

RECOGNITION AS SANCTION: USING INTERNATIONAL RECOGNITION OF NEW STATES TO DETER, PUNISH, AND CONTAIN BAD ACTORS

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1. INTRODUCTION

This Article makes two novel claims, one normative and one descriptive. The normative claim is that the international community should recognize as new states entities claiming independence from their parent states if doing so would serve as an effective sanction for human rights abuses committed by the parent state, even if there is no connection between the secessionist entity and the bad behavior of the parent state (“the sanction theory of recognition”). The descriptive claim is that the international community’s recognition decisions, while not expressed in terms of the sanction theory of recognition, are becoming increasingly driven by it.

Secession, recognition, and the creation of new states is an issue of enormous practical significance; in addition to the almost 150 states that came into existence in the twentieth century, numerous entities and movements seek independence today.¹ While some movements can be dismissed as fantastic, like the current movement for an independent Vermont and similar movements in other states,² many secessionist entities, like Chechnya, Darfur,

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¹ See Bruno Coppieters, *Introduction*, in *CONTEXTUALIZING SECESSION: NORMATIVE STUDIES IN COMPARATIVE PERSPECTIVE* 1, 1 (Bruno Coppieters & Richard Sakwa eds., 2003) (discussing modern secession crises).

² See Ian Baldwin & Frank Bryan, *The Once and Future Republic of Vermont*, *WASH. POST*, Apr. 1, 2007, at B1. (discussing the movement for Vermont’s independence and noting that similar movements exist in Alaska, California, Hawaii, New Hampshire, South Carolina, Texas, and other states).

Tibet, Kosovo, Taiwan, Somaliland, and others present extremely difficult situations and complex theoretical and practical questions. A secessionist entity's quest for independence, of course, concerns not only the secessionist entity itself, but also the parent state from which it seeks independence: if the secessionist entity is successful, the parent state suffers a blow to its territorial integrity and loses control over the entity's territory, population, and resources. The question of secession is a high-stakes contest in which there are winners and losers. And as with any such contest, determining who wins and who loses will rarely be a simple task.

Much of that complicated determination, declaring either the secessionist entity or its parent state the winner or the loser, falls to other states in the international community. For secessionist entities to become full-fledged states with all the accordant benefits, they must be recognized as states for one of two reasons: either because recognition is an essential precondition for statehood or, more practically, because it is only with recognition that new states actually realize the benefits of statehood. Under international law, other states decide whether or not to recognize secessionist entities as new states. The question, then, is: how should states decide whether or not to recognize a secessionist entity as a new state?

Traditional answers to this question have focused on the intrinsic merits of the secessionist entity. The simplest answers specify certain requirements of statehood, and suggest that recognition should be granted to all secessionist entities that meet those requirements. Others have supplemented the requirements of statehood with additional requirements, usually related to some international ideological norm: that is, secessionist entities should be recognized as states if they meet the requirements of statehood and have democratic institutions, or promote self-determination, or do not have illegal origins, or meet some other criterion.

These proposals are flawed for two primary reasons, both caused by their inattention to the parent states implicated in recognition decisions. First, they fail to take account of the interests of the parent state, which has an enormous stake in whether or not the secessionist entity is recognized as a new state and thereby removed from the parent state's control. These theories do not provide sufficient justification for the violation of the parent state's territorial integrity that is inherent in recognizing the secessionist entity as a new state. Similarly, because parent states are so interested in the outcome of recognition decisions, the

international community's strategy for recognition decisions can be used to influence the behavior of states. These theories, by ignoring the parent state, squander a vital opportunity for the international community.

Focusing on human rights abuses committed by the parent state takes advantage of this opportunity for influence while also providing a justification for damaging the interests of the parent state. While the international community has many interests it might like to advance through its recognition decisions, focusing on human rights abuses has much to recommend it. Certainly, deterring human rights abuses qualifies as an important interest of the international community; and the international community has very few tools to use in its efforts to deter such abuses. Critically, while other interests might also be worth promoting, focusing on the human rights abuses of the parent state provides the international community with a justification for damaging the interests of the parent state and violating its territorial integrity through recognition of a secessionist entity within its borders: the international community is not just advancing its own selfish interests at the expense of the parent state, but the parent state, through its criminal acts, has forfeited its right to respect for its interests, including its territorial integrity.

Picking up on these notions, "just cause" and "just cause plus" theories of recognition merge the question of human rights into the intrinsic merits of the secessionist entity: they require that a secessionist entity have suffered human rights abuses at the hands of its parent state before a secessionist entity can be recognized as a new state. While these theories of recognition deter certain human rights abuses and provide a justification for damaging the interests of the parent state, they are inherently limited because they approach recognition as a question of the intrinsic merits of the secessionist entity, and thus require a nexus between the human rights abuses of the parent state and the secessionist entity.

The sanction theory of recognition removes this nexus requirement, and shifts the approach to recognition from an evaluation of the intrinsic merits of the secessionist entity, the focus of other theories of recognition, to a consideration of extrinsic concerns: it uses recognition as a tool to deter human rights abuses generally. Simply put, the sanction theory advocates recognition for secessionist entities when granting them recognition would serve as an effective sanction for human rights abuses committed by the parent state, whether or not those abuses are in any way

related to the secessionist entity, and so long as recognizing the secessionist entity will not make the world worse off. The sanction theory of recognition thus realizes the full potential of recognition decisions for the international community: it transforms them into a tool for combating human rights abuses, regardless of whether the abuses are committed against secessionist entities or not.

This is not to say that, at times, states cannot recognize secessionist entities based on some analysis of their intrinsic merits. The sanction theory simply argues that when a parent state is committing human rights abuses somewhere in its territory, and recognizing a secessionist entity within that parent state would serve as an effective sanction for that behavior, while not making the world worse off, the extrinsic concerns of stopping such behavior override any intrinsic concerns that might be taken into account in other situations.

Importantly, because the sanction theory grounds recognition decisions in human rights abuses by the parent state, and because international law has accepted that states have enormous discretion in their recognition decisions, the sanction theory of recognition fits reasonably well within the confines of existing international law and practice. Furthermore, recent recognition decisions by the international community seem to be driven, at least in part, by the same considerations that underlie the sanction theory of recognition.

Section 2 of this paper outlines the “just cause” and “just cause plus” theories of recognition and the sanction theory of recognition in greater depth, to make the contours of the sanction theory evident and illustrate the great distance between it and these previously proposed theories. Section 3 continues to explore the sanction theory by outlining its place within the context of current law, thinking, and practice on statehood and recognition. Section 4 analyzes the cases of Kosovo, Somaliland, and Chechnya, arguing that the recognition decisions in those cases can best be explained by the intuitive, if unstated and perhaps unconscious, application of the sanction theory by the international community.

2. RECOGNITION AS RIGHT; RECOGNITION AS SANCTION

“Just cause” theories, popularized by Allen Buchanan, are not necessarily theories of recognition; they arise in the context of the right to secede, and suggest that an entity has a right to make a

secessionist attempt if it has “just cause.”³ Under these theories, a secessionist entity, as “a remedy of last resort,” has a right to secede “[i]f the [parent] state persists in certain serious injustices toward” the secessionist entity.⁴ If we assume that a state with a just cause to secede has a right to be recognized, we are left with a theory that recommends recognition for any secessionist entity that has suffered sufficient and continuing abuse at the hands of its parent state.⁵

Theories, of course, may reject this assumption, and argue that even if an entity has a right to secede, it may not have a right to recognition, a position Buchanan, himself, adopts.⁶ Buchanan’s theory of recognition builds upon the just cause theory, requiring entities not only to have a just cause for secession but also to meet other criteria in order to be recognized, a “just cause plus” theory. While Buchanan thinks that an entity has a right to attempt to secede if it has a just cause, a just cause “by itself does not imply that the new entity ought to be recognized as a legitimate state in international law.”⁷ Specifically, Buchanan asserts that recognition:

should depend upon whether the group provides credible commitments to satisfying the appropriate normative criteria for recognition of new entities as legitimate states, in particular whether its constitution and other relevant documents . . . evidence a clear commitment to equal rights for all within their borders, including ethno-national minorities.⁸

That is, secessionist entities that have a just cause to secede, based on bad acts by their parent state, and that also “make credible commitments to internal and external justice” should be recognized.⁹ Similarly, NedZad Basic has argued:

³ ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 207 (2003).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 208.

⁹ *Id.* at 244.

