. *Id.* at 19. Antonio Cassese commented that "[t]o explore self-determination is also a way of opening a veritable Pandora's box" because "[i]n every corner of the globe peoples are claiming the right to self-determination. *Id.* at 2. Former UN Secretary-General U. Thant went so far as to say: "As far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member States." *Id.* at 25.

107. See *id.* at 48.

108. See *id.* at 47.

109. *Id.* at 48.

110. VAN DEN DRIEST, *supra* note 87, at 32.

nition is not necessary; rather, recognition acts instead as evidence of statehood.¹¹¹

Domestic and international courts, including federal courts in the United States and the International Court of Justice (ICJ), have applied the declaratory theory.¹¹² For example, the Second Circuit applied the declaratory standard in *Kadic v. Karadzic*.¹¹³ In *Kadic*, the court was asked to determine whether the leadership of Srpska, a self-proclaimed republic, could be held liable for various human rights atrocities carried out by its leaders.¹¹⁴ The court held that Srpska met the definition of a state because Srpska “is alleged to control defined territory, control populations within this power, and to have entered into agreements with other governments.”¹¹⁵ Despite this being the favored theory by commentators,¹¹⁶ a state will still probably not obtain international rights unless the international community recognizes it.¹¹⁷

The constitutive theory of recognition reflects the realities of state recognition by providing that statehood is dependent on recognition by the international community.¹¹⁸ State recognition is not automatic under the constitutive theory.¹¹⁹ Existing states act as gatekeepers to ensure that de facto states meet the criteria under the Montevideo Convention.¹²⁰ Commentators argue that the gatekeeper function turns recognition into a political instrument with powerful states essentially exercising veto power.¹²¹

Neither theory is the “correct” or dispositive theory in establishing statehood recognition. New states sometimes qualify as a state under the constitutive theory but not the declaratory theory, and vice versa.¹²² Ultimately, recognition is not only dependent on the theory used, but is also dependent on the context surrounding a state’s secession.

111. *Id.*

112. *See e.g.* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (discussing the existence of jurisdiction over Radovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of Srpska).

113. *Id.*

114. *Id.* at 236-37.

115. *Id.* at 245.

116. The declaratory theory is the more favored approach because it is considered to be the more legal and politically correct framework. *See, e.g.*, William Worster, *Sovereignty: Two Competing Theories of State Recognition*, EXPLORING GEOPOLITICS (Feb. 2010), http://www.exploringgeopolitics.org/Publication_Worster_William_Sovereignty_Constitutive_Declaratory_Statehood_Recognition_Legal_View_International_Law_Court_Justice_Montevideo_Genocide_Convention.html.

117. STERIO, *supra* note 20, at 48.

118. *Id.*

119. *Id.*

120. *See id.*

121. *Id.* Political maneuvering means that a failed state may remain viable as a political tool in the international community. “[W]here doubts remain as to the factual fulfillment of the requirements necessary for statehood . . . recognition assumes an important (political) function: it translates international politics determined by domestic policies into international law.” Lalos, *supra* note 44, at 800.

122. Arguably, Bosnia-Herzegovina would not satisfy the criteria for the Montevideo Convention under the declaratory theory. Somaliland and Taiwan, however, satisfy the declaratory theory but fail under the constitutive theory. *See* Worster, *supra* note 116.

C. Current Status of Self-Determination

Self-determination is a rule of customary international law that declares the legal right for a “people” to attain a certain degree of autonomy from its sovereign.¹²³ The principle of self-determination is currently embodied in several international treaties and conventions.¹²⁴ States typically seek secession in response to the mother state’s failure of governance and the exclusion of minority groups in running affairs of the state.¹²⁵ Secession is considered a remedy of last resort “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.”¹²⁶ Because secession is a remedy of last resort, a valid exercise of self-determination is difficult to achieve. First, a group claiming the right to self-determination must be categorized as a people, not simply a minority group.¹²⁷ Second, the people’s circumstances must fit under the definition of external self-determination.¹²⁸

Self-determination is limited to a group that consider themselves a “people.” Generally, a “people” is a group of individuals living in the same territory.¹²⁹ A “people” is not defined strictly based on ethnicity, religion, or language. The broad construction of “people” is to create a limiting principle for the right to self-determination.¹³⁰ The right to self-determination is not available to minority groups solely based on their minority status.¹³¹ While all minority groups are entitled to a level of protection by the mother state, “there would be no limit to fragmentation, and peace, security and economic well-being for all” if every minority group had a right to self-determination.¹³² Thus, the distinction between peoples and a minority group is critical to evaluating a claim for self-determination.

The international community analyzes a group of individuals under a two-part test to determine whether the group should be categorized as a

123. Some have argued that a state that violates the right of self-determination of its peoples is “nothing more than a ‘fabricated state’ because it has manipulated statehood.” Nii Lante Wallace-Bruce, *CLAIMS TO STATEHOOD IN INTERNATIONAL LAW* 69 (1994). The classical view of self-determination—that it’s a right preserved for colonial people—has acquired *jus cogens* status. See also Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 *HARV. INT’L L.J.* 553, 567 (2010).