The international community will assess the policies and actions of [the parent state and the secessionist entity] against their respect for human rights. It will allow secession if the central government fails to respect human rights, peace, and development [within the secessionist entity]. Similarly, the group seeking self-determination must not use force and must not violate human rights; otherwise, the international community will respect the state's territorial integrity against the group's desire to secede. Assessment against a human rights standard produces competition between the parties to outperform the other.¹⁰

For Basic, recognition decisions should hinge on the parent state and the secessionist entity's behavior during the conflict between the two.

While these theories relate the recognition decision in some way to the behavior of the parent state, they, like all other previously proposed theories of recognition, keep their focus on the secessionist entity. Both are framed in "rights talk": under "just cause" theories, secessionist entities have a right to be recognized because they have been abused, while under "just cause plus" theories, secessionist entities have a right to be recognized because, in addition to being abused, they are committed to being "good" states. Unlike previously proposed theories of recognition, the sanction theory of recognition abandons this "rights talk" and conceptualizes recognition as one tool in the international community's toolbox for stopping international crime, specifically the abuse of human rights, as a measure of last resort when other tools, like economic and political sanctions, fail.

The essential theoretical notion behind the proposal of the sanction theory is to shift the focus of the recognition decision from the entity claiming independence to the state from which independence is sought. The sanction theory thus comports more with the reality of the situation: the parent state is at least as affected by the recognition decision as the secessionist entity is, given that the parent state loses a significant portion of its resources, population, and territory if recognition is granted. The

¹⁰ NedZad Basic, *International Law and Security Dilemmas in Multiethnic States*, 8 ANN. SURV. INT'L & COMP. L. 1, 32 (2002).

sanction theory also greatly increases the mechanisms available to the international community to enforce human rights norms; by transforming recognition decisions into a means to stop human rights abuses, it captures significant utility that current theories waste.

Under the sanction theory of recognition, recognition decisions are used as sanctions. The shift in focus is somewhat akin to a similar shift in focus that has occurred in criminal sentencing law, at least in the United States. While sentencing law has remained focused on the offender, theories of sentencing have shifted from a notion that the sentence should serve to rehabilitate the offender to sentences designed to accomplish primarily four purposes: punishing an offender for his crime, deterring the offender from committing future crimes (specific deterrence), deterring others from committing crimes (general deterrence), and incapacitating the offender through incarceration, thereby preventing the offender from committing other crimes.¹¹ Under the sanction theory of recognition, recognition decisions are understood as a tool to promote these same ends, replacing everyday criminals with criminal states and everyday crimes with human rights abuse; that is, recognition decisions should be made based on signaling the international community's moral outrage at the parent state's human rights abuses, deterring the parent state from committing human rights abuses, deterring all states from committing such abuses for fear that they, too, will have a secessionist movement recognized within their territory, and physically disabling the parent state from committing human rights abuses at least within the area of a secessionist entity, by removing the entity from the control of the parent state. As sanctions in the international community are primarily justified by their ability to make the international community a better place, with fewer human rights abuses, the most important of these goals is deterrence in the general sense. Thus under the sanction theory of recognition, a new entity should be recognized as a state when recognition would serve to fulfill these purposes, particularly general deterrence, and need not be recognized as a state when recognition would not do so.

¹¹ See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1, 9-11 (2003) (describing the shift in purposes in the United States); 18 U.S.C. § 3553(a)(2) (1985) (laying out the purposes of U.S. sentencing law).

Recognition of secessionist entities has the potential to be a sanction against the parent state because it is bad for the parent state: not only are sanctions qua sanctions bad for the parent state because they hurt the state's international reputation by signaling that the state has been judged by the international community to be a bad actor, but the sanction is also (and primarily) bad for the parent state for very practical reasons: the parent state is losing its legal control over the territory of the newly recognized state, and the people and resources it encompasses. Because recognition of a secessionist entity is bad for the parent state, a rational government in charge of the state will seek to avoid it; the state should be willing to change its behavior in the face of a plausible threat of recognition. Thus, recognition is theoretically suitable for use as a sanction.

Furthermore, the simple act of recognition is costless, requiring nothing more from the recognizing state than a statement. Of course, to achieve fully the removal of the secessionist entity from the parent state's control, other sanctions and potentially armed intervention may be necessary. But recognizing the secessionist entity has power of its own: empirical evidence suggests that recognition fortifies "the security of a community," and thus is independently helpful in removing the territory from the control of the parent state.¹² For instance, the security of the former Yugoslav republics of Slovenia and Croatia were significantly increased through recognition.¹³ Recognition can give the secessionist entity numerous benefits that increase its chance of survival, and thus the effective loss of the territory for the parent state. These benefits include "greater ability to provide for the welfare of the population . . . ; a reduction of the risk of external intervention; the possibility of entering into treaty relationships with other states; more settled borders; expanded opportunities for trade; enhanced domestic legitimacy; . . . and other benefits."¹⁴ The bare act of recognition seems to help the secessionist entity actually free itself

¹² THOMAS D. GRANT, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION* 27 (1999) ("Empirical evidence has been adduced which suggests unrecognized entities lie in greater jeopardy of extinguishment than full-fledged states.").

¹³ *Id.* at 29.

¹⁴ Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT'L L. 131, 158 (2005). See also Coppieters, *supra* note 1, at 17 (discussing the benefits of recognition).

from the parent state, and thus remove territory, people, and resources from the parent state.¹⁵

In a somewhat circular fashion, recognition also changes the legal framework of the interactions between the parent state, the secessionist entity, and other states. It enables the secessionist entity to seek the benefits of the international system, including military and economic aid. Recognition allows the new state to seek admission into the United Nations¹⁶ and to secure aid from the World Bank and the International Monetary Fund.¹⁷ Support from these institutions, achieved only after recognition, undoubtedly aids the continued existence and security of the new state, and secures its removal from the control of the parent state. Finally, recognition as a new state frees other states in the international community to send military assistance to secure the newfound territorial integrity of the recognized state. Even if military assistance is not actually sent, recognition makes it easier for the international community to threaten such action, making it more likely that the parent state will not resist the newly recognized state's independence. Given the potential negative consequences of recognition for the parent state, it can serve effectively as a sanction for the parent state's bad behavior.

As a theory of sanction and deterrence, the sanction theory focuses predominantly on the parent state: primarily, whether the parent state should be sanctioned and secondarily, whether such sanctions would be efficacious. A parent state should be sanctioned if its behavior is the type of behavior that the international community wants to deter, and if the imposition of the sanction will effectively signal that such behavior will be followed with a similar sanction in the future. As the typical target for international sanctions, and the type of behavior the international community most wants to deter, human rights abuses are the target of the sanction theory. When the abuses are sufficiently grave, recognition of a secessionist entity should be threatened to deter the parent state's continuation of its human

¹⁵ ALEKSANDAR PAVKOVIC & PETER RADAN, *CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION* 11 (2007).

¹⁶ *Id.*

¹⁷ See About the IMF, <http://www.imf.org/external/about.htm> (last visited Dec. 1, 2009) (describing its members as "countries"); About Us: Member Countries, <http://go.worldbank.org/F3SMXIS5K0> (last visited Dec. 1, 2009) (describing its members as "countries").

rights abuses and, failing that, recognition should be granted to deter the parent state and other states from committing similar abuses in the future.

By shifting the focus of the recognition decision from the secessionist entity to the parent state, from “rights talk” to sanctions, the sanction theory eliminates any requirement of a nexus between the secessionist entity and the bad behavior of the parent state, a requirement inherent in “just cause” and “just cause plus” theories. Under the sanction theory, the parent state need only engage in the type of behavior that the international community wants to deter; the behavior need not be related to the secessionist entity. This critical difference between the sanction theory and other theories of recognition can be seen by comparing two hypothetical situations: suppose secessionist entity B desires independence from parent state A. If A is abusing human rights in B, a “just cause” theory will generally recommend recognition of B; similarly, the sanction theory will also recommend recognition of B if doing so would serve as an effective sanction against A. But suppose A is not abusing human rights in B, but is instead abusing the human rights of a religious group, C, that is widely dispersed throughout the territory of A, or even concentrated in some other part of A, completely separate from B. “Just cause” theories of recognition will not recommend recognition for B; B has not earned a right to secede or to be recognized. But as long as threatening recognition of B will deter A from abusing the human rights of C, or would deter other states in similar situations from abusing the rights of groups in their states, the sanction theory of recognition would recommend threatening recognition of B and eventually recognizing B if A fails to improve its behavior.