124. See STERIO, *supra* note 20, at 13.

125. See *id.*

126. *Id.* at 20.

127. See *id.* at 16.

128. See *id.*

129. See *id.* See also Grant, *supra* note 95, at 637 (according to the Permanent Court of International Justice, “a community is: [A] group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language, and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other”).

130. See STERIO, *supra* note 20, at 16-17

131. See *id.*

132. *Id.* at 18.

minority group or a “people” for the purposes of self-determination.¹³³ The test has both an objective and subjective component. The objective test evaluates the group to determine to what extent its members share common characteristics such as race, ethnicity, language, religion, history, and cultural heritage.¹³⁴ The international community also determines if the group of individuals shares a common territory.¹³⁵ The subjective component of the test examines how individuals within the group perceive themselves.¹³⁶ Considerations for the subjective component include a shared sense of values, a common goal for the group’s future, and the degree to which the group can form a viable political entity.¹³⁷ Classification as a “people” does not demonstrate the right to exercise secession; rather, it triggers the right to internal self-determination.¹³⁸

There are two forms of self-determination: internal and external self-determination.¹³⁹ The distinction between internal and external self-determination serves the purpose of limiting secession to extremely narrow circumstances, because “[t]he right to opposed unilateral secession stands in obvious tension with the claim to territorial integrity and unity of existing states.”¹⁴⁰ Thus, international law aims to preserve territorial integrity of existing states, except in truly unique circumstances.¹⁴¹

Internal self-determination is premised on the beliefs that individuals should have cultural, social, political, linguistic, and religious rights and that these rights need to be respected by the mother state.¹⁴² Internal self-determination’s focus on social and political rights aligns with Woodrow Wilson’s belief that self-determination reflects the right to democratic process and representation.¹⁴³ At the end of the 20th century, internal self-determination gained substantial support when the Supreme Court of Canada established the right to internal self-determination in *Reference re*

133. See *id.* at 16. See also Grant, *supra* note 95, at 637.

134. See STERIO, *supra* note 20, at 17. While all minority groups are entitled to a level of protection by their mother state, their protection stems from the mother state’s commitment to human rights. See *id.* at 18.

135. See *id.* at 16. See also Reference re Secession of Quebec, [1998] S.C.R. 217, para. 126 (holding that the right to internal self-determination is “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state.”).

136. STERIO, *supra* note 20, at 16.

137. See *id.* at 16-18.

138. See *id.*

139. See *id.*

140. *Id.* at 21 (quoting Marc Weller).

141. UNESCO, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. Final Report and Recommendations*, Paris, 22 Feb. 1990, SHS-89/CONF.602/7, at para. 5 (“There is an understandable fear that, understood in one way, the peoples’ right to self-determination might lead to the fragmentation of States, the disruption of settled international boundaries, the breakdown of governmental authority and even manipulation of peoples for the purpose of disrupting the internal affairs of States.”). See also STERIO, *supra* note 20, at 19.

142. See also STERIO, *supra* note 20, at 19.

143. *Id.*

Secession of Quebec.¹⁴⁴ In that case, the Supreme Court of Canada held that Quebec cannot unilaterally secede from Canada because the right to self-determination could only be exercised *within* the framework of Canada's political system.¹⁴⁵ A referendum held by Quebecers was insufficient to trigger the right to self-determination; rather, Canada as a whole had to vote on whether Quebec could secede from the nation.¹⁴⁶ The Court did hold that the Canadian government would be required to negotiate with Quebec based on the outcome of the referendum.¹⁴⁷ According to the Court, however, only extreme circumstances could override the state's interest of territorial integrity.¹⁴⁸

External self-determination applies to the small number of cases when extreme circumstances override the state's interest of territorial integrity.¹⁴⁹ External self-determination signifies that a group of people seeks to separate from the mother state in order to self-govern.¹⁵⁰ External self-determination stems from the Friendly Relations Declarations, which states that such separation can take place through the "establishment of sovereign and independent State, the free association or integration with an independent State, or the emergence into any other political status freely determined by a people."¹⁵¹ In practice, the external right to self-determination is exercised through one of the following methods: the peaceful dissolution of a State, the reunion or merger of one state with another state, or secession.¹⁵² Reunion or merger is the rare instance where two or more states unite to create a new sovereign state.¹⁵³

144. Reference re *Secession of Quebec*, [1998] S.C.R. 217 (adopting the *Declaration on Friendly Relations*' definition of external self-determination, which is "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people").

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. STERIO, *supra* note 20, at 19.

150. *Id.*

151. See VAN DEN DRIEST, *supra* note 87, at 85; See also *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, UN Doc. A/RES/2625 (XXV) (Oct. 24, 1970).

152. See VAN DEN DRIEST, *supra* note 87, at 85. In addition to these modes of implementing the right to external self-determination, the text of the Friendly Relations Declaration concerning the right to self-determination is generally seen to give rise to a right to independence for the population of a State whose territory has been annexed or occupied by foreign powers. As such, the exercise of the right to self-determination should not be viewed as the creation of a new, independent State but as the *de facto* re-establishment of the independence of a state. *Id.*

153. *Id.* at 86-87. The state does not need to have been previously united. An example of reunion or merger is the unification of East and West Germany. *Id.*

IV. Tension between Sovereignty and Self-Determination

A. Two *Jus Cogens* Norms at War

There has been difficulty reconciling self-determination with sovereignty. The right to territorial integrity is inherent to sovereignty, but both self-determination and sovereignty are *jus cogens* norms that the international community has long recognized. Historically, state recognition was a necessary requirement for an entity to become a member of the small community of “civilized” states.¹⁵⁴ But the situation changed when France prematurely recognized the United States. Great Britain viewed France’s recognition as an intervention in its internal affairs.¹⁵⁵ Self-determination then became “a political and discretionary act ‘determined solely by considerations of convenience or national interests.’”¹⁵⁶

In modern society, tension between sovereignty and self-determination is exacerbated by the use of recognition as a political tool within the international community. Self-determination is successful only when the international community recognizes the state. However, is the international community then asserting sovereignty over an otherwise independent state? Raustiala briefly discusses how “[m]any analysts conceive sovereignty in terms of ‘local (domestic) authority and control, and thus the shifting of authority and control to outside (international) institutions represents a loss of sovereignty.’”¹⁵⁷ A further indication of a loss of sovereignty is seen with the emergence of provisional sovereignties. Concern with provisional sovereignties demonstrates the “pervasive substantive limitations on the capacity of weak states to shape domestic decision-making.”¹⁵⁸

Some critics are not only skeptical of provisional sovereignties, but are vehemently opposed to any watered-down definition of sovereignty. Mahmood Mandani argues that there is a “new humanitarian order” that evolved in response to postwar decolonization.¹⁵⁹ Mandani demonstrates that as former colonies became independent sovereigns, great powers found a new way to reassert control: by reconstructing humanitarian law.¹⁶⁰ The responsibility arising from a violation of humanitarian law initially fell on the state which actively engaged in the violation; now, a violation of humanitarian law falls on the international community. Because of this newfound duty to protect all vulnerable populations—a duty embraced in practice by the UN Security Council where all but one

154. See ABDELHAMID EL OUALI, TERRITORIAL INTEGRITY IN A GLOBALIZING WORLD 198 (2012).

155. *Id.* at 272.

156. *Id.*

157. Raustiala, *supra* note 75, at 417.

158. Aziz Rana and Asli U. Bali, *Pax Arabica?: Provisional Sovereignty and Intervention in the Arab Uprisings*, 42 CAL. W. INT’L L. J. 321, 323 (2012).

159. See Mahmood Mandani, *The New Humanitarian Order*, TheNation.com (Sept. 10, 2008), <http://www.thenation.com/article/new-humanitarian-order>.

160. *Id.*

permanent member were former colonizers¹⁶¹—the great powers found a way to validate their intervention and infringement on sovereignty.

The international community argues against the proposition that it is reasserting its power by diminishing another state's sovereignty by claiming there needs to be some limiting principle to the right of self-determination. Without the international community acting as a state police, every minority group will want to assert their right to self-determination.¹⁶² This fear has led to a presumption against recognizing states.¹⁶³ But a more elaborate explanation of the tension between sovereignty and self-determination is evident through the rule of the great powers.

B. The Rule of Great Powers: A New Theory of Self-Determination

An alternative theory of self-determination is the great powers rule. Under this theory, Milena Sterio argues that any entity claiming a right to self-determination has to demonstrate four criteria for recognition by the international community.¹⁶⁴ Through these criteria, a group receives validation by the international community to become a state. The four criteria include: “a showing by the relevant people that it has been oppressed, that its central government is relatively weak, that it has been administered by some international organization or group, and that it has garnered the support of the most powerful states on our planet.”¹⁶⁵ The fourth element to this rule—support of the most powerful states—carries the most weight and tends to be dispositive for a successful claim of self-determination.¹⁶⁶

Sterio delves further into the rule of great powers by demonstrating how much power strong nations have over the future of struggling minority groups and their mother states. By oppression, Sterio emphasizes the portrayal of secessionist groups by the great powers. The great powers “must accept that the mother state is *at fault* and that the minority group represents the victim” in order for the minority group to claim oppression.¹⁶⁷ To determine whether the mother state's central government is weak, a great power typically will help weaken that government by strategically aiding a minority group.¹⁶⁸ The third prong—involvement of international

161. The five permanent members of the UN Security Council are: China, France, Russian Federation, the U.K., and the U.S. All but China colonized other parts of the world: France, Russia, and the U.K. have all colonized parts of the Horn of Africa alone and the U.S. has colonies in Oceania and the Caribbean. *United Nations Security Council Members*, UNITED NATIONS (last visited May 5, 2014), <http://www.un.org/en/sc/members/>.