To take a more concrete example, consider the situation in Sudan. The government in Khartoum has committed serious human rights abuses against the people of the Darfur region.¹⁸ Simultaneously, Southern Sudan, governed by the Sudan People’s Liberation Movement, has at times expressed a desire to become an independent country.¹⁹ While Sudan has certainly violated human

¹⁸ See Q&A: *Sudan’s Darfur Conflict*, BBC NEWS, Aug. 27, 2009, <http://news.bbc.co.uk/2/hi/africa/3496731.stm> (noting that over 2.7 million Darfur civilians have fled to camps where they are subject to rape and murder by patrolling Janjaweed militia).

¹⁹ See Glenn Kessler, *Sudan’s Peace Deal, Seen as a Bush Success, is Endangered*, WASH. POST, Jan. 28, 2007, at A18 (reporting that an administration official acknowledged that Southern Sudan is moving towards independence).

rights in Southern Sudan in the recent past,²⁰ and while its current treatment of Southern Sudan should not be taken as a model for good governance,²¹ Sudan's current treatment of Southern Sudan would likely not be considered sufficiently abusive to justify recognition under "just cause" theories. Under "just cause" theories, the only recognition-related concern for Sudan in regards to its treatment of Darfur is recognition of Darfur, itself. This may be complicated by the specific facts of the situation, or, under "just cause plus" theories, by the behavior of Darfur itself. The sanction theory of recognition, however, would allow the international community to threaten to, and eventually recognize, Southern Sudan if Sudan did not reform its behavior in Darfur. Recognition, when approached according to the sanction theory, thus provides the international community with a tool to combat human rights abuses that is unavailable under other recognition theories.

Even assuming that the international community could recognize Darfur under the "just cause" and "just cause plus" theories, by eliminating the nexus requirement, the sanction theory would allow the international community more flexibility and a more powerful tool to combat Sudan's behavior. On a basic level, recognition of Southern Sudan might be more practical, as independence might be more effectively achieved for Southern Sudan than for Darfur. Further, recognition of Southern Sudan might be a better deterrent to Sudan's behavior in Darfur than the recognition of Darfur, itself; given the resource wealth in Southern Sudan, there is good reason to believe this is the case.²² Finally, the power and effect of the sanction could be ratcheted up under the sanction theory: the international community could threaten to and eventually recognize first one and then the other secessionist entity within Sudan, providing an even more powerful incentive for Sudan to reform its bad behavior.

Because there is no requirement of a nexus between the bad behavior of the parent state and the secessionist entity, the sanction

²⁰ See Human Rights Watch, *Sudan: Oil Companies Complicit in Rights Abuses*, Nov. 24, 2003, <http://hrw.org/english/docs/2003/11/25/sudan6528.htm> (reporting the Sudanese government's use of looting, murder, and relief prevention to drive thousands of farmers from oil-rich lands in Southern Sudan).

²¹ See Kessler, *supra* note 19 (discussing the potential erosion of the Comprehensive Peace Agreement as the Khartoum government has exhibited increasing unwillingness to abide by its terms).

²² See *id.* (examining the tension over sharing oil wealth and the conflict between the north and south over Abyei, a region with a large oil field).

theory deters all manner of human rights abuses, and not simply those committed against secessionist entities. This allows recognition to be a more useful sanction. If a nexus is required, while states may be deterred from committing human rights abuses against secessionist entities, they will still be capable of abusing with impunity the human rights of the general population, of a widely dispersed minority group, or of a particular region's population if, for some reason, that group is not a viable or acceptable candidate for recognition. With the nexus requirement eliminated, as long as a viable and acceptable secessionist entity exists within the parent state, the threat of recognition of that secessionist entity can serve to deter the parent state from abusing the human rights of any group throughout its territory.

Of course, in practice there will likely be significant overlap between the secessionist entity seeking recognition and the human rights abuses of the parent state. It is unsurprising that human rights violations against a particular group would lead to that group forming a secessionist movement; or that, faced with the threat of a secessionist movement, the parent state might respond in a fashion that violates the secessionist group's human rights. Since human rights violations will often be tied to secessionist movements on their own, the sanction theory of recognition will frequently involve recognition of the very secessionist entity that has been the subject of the human rights abuse; but under the sanction theory, this need not be the case.

There are added benefits to having the subject of recognition be a secessionist entity in which the human rights abuse has occurred. If the abuse has occurred within the secessionist entity, then the recognition and separation of the secessionist entity can serve to physically block the parent state from continuing its abuse by removing the secessionist entity from its control, much like the sentencing goal of incapacitation.²³ This, however, is merely an additional consideration to be taken into account when making recognition decisions, and need not be present. It will often be outweighed by the other, more primary goals of the sanction, general and specific deterrence. For instance, in the case of Sudan,

²³ See Alschuler, *supra* note 11, at 11 (discussing the popular concept of "selective incapacitation," which provides for long-term confinement of those believed to be responsible for a disproportionate share of crime); 18 U.S.C. § 3553(a)(2)(C) (1985) (listing "protect[ion of] the public from further crimes of the defendant" as a central purpose of U.S. sentencing law).

threatening to and recognizing Southern Sudan may be a better sanction than threatening to and recognizing Darfur. The chance that Darfur can be removed from the control of Sudan may be outweighed by the greater deterrence that the loss of the territory and natural resources of Southern Sudan would provide.

In certain circumstances, however, a sanction of recognition would be ineffective, and therefore inappropriate, despite the bad behavior of a parent state and the presence of a viable and acceptable secessionist entity. This may occur either because the parent state cannot be deterred or because the international community will not perceive the sanction as generally applicable. Even if specific and general deterrence do not justify the sanction, other considerations may, such as the punitive expression of moral outrage or the incapacitation of the parent state in regards to the secessionist entity. These considerations may also fail in certain circumstances, such as where the international community and the secessionist entity will be unable to contain the parent state. In cases where the recognition decision would not fulfill its purposes or where the results of the recognition decision would be, on the whole, worse for the international community, recognition, like other sanctions, would be inappropriate.²⁴

For instance, if the parent state is extremely strong and militarily aggressive in general, it is possible that recognizing the secessionist entity will have no actual effect other than to anger the parent state and pull the international community into a war that it cannot win. In such cases, even if the secessionist entity is somewhat strong, the parent state could simply ignore the recognition decision, use its strength to conquer the secessionist entity or bring it better under its control, and continue in its bad behavior. The threat of recognition and the recognition decision thus would fail to deter the parent state from its bad behavior and would fail to incapacitate the parent state from abusing human rights within the secessionist entity. The decision would also reduce the credibility, and thus the general deterrent effect, of such threats by the international community in the future. Finally, in cases where the parent state and the secessionist entity are in

²⁴ For further discussion of cases where recognition would not serve the purposes, either to deter or incapacitate, of the sanction theory of recognition despite human rights abuses, as well as cases where, on the whole, recognition would have a severely negative effect on the international community, see *infra* Section 4.3 on the situation in Chechnya and Russia.

conflict, the recognition decision might raise the stakes of the conflict and, to the degree the international community felt compelled to back up its recognition decision, could potentially embroil other states or the entire international community in military conflict, all with no positive benefits gained. While the "just cause" theory would recommend recognition in this situation if the secessionist entity had been the subject of the parent state's abuse, the sanction theory, recognizing the ineffectiveness of the recognition decision as a sanction, would not, regardless of whether a nexus existed between the parent state's bad behavior and the secessionist entity.

Similarly, there may be cases where the sanction theory does not call for recognition despite the bad behavior of the parent state, the presence of a secessionist entity, and a set of circumstances where recognition of the secessionist entity would have some deterrent effect on the parent state. As a general matter, just as the sanction theory of recognition shifts the focus of the recognition decision to the parent state, it simultaneously shifts the focus of the recognition decision away from the secessionist entity. Sanctions work best the more readily they are available; the more invariably the sanction follows the bad behavior, the more the sanction serves to deter such bad behavior and the stronger the incentives of the parent state to avoid such bad behavior become. Thus the sanction theory of recognition encourages the international community to think very little about the secessionist entity; the more the international community analyzes secessionist entities and the more it demands from such entities before granting recognition, the less frequently the recognition decision can serve as a deterrent to bad behavior. To maximize the availability of the recognition decision, and thus of its deterrent effect, it is best if the standards for the secessionist entity are kept as low as possible.

Pushing somewhat in the opposite direction, however, is the notion that the product of the recognition decision should not be worse than the problem that called for recognition in the first place. The justification for a sanction theory of recognition is that it makes the world better off: its purpose is to deter bad behavior. Even if a particular recognition decision would successfully deter some bad behavior, it would not be justified if, on the whole, the recognition decision made the world worse off. For instance, consider a secessionist entity that appears not to have any chance as a viable state, and thus appears likely to collapse into a power vacuum upon independence. Taking into account the dangers to human

rights and the international community that may result,²⁵ recognition should not be granted if such negative consequences are not justified by the positive consequences of the recognition decision's deterrent effect.