162. See STERIO, *supra* note 20, at 20-21.

163. Geldenhuis, *Contested States in Africa*, SOMALILAND CYBERSPACE (Feb. 17, 2010) <http://www.mbali.info/doc556.htm> (“This is coupled with an almost pathological fear of setting precedents that would encourage disaffected ethnic minorities to break away from existing states.”).

164. See STERIO, *supra* note 20, at 57.

165. *Id.*

166. Sterio goes further to say that the support of the great powers swallows the other three criteria. *Id.*

167. *Id.* (emphasis added).

168. *Id.*

organizations—is dependent on other nations acknowledging and prioritizing the minority group’s struggle for self-determination. This is best reflected when looking at the United Nations Security Council. The United Nations Security Council exercises great control in what groups receive assistance from the organization. Five nations—all great powers—exercise veto power in the Security Council, “thereby precluding any United Nations’ involvement, if they deem that a self-determination struggle is not worthy of their concern or not deserving of their help.”¹⁶⁹ The great powers support ultimately determines the fate of most minority groups trying to claim a right to self-determination, fulfilling the fourth criteria.

C. Defining the Great Powers

In order to apply the rule of great powers, the nations that encompass the “great powers” must first be defined. The great powers “are states that wield the most financial, strategic, political, and military power on our planet.”¹⁷⁰ They have an enhanced status that allows them to exercise great influence in a coercive manner against other states. Great powers also enjoy positions within international institutions, and sometimes occupy prominent positions.¹⁷¹ Regional organizations and international courts provide yet another platform for great powers to enjoy an elevated status.¹⁷²

The influence of the great powers impedes on the traditional legal and political power a state may have against other states. For example, great powers may engage in interventions, thereby offending other states’ sovereignty.¹⁷³ Great powers have created international tribunals and led criminal proceedings against leaders from weaker states.¹⁷⁴ Through their immense influence, great powers have reduced the sovereignty of other states.

The great powers in our modern society include “the United States,

169. *Id.*

170. *Id.*

171. In addition to the United Nations Security Council, almost all great powers have an elevated position within specialized international organizations such as the International Monetary Fund (IMF) and World Trade Organization (WTO). *Id.* at 58.

172. Certain powers routinely have representation on the International Court of Justice through de facto permanent judges. *See id.* Additionally, critics have argued that the International Criminal Court has become a tool for the great powers, such as the United States, to target African leaders for crimes in an international forum. *See, e.g.,* Mahmood Mandani, *The New Humanitarian Order*, THE NATION (Sept. 10, 2008), <http://www.thenation.com/print/article/new-humanitarian-order> (“[T]ake into account the four countries where the ICC has launched its investigations: Sudan, Uganda, Central African Republic and Congo. All are places where the United States has no major objection to the course chartered by ICC investigations. [T]he ICC is rapidly turning into a Western court to try African crimes against humanity.”).

173. STERIO, *supra* note 20, at 58.

174. *Id.* Some have criticized the great powers for abusing their status to target African states in international criminal proceedings. *See, e.g.,* Mandani, *supra* note 172.

Russia, Great Britain, France, Germany, Italy, and Japan.”¹⁷⁵ Some claim that China and India are new additions to this exclusive club.¹⁷⁶ These nine nations have attained their status as a great power through different means. The United States, Great Britain, France, and Russia achieved their status through historical privileges after World War II.¹⁷⁷ The more recent additions—China and India—have achieved their status through their enormous industrial growth, manufacturing base, work ethic, and emphasis on education.¹⁷⁸

Others have argued that in addition to historical and newer powerhouses, two other categories of states deserve the status of great powers: (1) non-declared nuclear states and (2) rogue and volatile states.¹⁷⁹ Non-declared nuclear states, such as Israel and Pakistan, exercise enormous power through the threat of the use of nuclear weapons. These states can exercise powers normally reserved for the great powers with the knowledge that few countries would retaliate for fear of nuclear warfare.¹⁸⁰ Rogue and volatile states wield power through their extremely unpredictable behavior, which makes it difficult for the traditional great powers to exercise influence.¹⁸¹ Because these states have their own enhanced financial, political, or military power, they are able to engage in risky diplomatic, political, and military actions without concern for retaliation.¹⁸² Rogue and volatile states are powerful because they are willing to do almost anything, rendering great powers helpless to retaliate. Ultimately, the historical definition of great powers best explains the influence of other nations on self-determination by analyzing the four criteria and its effect on self-determination movements throughout the 20th century.

D. Criteria for the Great Powers Approach to Self-Determination

Under the rule of great powers, a group of people seeking self-determination has to satisfy four criteria: “it has to show that it has been oppressed, that its central government is relatively weak, that it has already been administered in some form by some international organization, and that it has the support of the great powers.”¹⁸³

175. M.J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”? Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 364, 381 (2005) (stating that the Great Powers can “cross theoretically unbreachable frontiers either individually or collectively” through somewhat justifiable state interventions).