Similarly, if the international community determines that the secessionist entity, upon recognition, would engage in its own human rights abuses, recognition should be avoided if the negative consequences of such bad behavior would outweigh the positive consequences of the deterrent effect of the sanction. That is, what states should demand of the secessionist entity is that its nature and its commitments indicate that its existence as a recognized state, with the benefits of the deterrent effect of recognition as a sanction taken into account, will not make the world worse off than had the secessionist entity remained a part of its parent state.

The nature of these demands further distinguishes the sanction theory of recognition from "just cause plus" theories. Under the sanction theory, the level of the demands placed upon the secessionist entity depends on the expected effects of the recognition decision. If the parent state's bad behavior is particularly acute, or the deterrent power of recognizing the secessionist entity is particularly high, then the sanction theory of recognition tolerates recognizing a secessionist entity that is comparatively less viable or more badly behaved, so long as the benefits of using recognition as a sanction in that instance outweigh the negative effects of the recognition decision. Conversely, if the parent state's bad behavior, while worthy of sanction, is not particularly acute, or the deterrent power of recognizing the secessionist entity is not particularly high, then the secessionist entity will have to be more viable and better behaved to ensure that the benefits of using recognition as a sanction are not outweighed by the negative effects of the recognition decision.

Under a "just cause plus" theory, on the other hand, the requirements for secessionist entities are static.²⁶ Others have suggested a requirement that any secessionist entity must meet a presumably constant standard of respect for minority rights to be

²⁵ See, e.g., Human Rights Watch, *The Human Rights Crisis in Somalia*, Mar. 30, 2008, <http://www.hrw.org/en/news/2008/03/30/human-rights-crisis-somalia> (documenting the human rights abuses and international security problems that have arisen in Somalia during its years of state collapse).

²⁶ See BUCHANAN, *supra* note 3, at 208 (discussing the growing consensus in international law that distributive justice matters).

an acceptable candidate for recognition.²⁷ This has the consequence of nullifying the power of recognition as a sanction in certain circumstances where recognition would make the world better off. For example, if parent state A is committing atrocious human rights violations throughout its territory, and secessionist entity B falls just below the “just cause plus” theory’s standard for recognition, even if threatening to recognize B would perfectly deter A’s bad behavior, under the “just cause plus” theory, A knows that the international community’s hands are tied; the international community cannot recognize B, no matter what A does. Under the sanction theory, the bad behavior or uncertain commitments of the secessionist entity give the parent state no such license; as long as the positive effects brought about by the sanction outweigh the negative effects of recognition, the state can be threatened and punished with recognition of the secessionist entity.²⁸

This may result in the recognition of certain secessionist entities that are, in and of themselves, bad. Buchanan worries that recognizing badly behaved secessionist entities may make the international community “accomplices in injustice.”²⁹ But under the sanction theory, while the international community would be, in some sense, aiding the injustices committed by the newly recognized and bad state, it would do so only to end injustices committed by the parent state, and only after determining that, on the whole, the benefits outweighed the costs. While this may be problematic in some philosophical sense, the international community is only guilty of doing the best it can to make things

²⁷ See GRANT, *supra* note 12, at 96–98 (discussing the increasingly important role of minorities’ rights guarantees in state recognition in the context of the changing focus of minorities’ rights; with special emphasis on Russia, Croatia, and Slovenia).

²⁸ In addition to eliminating the requirement of a nexus between the parent state’s bad behavior and recognition for the secessionist entity, and basing the requirements for the secessionist entity on a sliding scale related to the circumstances and behavior of the parent state, the sanction theory also leads us to talk about recognition in different terms than “just cause” theories. Under the sanction theory, we express our thinking by saying, “Parent state A has been bad, and so we will recognize secessionist entity B;” under the “just cause” theory, we express it through “rights talk,” saying, “Secessionist entity B has been mistreated, and so deserves to be recognized as a state.” This dulls the moral condemnation that should accompany the recognition decision, moral condemnation that, under the sanction theory, should theoretically influence players in the international community to avoid abusing human rights.

²⁹ BUCHANAN, *supra* note 3, at 167–68.

better. Thus the international community's primary sin is contributing to an unfortunate reversal of moral luck; in attempting to stop one set of human rights abuses, it may lead to another, although lesser, set of human rights abuses.

It should be noted, however, that all tools of international law seem to have this same problem: they shift negative consequences from an abused population to another, potentially innocent, population. Economic sanctions, for instance, are designed to convince governments to go easier on minority groups; but they inevitably lead to making the country as a whole poorer, resulting in suffering for potentially innocent people. The international community's squeamishness about affecting moral luck should not stop it from adopting a theory of recognition that, on the whole, would deter more bad behavior than it would enable.

In addition to the international community being able to make demands of the secessionist entity at the point of recognition (including, for instance, demanding a temporary peacekeeping presence), once the secessionist entity is recognized, it is subject to all of the same sanctions that are available for use against other states, including the threat of recognition of a sub-secessionist entity as a sanction. Additionally, to the degree that a "just cause plus" theory only demands "credible commitments" to justice,³⁰ it gets only that: credible commitments. These, like other principles of international law to which the secessionist entity has not committed, will need to be enforced by the international community, just as if no commitments had been made.

Further cabining this concern is an essential insight into the nature of deterrence: like all sanctions, to the degree that recognition works as a deterrent, it need not be implemented in fact. Were the sanction to be completely efficacious, and to deter fully all human rights abuses, it would simply never be necessary to impose the sanction. Thus, while the sanction theory of deterrence is, on its face, a theory about making recognition decisions, to the degree that it is efficacious it requires only that the international community threaten to recognize secessionist entities as new states and not that the international community ever actually recognize them.

The philosophy behind the sanction theory of recognition is straightforward: recognition should be used like every other tool

³⁰ *Id.* at 244.

of human rights enforcement available to the international community: to sanction bad behavior. The international community has very few tools at its disposal for enforcing human rights; by focusing on deterring the bad behavior of the parent state and eliminating the requirement of a nexus between the bad behavior and the secessionist entity, the sanction theory ensures that recognition will be as effective a tool for human rights enforcement as possible.

While the sanction theory of recognition is quite novel in its approach to recognition, it fits reasonably well within the confines of international law on statehood and recognition, although it counsels rejection of certain proposals that have been made in both areas. Section 3 will outline the nature of states and recognition generally, as well as previously proposed theories of recognition, and place the sanction theory of recognition within the framework of currently existing international law, theory, and practice.

3. SITUATING THE SANCTION THEORY IN THE LAW AND PRACTICE OF RECOGNITION

3.1. Statehood

States are the primary building blocks of the international community. While other entities such as non-governmental organizations, autonomous units, secessionist movements, and international entities like NATO and the U.N. play important roles on the international stage, states have “the widest range of rights, duties, and legal capacity under the rules of international law.”³¹ But what makes an entity a state? Like sailors to the siren’s song, no writer seems able to resist beginning by citing the requirements for statehood laid out in the 1933 Montevideo Convention on the Rights and Duties of States.³² The Convention requires that the entity possess four characteristics: “(a) a permanent population; (b) a defined territory; (c) [a] government; and (d) [the] capacity to enter into relations with other states.”³³ The Convention has at its

³¹ M. J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE*, 1815-1995, 1 (1997).

³² GRANT, *supra* note 12, at 6 n.26 (collecting sources).

³³ Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

core “concepts of effectiveness and territoriality:”³⁴ the entity must have a government that effectively controls an actual territory.

In addition to its frequent citation in the literature, numerous governments have expressed their concepts of statehood in nearly identical terms: the United States Department of State has suggested that states must have “effective control over a clearly defined territory and population; an organized governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfill international obligations.”³⁵ The Restatement (Third) of Foreign Relations Law of the United States says that “a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”³⁶ The Restatement notes that these requirements are drawn from the Montevideo Convention and claims that the requirements are generally accepted in international law.³⁷ The Foreign Minister of the United Kingdom has made similar pronouncements.³⁸

The Montevideo requirements, however, despite their frequent quotation by intellectuals and politicians alike, are not as firmly required by international law as many seem to suggest. As a matter of international law, the “Montevideo definition . . . [i]f it was binding at all . . . was binding only on the small number of Western Hemisphere states that were party to it. Though signed at Montevideo by nineteen states, the Convention was ratified by only five . . .”³⁹ As a practical matter, numerous entities are or have been regarded as states by the international community without meeting the Montevideo requirements.

The requirement of a “permanent population” amounts to very little: states with populations as small as “Andorra, Liechtenstein, Nauru, San Marino, Sao Tome and Principe, Tuvalu and many

³⁴ GRANT, *supra* note 12, at 6.

³⁵ *Id.* (quoting Notice, U.S. Dep’t. of State Press Relations Office (Nov. 1, 1976)).

³⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

³⁷ *Id.* § 201 cmt. a.

³⁸ A.V. Lowe & Colin Warbrick, *Recognition of States*, 41 INT’L & COMP. L.Q. 473, 480 (1992) (quoting the Foreign Minister).

³⁹ Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 456 (1999).

others" are considered states, despite minimal populations.⁴⁰ The requirement of a "defined territory" is similarly unrestrictive: Nauru, for instance, is approximately twenty-one square kilometers in area.⁴¹ The requirement that the territory be "defined" also seems to be overlooked in international practice. Albania and Yemen were acknowledged as states "without fully delimited or defined boundaries;" The Congo was acknowledged as a state even though a significant part, Katanga, "was actively engaged in a secessionist attempt;" and Israel, Kuwait, and Mauritania have been accepted as states in the face of claims by other states to the entirety of their territory.⁴² As a practical matter, in the context of entities attempting to secede, it seems clear that any such entity will conceive of itself as having territory, in which there will undoubtedly be some population, and thus these first two requirements do not appear as if they will ever serve to exclude an entity from qualifying as a state.

The requirement that the entity have a "government" that exercises "effective control" also seems to place little actual restriction on the practice of the international community. The Congo was acknowledged as a state in the midst of a civil war and with "governing structures [that] were completely ineffective for a number of years;" the U.N. considered Rwanda and Burundi to be states "even though the General Assembly openly acknowledged that they did not fulfill the traditional criterion of effective government;" Angola was similarly considered a state, despite undergoing a civil war "with three competing would-be governments all proclaiming their rule."⁴³

The international community also acts as if statehood persists even when the entity suffers an almost total loss of effective control over the territory, such as with Cambodia and Lebanon "during their periods of near-total collapse,"⁴⁴ the continued existence of the Baltic states and Poland, Czechoslovakia, and Yugoslavia in the minds of the Allies during the Second World War, and Somalia today.⁴⁵ France seems to have regarded Poland and

⁴⁰ SCOTT PEGG, *INTERNATIONAL SOCIETY AND THE DE FACTO STATE* 46 (1998).

⁴¹ *Id.*

⁴² *Id.* at 46-47.

⁴³ *Id.* at 47.

⁴⁴ *Id.*

⁴⁵ Matthew N. Bathon, Note, *The Atypical International Status of the Holy See*, 34 *VAND. J. TRANSNAT'L L.* 597, 621 (2001); Grant, *supra* note 39, at 435.

Czechoslovakia as states during the First World War as well, even though Poland had possessed no territory or effective control for 100 years and Czechoslovakia had never had either territory or effective control.⁴⁶ More recently, the international community almost uniformly acknowledged Bosnia and Herzegovina as a state, at a period in time when it had almost no effective control over its territory, and when its boundaries, and even its claim to any territory whatsoever, were hotly contested by numerous other entities.⁴⁷

As for engaging in foreign relations, Liechtenstein “remained a state after transferring control of its foreign affairs to Switzerland”⁴⁸ More generally, the Vatican City is widely regarded as a state,⁴⁹ even though it has a population of approximately five-hundred people, none of whom are permanent,⁵⁰ its territory is a robust one-hundred and six acres,⁵¹ and it is heavily dependent on Italy for even its most basic services.⁵² On the flip side of the coin, the international community has acted as if entities that meet all of these criteria, including Somaliland, pre-independence Eritrea, and the Turkish Republic of Northern Cyprus, among others, were not states.⁵³ Given the laxity of these requirements, it seems unlikely that many secessionist movements, by definition claiming some territory with some population, will fail to meet them, at least to the extent that their governments are required to be no more effectively in control or capable of conducting foreign relations than states like Somalia and occupied Czechoslovakia.

Despite the fact that numerous states, present and past, at their inception and during their continuation, have failed to live up to the Montevideo requirements, numerous commentators have argued that statehood requires more. James Crawford has argued that independence is a requirement of statehood.⁵⁴ For

⁴⁶ Grant, *supra* note 39, at 436.

⁴⁷ Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EUR. J. INT’L L. 36, 49-51 (1993).

⁴⁸ Bathon, *supra* note 45, at 616.

⁴⁹ *Id.* at 599.

⁵⁰ *Id.* at 609.

⁵¹ *Id.* at 604.

⁵² *Id.* at 616.

⁵³ PEGG, *supra* note 40, at 52.

⁵⁴ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1979).

independence to be distinct from effective control, it must mean that the state is capable of standing on its own. Understood in that way, "any number of entities widely agreed to be states might not be properly termed as such."⁵⁵ The Vatican City is clearly dependent on Italy in a sense that makes it non-independent;⁵⁶ Iraq seems currently to maintain itself only through the support of the United States and other states;⁵⁷ and Bosnia and Herzegovina was clearly reliant on the support of NATO, the U.N., and numerous states at the time that it gained wide acknowledgment as a state.⁵⁸

While Crawford and others have also argued for a requirement of independence in a sense connected with the entity's "legality or illegality of origin,"⁵⁹ this requirement seems more properly considered as a proposed requirement for recognition than statehood, given that an entity that has come into being through illegal means operates indistinguishably from one that has come into being through legal means, with the exception of how the entity might be viewed by the international community, and so it will be discussed along with other proposed criteria for recognition *infra*. Similarly, the proposals made by some critics that entities must go through popular referenda on independence to be states,⁶⁰ that entities must have democratic governments to be states,⁶¹ and that entities must respect the rights of minorities to be states⁶² seem clearly to belong to the realm of recognition decisions and not definitional statehood. As such, they will be discussed *infra*.

Another proposed criterion for statehood is that the entity must make a claim that it is a state. According to The Restatement (Third) of Foreign Relations Law of the United States, "[w]hile the traditional definition does not formally require it, an entity is not a state if it does not claim to be a state."⁶³ This criterion seems to be driven entirely by consideration of the case of Taiwan, which "does

⁵⁵ Grant, *supra* note 39, at 438.

⁵⁶ Bathon, *supra* note 45, at 616.

⁵⁷ See, e.g., Abigail Hauslohner/Mahmudiya, *Iraqi Troops: Asleep on the Job?*, TIME, Apr. 21, 2008, available at <http://www.time.com/time/world/article/0,8599,1732617,00.html> (describing Iraq's dependence on U.S. military aid).

⁵⁸ Rich, *supra* note 47, at 49-51.

⁵⁹ PEGG, *supra* note 40, at 48.

⁶⁰ Grant, *supra* note 39, at 440.

⁶¹ *Id.* at 442.

⁶² *Id.* at 444.

⁶³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. f (1987).

not claim to be Taiwan, but rather the Republic of China.”⁶⁴ This requirement seems, on its face, to be a rather absurd ad hoc addition to the requirements of statehood, added simply to explain a singular situation that could be more truthfully explained by appeals to the particular reality of that situation. Taiwan clearly is a state insofar as “state” is a descriptive term; it is at least as effective as numerous other entities that are acknowledged to be states. The willingness to call Taiwan a non-state as opposed to an “unrecognized state” seems simply to be an extension of the decision not to recognize Taiwan. Further highlighting the ad hoc nature of this criterion, as far as secessionist movements go, this criterion will never come into play; by definition, secessionist entities claim to be states, and so this criterion will not serve to limit the international community from recognizing secessionist movements as states.

To the degree that statehood is a prerequisite for recognition, the sanction theory of recognition would impel us to keep our standards for statehood as low as possible. By keeping the standards for statehood low, and, in turn, lowering the bar for recognition, recognition would be available more frequently for use as a sanction, and thus could serve more effectively as a deterrent to human rights abuses. Given that the requirements of territory and population will almost always be satisfied in the weak sense in which they are required in practice, they should pose no impediment to the efficacy of the sanction theory of recognition.

Similarly, given the low standards set by international practice for the requirements of a government with effective control over the entity and of a government with the capacity to engage in foreign relations, these requirements should not hinder the sanction theory of recognition. Bosnia was granted recognition at a time when any effective control its government might have had over its territory was completely dependent upon foreign support.⁶⁵ To the degree that a secessionist entity will not be able to have anything approaching effective control over any of its territory even with significant foreign intervention, recognition of the entity will not be able to function as a sanction; the parent state should have no trouble reasserting its dominion over the

⁶⁴ Grant, *supra* note 39, at 439.