176. STERIO, *supra* note 20, at 59.

177. These nations also make up four of the five states with veto power on the United Nations Security Council. They attained their seats in part because these four nations were the only four that had the capacity to fulfill the Security Council’s Article VII power to take measures against threats to peace. *Id.* at 45, 58-59.

178. *See id.* at 59.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 57.

First, a group typically demonstrates that it is oppressed by getting international attention through the atrocities it faces at the hands of its central government.¹⁸⁴ Mild human rights violations usually do not attract enough attention to persuade the great powers to act.¹⁸⁵ Therefore, groups that have satisfied the oppression prong demonstrate “a high level of suffering and a consistent policy of harsh abuse by the government.”¹⁸⁶ For example, the East Timorese demonstrated the abuse they faced under Indonesia’s power that led to a referendum vote on independence.¹⁸⁷ On the other hand, the Quebecois in Canada were unable to satisfy the oppression prong because the central Canadian government allowed Quebecois to participate in high levels of government.¹⁸⁸ The international community ultimately balances the degree of suffering to determine whether it is worth the effort to interfere with another state’s sovereignty.

Second, a group of people must demonstrate that their mother state’s central government is relatively weak and incapable of administering to the people’s province or region. Groups seeking self-determination easily demonstrate that their central government is unable to assert proper control militarily, politically, or structurally.¹⁸⁹ Breakaway regions such as South Sudan, East Timor, and Kosovo have successfully argued their rights to self-determination partly because Sudan, Indonesia, and Serbia were unable to control violence and warfare in the regions.¹⁹⁰ A few groups, however, have had difficulty separating because of their central government’s strength.¹⁹¹ Again, the international community will balance the stability of the central government to determine whether a group has the right to self-determination.

Third, a group seeking self-determination must demonstrate that its region needed international help in some capacity because of the “brutality and inefficacy of the central government.”¹⁹² This prong is a derivative of the second criteria: once a group has successfully shown it is governed by a weak central government, international authorities intervene to preserve or re-establish peace.¹⁹³ For example, NATO, the U.N., and the European Union have all had a presence in Kosovo in its struggle for independence;

184. *Id.* at 60.

185. *Id.*

186. *Id.* at 61

187. *See id.* at 62.

188. Reference re Secession of Quebec, 2 SCR 217, ¶ 65 (1998) (“In individual terms, the right to vote in elections to the [Canadian] House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to ‘Every citizen of Canada’ . . . Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters . . . and as candidates.”).

189. STERIO, *supra* note 20, at 62.

190. *Id.*

191. For example, the Kurds have been denied external self-determination by the government of Turkey because of the strength of Turkey’s central government. *See, e.g.*, M.J. Kelly, *supra* note 175, at 390.

192. *See* STERIO, *supra* note 20, at 60.

193. *Id.* at 62.

the U.N. led the referendum effort for East Timor and helped orchestrate South Sudan's independence.¹⁹⁴ But groups that had strong central governments, such as Chechnya, South Ossetia, and Abkhazia, were unable to satisfy this third prong to the great powers approach.¹⁹⁵ A higher degree of involvement by the international community significantly improves a group's chances of attaining self-determination.

Lastly, a group seeking self-determination "must prove that external actors, including the great powers, view its struggle as legitimate, and that external actors, including the great powers, are ready to embrace it as a new sovereign partner."¹⁹⁶ Sterio asserts that this fourth prong is dispositive for a group of people to gain recognition. For example, Kosovar Albanians declared independence from Serbia in 2008.¹⁹⁷ All the great powers, excluding Russia, immediately recognized Kosovo as a new state.¹⁹⁸ The support from the great powers helped Kosovo in two critical ways. First, the support of virtually all of the great powers led Kosovo to declare independence with confidence.¹⁹⁹ Second, many neutral states accepted Kosovo once they saw the support of the great powers.²⁰⁰ The influence of the great powers also can be seen through South Sudan's struggle for independence. South Sudan was unable to gain international recognition until the group garnered United States' support.²⁰¹ Therefore, only entities that have had the support of at least *one* of the great powers have succeeded in gaining international recognition.²⁰²

E. The Great Powers Influence on Somaliland

The influence of the great powers on Somaliland's claim for recognition cannot be understated. The great powers theory of recognition calls for (1) oppression; (2) weak central government of the mother state; (3) some involvement by international authorities; and (4) external actors viewing the claim as legitimate. All but the last claim have been satisfied time and time again in the case of Somaliland.