⁶⁵ Rich, *supra* note 47, at 57.

secessionist entity, and the recognition will have been in vain. Even were that not the case, recognition of such entities would likely lead to power vacuums and the human rights abuses that tend to follow them, making them inappropriate candidates for recognition.⁶⁶

For the sanction theory to be most efficacious, the non-Montevideo requirement of independence (in the sense of not requiring external support) should be rejected, so as to make recognition more readily available as a sanction. As this section suggests, however, rejecting the requirement of independence and keeping the Montevideo requirements easily satisfied—i.e., conditions conducive to the most efficacious use of the sanction theory of recognition—does not move current practice far, if at all, from its current state. Thus, while the sanction theory pushes for a low bar for statehood under international law, current practice has already done most of the work on that front.

3.2. Recognition

Just as there is room for the sanction theory of recognition within the confines of international law and practice on statehood, there is room for the sanction theory of recognition within the legal framework and practice of recognition. As a general matter,

Recognition is a procedure whereby the governments of existing states respond to certain changes in the world community. It may also be a means by which existing states seek to effect changes in that community Recognition is an authoritative statement issued by competent foreign policy decision-makers in a country. Through it, those decision-makers signal the willingness of their state to treat with a new state or government or to accept that consequences, either factual or legal, flow from a new situation.⁶⁷

In the context of states, recognition of an entity as a state signifies that the recognizing state accepts that the recognized entity is a state and that the recognizing state will extend to the

⁶⁶ Cf. Human Rights Watch, *The Human Rights Crisis in Somalia*, *supra* note 25 (chronicling the human rights violations in Somalia after the fall of the government).

⁶⁷ GRANT, *supra* note 12, at xix.

newly recognized state all of the benefits that come with statehood and formal relations. Recognition is, then, extremely important in the context of secessionist entities: “[h]istorically, international recognition of statehood has been the major foreign policy goal of any secessionist movement.”⁶⁸

Just as no writing on statehood is complete without reference to the Montevideo convention, writings on recognition appear to be subject to an unwritten rule that they must distinguish the constitutive and declaratory theories on the nature of recognition. Under the constitutive theory, recognition is essential to being a state: before an entity can be a state, it must be recognized by other states.⁶⁹ Thus, when a state recognizes an entity as a new state, it is doing something constructive; it is helping to transform the entity from some non-state thing into a state. Under the declaratory theory, recognition is simply “an acknowledgment of statehood already achieved.”⁷⁰ Thus, when a state recognizes an entity as a new state, it is not contributing to the transformation of the entity into a new state, but simply announcing that it understands that the entity has fulfilled the requirements of statehood, and is thus a new state.

While writers tend to understand the difference as significant, with declaratory theory belonging to the realm of “legal principle” and constitutive theory belonging to the realm of “statecraft,” there is enormous play in the joints.⁷¹ Before the declaratory theory can mean anything, the contours of what it is to be a state must be firmly established. As discussed above, the requirements of statehood are of dubious legal validity, uncertain, and, in practice, not particularly meaningful. And while some have suggested that, under the constitutive theory, the recognition decision “is an act of unfettered political will divorced from binding considerations of legal principle,”⁷² this is not necessarily so. The constitutive theory, at its core, simply requires that entities be recognized as states to be states; it is, of course, possible that states could make these decisions based on “considerations of legal principle.”

⁶⁸ PAVKOVIC & RADAN, *supra* note 15, at 11 (quoting JAMES B. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 376 (2nd ed. 2007)).

⁶⁹ GRANT, *supra* note 12, at 2.

⁷⁰ *Id.* at 4.

⁷¹ *Id.*

⁷² *Id.* at 2 (quoting HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 41 (1948)).

Similarly, the declaratory theory need not be entirely devoid of political considerations: if the criteria for statehood are determined on the basis of politics, then, in some sense, the declaratory theory simply carries forward political decisions under the guise of legal reasoning. Similarly, if determining whether or not states have successfully met the legal criteria for statehood is left to individual political actors, then politics will likely figure in that decision as well.⁷³

The essential distinction between the two theories comes from what seems to be an added-on feature of the two theories. As typically conceptualized, under the constitutive theory, recognition decisions are made entirely "at the discretion of the individual state" making the decision,⁷⁴ while under the declaratory model, announcements of recognition are considered to be "an automatic duty" whenever an entity has fulfilled the requirements of statehood.⁷⁵ The theories do not simply envision a different role for recognition decisions in the formation of states, but also a different level of freedom for the states making recognition decisions.

The sanction theory of recognition can fit under either the declaratory or constitutive theories. Under the constitutive theory, the sanction theory works if states choose to recognize secessionist entities as states when doing so would serve as an effective sanction for the bad behavior of the parent state; this act of recognition would help turn the secessionist entity into a state. Under the declaratory theory, the sanction theory works if we simply choose to make it a requirement for statehood that coming into being as a state serves as an effective sanction for the bad behavior of the parent state; the act of recognition would then simply acknowledge that the secessionist entity fit the requirements of statehood and was a state. Of course, making the fact that a state's coming into being serves as a sanction against a parent state a requirement of statehood is a somewhat strange maneuver, but it is not clear why it would be impermissible.

Some authors have perceived that the debate between the declaratory and constitutive theories are outdated, and that, in fact,

⁷³ See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 reporters' note 1 (1987) (discussing the two theories of the recognition of statehood by other states).

⁷⁴ GRANT, *supra* note 12, at 3.

⁷⁵ *Id.* at 4.

“the critical tension in recognition law is concentrated along two axes . . . first, along an axis between recognition conceived as legal act and recognition conceived as political act; and, second, along an axis between a collective and a unilateral process of recognition.”⁷⁶ The sanction theory, however, is somewhat indifferent between both poles of both axes. By suggesting that all recognition decisions should be made with the effectiveness of the sanction in mind, the theory is, in some sense legally oriented: it suggests that all decisions should be made uniformly for the same reason: if recognition would be an effective sanction, it should be granted. Thus, a legal rule could carry out the sanction theory. However, the sanction theory could be carried into effect through political action: if states simply willingly embraced the sanction theory as their guide to their recognition decisions, and acted on it in all cases, the theory would lead to the same recognition decisions as if the theory were taken as a legal rule. Of course, the chances of this happening in the real world are somewhat slim, and so the sanction theory would likely work better as a legal rule; then again, getting states to obey legal rules is easier said than done. Additionally, the sanction theory is clearly, in some sense, a political rule; it is designed to carry out a specific political objective: stopping states from committing human rights abuses. On the other hand, this does not disqualify it as a legal rule; most, if not all, legal rules are designed to carry out a “political” purpose.

As for whether recognition is done through a collective or unilateral process, the sanction theory is once again somewhat indifferent. If all states act unilaterally, but all according to the sanction theory, then the theory would have the same practical effects as if recognition decisions were left up to a collective process under which recognition decisions were determined according to the sanction theory. As with the legal-political axis, the sanction theory would likely be more effective in practice if determined through a collective mechanism: the chances of all states acting unilaterally in the same way in all instances is slim. Then again, collective processes are by definition influenced by constituent actors, and so there is no guarantee that even a collective process would work perfectly. The sanction theory is also, in some sense, inherently “collective” in nature, in that its goal is a collective one: it acts to prevent human rights abuses,

⁷⁶ *Id.* at xx.

rather than further the ends of one particular state or another. Of course, it could be argued that, in the long run, it is in the interests of all states, both from a collective and a singular point of view, to prevent human rights abuses on a global scale. Further, the efficacy of the sanction theory is dependent on recognition or non-recognition being taken by a large number of states; the effects of each recognition decision are cumulative on the parent state and the secessionist entity. The sanction theory thus would seem to operate most effectively as a legal rule applied through a collective process, but could also succeed as a political rule applied through a unilateral process, as long as it was accepted widely and followed consistently.

The weight of scholarly opinion seems to come down on the side of the declaratory view of recognition, with the constitutive theory of recognition being attacked for theoretical and logical reasons.⁷⁷ But these attacks tend to focus on the idea that recognition is not essential for statehood, rather than attempting to argue that states are under a legal obligation to recognize entities as states if they fulfill the criteria for statehood.⁷⁸ The Restatement (Third) of Foreign Relations Law of the United States seems to adopt this composite view: while under Section 201, following the Montevideo Convention, an entity is declared to be a state if "it has a defined territory and permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities,"⁷⁹ under Section 202 it is made clear that "[a] state is not required to accord formal recognition to any other state but is required to treat as a state an entity meeting the requirements of Section 201."⁸⁰

That is, following the declaratory theory, whether or not an entity is a state is entirely independent of whether or not the entity has been recognized as a state by other states; but, following the constitutive theory, states are not obligated to recognize an entity as a state even if the entity has met all of the requirements for

⁷⁷ See *id.* at 19-22 (critiquing the constitutive view of recognition as a contractual event and highlighting practical disjunctions posed by constitutivism; including the proposition that unrecognized communities have no duties under international law and the difficulty of reconciling constitutive theory with retroactive juridical effect of recognition).

⁷⁸ See *id.*

⁷⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

⁸⁰ *Id.* § 202.

statehood. According to the Reporter's Notes, this combination "tends toward the declaratory view, but the practical differences between the two theories have grown smaller [T]he constitutive theory lost most of its significance when it was accepted that states had the obligation . . . to treat as a state any entity having the characteristics set forth in Section 201."⁸¹ For all practical purposes, the freedom of states to grant or deny recognition renders the debate between the constitutive and declaratory theories of recognition extremely academic. Whether an entity needs recognition to be a state or not, most of the benefits of statehood only come when recognition is granted: "an entity will fully enjoy the status and benefits of statehood only if a significant number of other states consider it to be a state and treat it as such, in bilateral relations or by admitting it to major international organizations."⁸² It is cold comfort to be an unrecognized state that knows it's a state because some theoretical requirements have been met. Until other states recognize the entity as a state, it will still be in a significantly inferior position in the international community.

In addition to the Restatement, numerous sources acknowledge that recognition decisions are made at the discretion of the recognizing government in practice.⁸³ According to the United Nations, "[w]hile states may regard it as desirable to follow certain legal principles in according or withholding recognition, the practice of states shows that the act of recognition is still regarded as essentially a political decision, which each state decides in accordance with its own free appreciation of the situation."⁸⁴ NATO has indicated that recognition is "entirely a matter for individual member states."⁸⁵ And, most importantly, given that they are the primary players in the recognition game, "most states regard recognition as a political act," made at their discretion.⁸⁶

⁸¹ *Id.* § 202, n.1.

⁸² *Id.* § 202 cmt. b.

⁸³ *See id.* § 202, n.2.

⁸⁴ GRANT, *supra* note 12, at 22 (quoting U.N. SCOR, 5th Sess., at 19, U.N. Doc. S/1466 (Jan./May 1950)).

⁸⁵ *Id.* at 23 (quoting Letter from N.W.G. Sherwen, Office of Information and Press, North Atlantic Treaty Organization, to Thomas D. Grant, Senior Research Fellow, Cambridge Univ. (Mar. 19, 1996) (on file with Grant)).

⁸⁶ PEGG, *supra* note 40, at 129 (quoting ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 148 (1986)).

Recent practice seems to carry this notion out, especially concerning the break-up of the former Yugoslavia.

After Slovenia and Croatia declared their independence from the Yugoslav Federation in June of 1991, fighting broke out.⁸⁷ After attempts to broker peace failed, the European Community came to the conclusion that the Yugoslav Federation was in the process of dissolution.⁸⁸ Having given up on keeping the Federation together, and believing that multiple states would be emerging from its dust and ashes, the European Community determined that it needed to come up with criteria for recognizing the entities that emerged as states.⁸⁹ Meeting in December of 1991, the Foreign Ministers of the member states of the European Community came up with a "Declaration on the Guidelines on Recognition of new States in Eastern Europe and the Soviet Union."⁹⁰ The very title of the document indicates that the European Community viewed recognition as a discretionary practice, framing it in terms of the requirements states had to meet in order to *achieve recognition*, not in terms of what requirements entities had to meet in order to *become states*.

The content of the document further indicated that the European Community neither believed that recognition was essential to statehood (as the constitutive theory holds) nor that the member states were obligated to recognize entities as states merely because they met the requirements for statehood (as the declaratory theory holds). According to the Declaration, "[t]he Community and its Member States" were prepared to recognize "subject to the normal standards of international practice and the political realities in each case, those new States which . . . 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."⁹¹ Not only does this statement explicitly recognize that the recognition decisions would be made based on "the political realities in each case," but it also conditioned recognition

⁸⁷ Lowe & Warbrick, *supra* note 38, at 475.

⁸⁸ *Id.* at 475-476.

⁸⁹ *See id.* at 476 (noting the importance of protecting minority rights in the context of recognition).

⁹⁰ *Id.* at 477.

⁹¹ *Id.* at 477 (quoting the Declaration on the Guidelines on Recognition of new States in Eastern Europe and the Soviet Union (hereinafter the Declaration)).

on a number of requirements beyond simple statehood: the entities had to be democratically constituted, accept their international obligations, and be committed to “a peaceful process and to negotiations.”⁹²

In addition to these three initial criteria beyond statehood, the Declaration added numerous other criteria for recognition. To be recognized, states needed to demonstrate their “respect for the provisions of the” U.N. Charter and other international law documents, “especially with regard to the rule of law, democracy and human rights;”⁹³ they needed to provide sufficient “guarantees for the rights of . . . ethnic and national groups and minorities”;⁹⁴ they needed to “respect . . . the inviolability of all frontiers” and acknowledge that they could “only be changed by peaceful means and by common agreement;”⁹⁵ they needed to commit to “disarmament and nuclear non-proliferation” as well as “security and regional stability;”⁹⁶ they had to be willing to “settle by agreement, including . . . arbitration, all questions concerning State succession and regional disputes”;⁹⁷ finally, there would not be recognition for states “which are the result of aggression,” and recognition decisions “would take account of the effect of recognition on neighbouring States.”⁹⁸ These additional requirements, numerous and independent of the basic notions of statehood, made it clear that the European Community viewed recognition as a process that could be conditioned quite openly on more than simple statehood.⁹⁹

Additionally, the European Community imposed specific requirements on states emerging from the former Yugoslavia: those states had to accept “provisions on human rights suggested by the EC Conference on Yugoslavia and the continued work of the Conference and . . . the work of the Security Council in Yugoslavia.”¹⁰⁰ As a last, somewhat unusual requirement, each state had to adopt “constitutional and political guarantees ensuring

⁹² *Id.* (quoting the Declaration).

⁹³ *Id.* (quoting the Declaration).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 478 (quoting the Declaration).

⁹⁹ See Rich, *supra* note 47, at 56–57.

¹⁰⁰ Lowe & Warbrick, *supra* note 38, at 478.

that it has no territorial claim towards a neighboring Community State, including the use of language which implies territorial claims."¹⁰¹ The fact that requirements for recognition could be crafted specifically for states emerging from Yugoslavia, rather than for all entities wishing to be recognized as states, further reveals the discretionary and political nature of the recognition decision. The final esoteric requirement, regarding "the use of language which implies territorial claims," "was inserted at the insistence of Greece, concerned about possible claims (and even the use of the name) by Macedonia which might imply designs on the northern Greek province of Macedonia."¹⁰² It seems implausible that this linguistic requirement could possibly be a true requirement of statehood, and the process through which it was inserted further makes clear the discretionary and political nature of recognition in the eyes of the European Community.

Just as the Declaration indicated that recognition was independent of statehood, so, too, did the actual practice of recognition that ensued. Entities that wished to be recognized as states were to apply to the Badinter Commission, a commission specifically set up by the European Community for resolving the situation in the former Yugoslavia.¹⁰³ If the application met with the Commission's approval, based on the guidelines for recognition, the European Community and its member states would grant the entity recognition.¹⁰⁴ If it did not, member states were free to choose for themselves whether or not they would grant the entity recognition, further indicating the discretionary and political nature of the decision.¹⁰⁵

After reviewing the applications of Slovenia, Croatia, Bosnia, and Macedonia, the Commission found that Slovenia and Macedonia should be recognized, while Croatia and Bosnia should not.¹⁰⁶ According to the Commission, Croatia's constitution afforded inadequate protection to the minorities within its borders

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See A.V. Lowe & Colin Warbrick, *Recognition of States Part 2*, 42 INT'L & COMP. L.Q. 433, 433 (1993) (discussing how Yugoslavia's Secretary of State awaited Badinter Commission decisions to resolve the Yugoslav crisis); *Id.* at 433 & n.3.

¹⁰⁴ Lowe & Warbrick, *supra* note 38, at 478.