In viewing oppression, there must be a balance between the degree of suffering of a people and the protection of state sovereignty. The civil war between Somalia and Somaliland led to the deaths of thousands of Somalilanders through tactics such as destroying major Northern cities and rounding up Somalilanders for execution.²⁰³ Even prior to the civil war,

194. See, e.g., *id.* at 62.

195. *Id.*

196. *Id.* at 63.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. The South Sudanese were ignored by the international community throughout the Cold War and in the 1990s. After 9/11, the Western great powers began to fear the rise of an influential Islamic state and thus turned to supporting South Sudan in order to weaken Sudan's central government. *Id.*

202. Others, such as the Biafrans and the Kurds, are forced to co-exist within their original mother states. *Id.*

203. See Poore, *supra* note 59, at 128. See also GELDENHUYS, *supra* note 61, at 131.

there were concerns of oppression when former Somalilanders were routinely excluded from political positions of power.²⁰⁴

The second requirement to the great powers theory for self-determination calls for a weak mother state. Somalia's inability to function as a government for a majority of Somaliland's renewed existence is clear. Since the fall of Barre's regime in 1991, clan warlords, militants, and Al Shabaab—a group with connections to Al Qaeda—have fought for control over the region, while a shaky transitional federal government has tried to maintain control.²⁰⁵ Somalia's federal government has failed to prevent Al Shabaab's bombings in Mogadishu, Somalia's capital, or in surrounding regions. Al Shabaab has claimed responsibility for various types of suicide attacks, "typically targeting Somali government officials, [African Union Mission in Somalia], and perceived allies of the [Somali Federal Government]."²⁰⁶ While Somalia's government has been recognized as functional,²⁰⁷ Al Shabaab has continued to be a threat within Somalia and in neighboring countries.²⁰⁸

The third requirement for the great powers theory is the involvement of international authorities who intervene to preserve or re-establish peace due to the ineffectiveness of the weak central government. Many of the great powers—in particular, the U.S. and U.K.—have intervened repeatedly in Somalia prior to Somaliland's independence in 1991,²⁰⁹ and have continued to intervene post-independence.²¹⁰

Where Somaliland struggles is the fourth prong of the great powers theory: whether external actors believe that their claim to recognition is legitimate. Numerous countries, including some of the great powers, have a diplomatic relationship with Somaliland,²¹¹ but none have officially recognized Somaliland. The U.S. has distanced itself from Somaliland's struggle for independence by reverting to the concept of "African solutions for African problems."²¹² Jendayi Frazer, in her capacity as Assistant Secretary of State for African Affairs for the U.S., stated that the U.S. would recognize Somaliland if the African Union (A.U.) first recognized Somali-

204. Former Somalilanders did not believe they were represented fairly until the appointment of Mohamed Ibrahim Egal in 1967. See BRADBURY, *supra* note 5, at 34.

205. See Watkins, *supra* note 17.

206. *Al-Shabaab*, THE NATIONAL COUNTERTERRORISM CENTER, http://www.nctc.gov/site/groups/al_shabaab.html.

207. See Watkins, *supra* note 17.

208. Al Shabaab most recently gained widespread publicity through their terrorist attack on Westgate Mall in Nairobi, Kenya. See, e.g., *id.*; *Al-Shabab Terrorists in Training Find Inspiration in Kenya Mall Attack*, PBS NEWSHOUR (Jan. 7, 2014), http://www.pbs.org/newshour/bb/world-jan-june14-shabab_01-07/.

209. See, e.g., BRADBURY, *supra* note 5, at 42-44.

210. See, e.g., <http://www.history.army.mil/brochures/Somalia/Somalia.htm#p15>.

211. Somaliland has relationships with the U.S., U.K., and France. Somaliland also holds diplomatic offices in Sweden, Kenya, Ethiopia, Norway, Belgium, Djibouti, South Sudan, and Canada. *Contracts and Addresses of the Somaliland Representative Offices Around the World*, THE REPUBLIC OF SOMALILAND (last accessed May 11, 2014), <http://somalilandgov.com/country-profile/embasies/>.

212. Schraeder, *supra* note 7.

land.²¹³ More than 5 years have passed since Frazer's statement, but the A.U. is not any closer to recognizing Somaliland.

F. Politics or International Law?

Through the great powers theory of self-determination, it is clear that the great powers legitimize a people's struggle for self-determination. But should the great powers' political views override the international law on self-determination? Groups seeking self-determination are left wondering what motivates the great powers in their decisions to support or not support a struggling group. If the great powers decide to not give media coverage to a struggling people, then those people will remain unnoticed on the global scene.²¹⁴ If a great power sees that self-determination will allow them to achieve unrelated personal goals, it will provide the support necessary for a group to attain international recognition. A great power may also choose not to interfere with a group's struggle for self-determination in fear of angering another great power.²¹⁵

While the great powers have to prioritize their own nation's policy interests, it is legally inappropriate to rest the law of self-determination on a handful of nations with a disproportionate amount of power. Sterio points out that the legal criteria for self-determination has been "brushed aside by the great powers' rule."²¹⁶ Somaliland's argument for self-determination highlights the tension between the legal approach to self-determination and the political interests of the great powers. Throughout Somaliland's recent history, many of the great powers have offered support to both the Somali government and Somalilanders, including the United States, United Kingdom, Russia, and China.²¹⁷ The doctrine of earned sovereignty has been proposed as a solution to the rule of great powers, and, more broadly, self-determination in the post-colonial world.

V. Solution to the Tension: Earned Sovereignty

A. Emergence of Earned Sovereignty

A new approach to attaining independence focuses on demonstrating

213. Jamal Gabobe, *What Jendayi Frazer Said About Somaliland and Somalia*, THE SOMALILAND TIMES, available at <http://somalilandtimes.net/sl/2008/332/71.shtml>.

214. For example, the world has heard little about Tibet in recent years due to China's totalitarian control of all national media outlets. See Sterio, *supra* note 20, at 64. But the genocide in Darfur, Sudan by the Janjaweed militia groups with alleged support from the Sudanese government was largely ignored until 2003 when media outlets were able to broadcast the atrocities. See *id.*

215. For example, the great powers have turned a blind eye to Chechnya due to the significant interest of a key great power, Russia. See *id.* at 66.

216. *Id.* at 69.

217. BRADBURY, *supra* note 5, at 42. Somalia and Somaliland not only changed alliances with nations, but their form of government as well - from protectorate under the United Nations, to communism, to a shaky form of democracy. See Ssekandi, *Somali FM Hails Somalia-China Relations*, ENGLISH.NEWS.CN, Jan. 30, 2013, http://news.xinhuanet.com/english/africa/2013-01/30/c_132139474.htm.

to the outside world that the state has “earned” its right to sovereignty.²¹⁸ Earned sovereignty is the conditional and progressive devolution of sovereign powers and authority from a state to a substate under international supervision.²¹⁹ The doctrine emerged from the fourth criterion of the Montevideo Convention, “the capacity to enter into international relations.”²²⁰ Earned sovereignty has its origins in the peace agreements relating to the state practice of Serbia and Montenegro, East Timor, the Northern Ireland and Bougainville agreements, and the proposed agreements for the Palestine Road Map and Western Sahara.²²¹ The purpose of earned sovereignty is to:

seek[] to bridge the approaches of sovereignty and self-determination by providing a mechanism whereby some substate entities may be guided through a process of transition to statehood or heightened autonomy in such a way so as not to undermine the legitimate interests of parent states and of the international community.²²²

It is designed to create an avenue for resolving sovereignty-based conflicts by providing for the managed devolution of sovereign authority and functions from a state to substate entity.²²³ It also acts as a reward for states that have achieved statehood through peaceful interactions with the international community.²²⁴ In some instances, the substate entity may acquire authority and functions sufficient to enable it to seek international recognition, while in others the substate entity may only acquire authority to operate within a stable system of heightened autonomy.²²⁵

Earned sovereignty first appeared under the name “intermediate sovereignty” in a 1998 memorandum issued by the Public International Law & Policy Group and the International Crisis Group as a proposed solution to the conflict in Kosovo.²²⁶ Earned sovereignty has been successfully used as an approach to resolving conflict in both Kosovo and South Sudan.²²⁷

There are three core elements to earned sovereignty and three optional elements. The core elements are: (1) shared sovereignty, (2) institution building, and (3) eventual determination of the state’s final status.²²⁸ Shared sovereignty represents the state and substate entity both exercising sovereign authority and functions over a defined territory.²²⁹ Institution

218. See STERIO, *supra* note 20, at 175.

219. See Paul R. Williams, *Earned Sovereignty: The Future of Sovereignty-Based Conflict Resolution*, 40 DENV. J. INT’L L. & POL’Y 128, 131.

220. See STERIO, *supra* note 20, at 175.

221. Williams, *supra* note 219, at 131.

222. *Id.* at 134.

223. *Id.*

224. See STERIO, *supra* note 20, at 175. For example, peoples such as the Kosovar Albanians or the East Timorese have earned their right to exist as independent states, whereas peoples that have been labeled violent such as Republika Srpska or Chechnya have not. *Id.*

225. Williams, *supra* note 219, at 134.

226. *Id.* at 132.

227. *Id.*

228. *Id.* at 135.

229. *Id.*

building represents when the substate entity, sometimes with assistance from the international community, undertakes to construct institutions for self-government and build institutions capable of exercising increasing sovereign authority and functions.²³⁰ Eventual determination of the final status of the substate entity is usually determined by a referendum. Sometimes, the final status of the substate entity is determined through a negotiated settlement between the state and substate entity with the assistance of an international mediator.²³¹

The three optional elements of earned sovereignty are: (1) phased sovereignty, (2) conditional sovereignty, and (3) constrained sovereignty.²³² Phased sovereignty is defined as the accumulation by the substate entity of increasing sovereign authority and functions over a specified period of time prior to the determination of final status.²³³ Conditional sovereignty lists certain benchmarks that the substate entity is required to meet.²³⁴ Conditional sovereignty may be applied to the accumulation of increasing sovereign authority and functions by the substate entity, or applied to the determination of the substate's final status.²³⁵ Lastly, constrained sovereignty involves continued limitations on the sovereign authority and functions of the new state, such as continued international administrative and military presence.²³⁶ It also provides limits on the right of the state to undertake territorial association with other states.²³⁷

Critics like Mandani view any threat to sovereignty as intolerable, thereby treating earned sovereignty with suspicion. Concerns of ethno-nationalism and population transfers that the successor states to the Soviet Union and former Yugoslavia faced come to mind as well. Would Somaliland fall into a similar trap? These concerns that Somaliland will fall into a pattern similar to the Soviet Union may be unwarranted. While ethno-nationalism through the "Greater Somalia" mission led to the unification of Somalia and Somaliland, the boundary split between the two nations reflects the clan divisions. As I.M. Lewis, a widely recognized anthropologist on the Somali people, has observed: "clanship remains a more comprehensively powerful focus of identity in Somali society."²³⁸ The difference between clanship and ethnicity has a huge practical implication in Somalia and Somaliland's case: "solidarity at the level of the ethnic group (the nation) is less binding than that within the clan structure."²³⁹ The concerns arising from a theoretical analysis of earned sovereignty, therefore, are not as prevalent here.

230. *Id.* at 136

231. *Id.*

232. *Id.* at 135.

233. *Id.* at 136.

234. *Id.* at 137.

235. *Id.*

236. *Id.*

237. *Id.*

238. I. M. Lewis, *Visible and Invisible Differences: The Somali Paradox*, 74(4) AFR.: JOURNAL OF THE INT'L AFRI. INST. 489, 511 (2004).

239. *Id.*

B. Somaliland's Earned Sovereignty

Somaliland's case for independence satisfies the underlying purpose of earned sovereignty by maintaining peace while striving for increased power over its territory. Since 1991, Somaliland has worked with international organizations and other nations to help provide peace and stability to the region.²⁴⁰ Because Somaliland has functioned for twenty years without any supervision from the international community, Somaliland's claim to recognition does not fit neatly into the three required and three optional elements of earned sovereignty. Shared sovereignty and phased sovereignty both involve a detailed arrangement for dual sovereignty with the mother state.²⁴¹ Through benchmarks for increased transfer of authority and functions, there is a gradual transformation to democratic rule that simultaneously respects the territorial integrity of the mother state.²⁴² Somaliland could not engage in either stage because Somalia did not have a recognized, functioning government until 2013.²⁴³ The inability to engage in dialogue with Somalia's government forced Somaliland to continue on its path to recognition.

The difficulty in line drawing as to where Somaliland lies in the earned sovereignty scheme can easily be remedied by the actions of the international community. The crucial element missing from the three-part test for earned sovereignty is a timeline for the determination of final status. The international community needs to help Somalia and Somaliland determine a deadline for when Somaliland will be recognized as independent by the international community; such a deadline would be similar to the deadlines set for U.N. trusteeships. It is typical for the international community—even after independence—to continue to monitor certain tasks to ensure the continued compliance with the prior phase conditions.²⁴⁴

Somaliland has managed to develop a state structure comprised of a popularly elected constitutionally-based government.²⁴⁵ The government has certain enumerated rights, and has been able to fulfill their duties through exercising some “control over its borders, manag[ing] certain public assets, lev[y]ng taxes, intervene[ing] in the market, formulat[ing] development policies and provid[ing] security for its citizens as competently as many better resourced and recognized states in Africa.”²⁴⁶ Somaliland has

240. See BRADBURY, *supra* note 5, at 243-44.

241. See Williams, *supra* note 219, at 135-36.

242. See *id.*

243. See, e.g., Watkins, *supra* note 17.

244. See Williams, *supra* note 219, at 135. For example, the international community, through a U.N. commission, had set a clear date for determining the final status of Kosovo at the Rambouillet Accords, the commission's initial meetings. The determination of final status was then transformed into an ongoing process in the United Nations Standards before Status doctrine “whereby the international community required that the conditions in [prior phases] be substantially met prior to undertaking negotiations to settle Kosovo's status.” *Id.*

245. See BRADBURY, *supra* note 5.

246. *Id.*

also managed to facilitate growth in the economic sector through the rehabilitation of infrastructure and social services.²⁴⁷ Most Somalilanders who took refuge in neighboring countries during the war have returned, and civil organizations have flourished.²⁴⁸

Conclusion

Over the last twenty-three years, Somaliland has gone from destruction and despair to a self-governing territory that fulfills the criteria for statehood. Mark Bradbury, a social analyst who has worked extensively in Somalia and Somaliland, suggests that the key to reconciling the right to territorial sovereignty and self-determination is through an ad hoc, fact-intensive analysis in order to “understand the place on its own terms.”²⁴⁹ The rule of great powers suggests that politics, more than international law, has dictated what groups are able to recognize their right to self-determination. From this understanding, it is clear that the international community has a responsibility to rise up and take the lead in resolving this issue. More importantly, an understanding of state building can help us with all nations that are emerging from civil war.

247. *Id.*

248. *Id.*

249. *Id.*