¹⁰⁵ *Id.*

¹⁰⁶ Lowe & Warbrick, *supra* note 103, at 434.

while Bosnia needed to demonstrate that its people were, in fact, in favor of becoming a new state.¹⁰⁷ Following the Commission's advice, the European Community and its member states quickly recognized Slovenia as a state.¹⁰⁸ In response to the Commission's ruling, Bosnia held a referendum on independence.¹⁰⁹ Bosnian Serbs, more than a third of Bosnia's population, boycotted the vote, but of those who did vote, Bosnian Muslims and Croats, more than ninety-nine percent endorsed independence.¹¹⁰ Following the vote, the European Community recognized Bosnia as a state.¹¹¹

That was where the European Community stopped following the Badinter Commission's advice. Despite the Commission's recommendation against recognizing Croatia, the European Community recognized Croatia as a state, seemingly satisfied with Croatia's promises that it would address the Commission's constitutional concerns in the near future, a promise upon which, somewhat unsurprisingly, "Croatia did not immediately deliver."¹¹² Despite having set up a legal-seeming Commission, the European Community recognized Croatia despite its recommendation, affirming the political and discretionary nature of the recognition decision.

These factors were even more evident in Macedonia's attempt to gain recognition. Despite the Commission's recommendation, the European Community refrained from recognizing Macedonia because Greece objected to the use of the name "Macedonia."¹¹³ Eventually, the European Community came to the conclusion that it would recognize Macedonia if it came up with a different name that was acceptable to Greece;¹¹⁴ that is, all that stood between Macedonia and recognition was Greece's objection to its name. This continued even after Macedonia "amended its constitution to meet the Greek concerns and had made internationally legally binding statements that Macedonia had no territorial designs against Greece."¹¹⁵ Eventually, despite retaining the name the

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 435.

¹¹⁰ *Id.*; Rich, *supra* note 47, at 50.

¹¹¹ Lowe & Warbrick, *supra* note 103, at 435.

¹¹² *Id.* at 434.

¹¹³ *Id.* at 437.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 438.

"Republic of Macedonia," Macedonia was recognized by the European Community and admitted to the United Nations, but those entities still refer to Macedonia as "the former Yugoslav Republic of Macedonia,"¹¹⁶ and the name dispute continues to this day.¹¹⁷ Thus despite the semi-legal appearance of the recognition process in the dissolution of Yugoslavia, the political and discretionary nature of the recognition decision, reflecting some combination of the declaratory and constitutive theories of recognition, was extremely clear: not only was recognition specifically conditioned on meeting numerous requirements beyond those for simple statehood, but recognition was granted when those conditions were not met, and was withheld when they were, specifically over something as petty and clearly political as the name of the new state.

The general law and practice of recognition thus make room for the sanction theory of recognition. While Section 202 of the Restatement limits the behavior of states in some way, by requiring states to treat as a state any entity that meets the requirements for statehood, recognition is left in general to the discretion of individual states.¹¹⁸ States are free to choose the standards under which they grant recognition (or to choose to have no standards at all); thus under international law and practice, they are free to choose the sanction theory to structure their recognition decisions.

3.3. Territorial Integrity

Recognition decisions, however, are not entirely discretionary; the discretion of states and theories of recognition are constrained by other international norms, like the principle of territorial integrity. The sanction theory, however, justifies overriding territorial integrity because of its basis in advancing human rights, a concept that appears to fit reasonably well within current international law and practice.

¹¹⁶ See Delegation of the European Union to the Former Yugoslav Republic of Macedonia, <http://www.delmkd.ec.europa.eu/en/index.htm> (last visited Dec. 6, 2009); United Nations, List of Member States, <http://www.un.org/members/list.shtml> (last visited Dec. 6, 2009) (using the disputed name).

¹¹⁷ See Associated Press, *Macedonian Parliament to Debate UN Proposal on Ending Name Dispute with Greece*, INT'L HERALD TRIB., Mar. 28, 2008.

¹¹⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 202 (1987).

According to the Restatement (Third) of Foreign Relations Law of the United States:

[A]ccepting as a state an entity that seeks to secede from another state, but has not yet succeeded in achieving complete control of its territory, is an improper interference in the internal affairs of the parent state, and if the seceding entity is given military support, may constitute the threat or use of force against the territorial integrity of the parent state in violation of Article 2(4) of the United Nations Charter.¹¹⁹

In other words, “[p]remature recognition . . . is itself a violation of the rights of the ‘parent’ state, and, if accompanied by armed support for the rebels, would constitute the use of force against the territorial integrity of the parent state contrary to Article 2(4) of the United Nations Charter.”¹²⁰ States have complete discretion in their recognition decisions when the secessionist entity at issue has “complete control of its territory,” and can recognize such states for the purpose of sanctioning the parent state. However, states are only justified in engaging in “premature” recognition if they are warranted in violating the territorial integrity of the parent state. While this imperative may constrain the discretion of states under other theories of recognition, it does not affect the sanction theory. The sanction theory only requires “premature recognition” (and any recognition at all, for that matter) when the parent state has been engaging in human rights abuses. Such abuses justify overriding the territorial integrity of the parent state through “premature” recognition.

The sanction theory operates unconstrained by territorial integrity if one of two conditions is true: either there is, in fact, no prohibition in international law and practice against “premature” recognition, or international law and practice reflect the notion that human rights abuses justify “premature” recognition. The widely accepted recognition of Slovenia, Croatia, Macedonia, and particularly Bosnia suggests that at least one of these conditions is true.

¹¹⁹ *Id.* § 202 cmt. f.

¹²⁰ *Id.* § 202, n.4.

When Croatia and Slovenia declared their independence, the Federal Government of Yugoslavia rejected their claims.¹²¹ Their recognition as independent states by the international community was certainly not accepted as legitimate by Yugoslavia. In fact, the federal government protested the recognition as “contrary to the sovereign rights of Yugoslavia which proceed from international, contemporary legal documents,”¹²² although it eventually accepted the independence of Slovenia.¹²³ For Croatia and Bosnia, recognition not only came without the consent of the parent state, but it also came at a time when neither state had “yet succeeded in achieving complete control of its territory”¹²⁴ At the time of Croatia’s recognition, the federal army was in the middle of Croatia and actively fighting with the Croatian army.¹²⁵ The government of Croatia had no control over more than a third of its territory.¹²⁶ Not long after recognition was granted, the U.N. felt it necessary to constitute a peacekeeping force, UNPROFOR, to help end the fighting in Croatia.¹²⁷ Given the necessity for a peacekeeping force and the fact that the parent state’s military was still at least partially in control of some of Croatia’s territory, it is hard to claim that the Croatian government had met a robust version of the Montevideo Convention’s “effective control” requirement for statehood, let alone the Restatement’s “complete control” requirement for non-premature recognition.

The recognition of Bosnia stands out as an even more extreme example of widely accepted “premature” recognition. In fact, the Yugoslav federal government specifically condemned it as such.¹²⁸ Following the vote for independence, there was widespread inter-ethnic fighting in Bosnia.¹²⁹ During this period, the Yugoslav National Army had “a substantial presence” on the ground in

¹²¹ Lowe & Warbrick, *supra* note 38, at 475 (“These assertions of statehood were not acquiesced in by the Federal authorities, nor have they been formally accepted by them since.”).

¹²² *Id.* at 479 (quoting INDEPENDENT, Jan. 16, 1992, at 8).

¹²³ Rich, *supra* note 47, at 49 (discussing the Federal Republic of Yugoslavia’s decision on August 13, 1992 to extend recognition to Slovenia).

¹²⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 202, cmt. f (1987).

¹²⁵ Warbrick, *supra* note 103, at 435.

¹²⁶ Rich, *supra* note 47, at 56.

¹²⁷ Warbrick, *supra* note 103, at 435.

¹²⁸ *Id.*

¹²⁹ *Id.*

Bosnia.¹³⁰ International forces, in the form of UNPROFOR, were also present.¹³¹ At the time of recognition, the government had “no effective control over any areas including the capital city”¹³² Not long after recognition, the President of Bosnia went so far as to say that Bosnia “could not protect its independence without foreign military aid.”¹³³

The Yugoslav federal government maintained that these facts proved that the recognition of Bosnia violated international law. In 1993, Bosnia filed an application with the International Court of Justice with the hope of bringing proceedings against the federal government of Yugoslavia. Bosnia accused Yugoslavia of “genocide, conspiracy and incitement to commit genocide, complicity in genocide, and a failure to prevent and punish genocide.”¹³⁴ In objecting to Bosnia’s application, Yugoslavia argued that the international community’s recognition of Bosnia violated international law.¹³⁵ The Court sidestepped Yugoslavia’s objections, and found that they had “jurisdiction independent of Bosnia’s legal soundness as a state.”¹³⁶ Unsurprisingly, Yugoslavia’s appointed judge ad hoc, Milenko Kreca, dissented on the grounds that Bosnia was not truly a state and that the international community’s recognition of Bosnia was illegal, following Yugoslavia’s arguments.¹³⁷

Judge Kreca argued that the international community had adopted the constitutive view of recognition in its approach to Bosnia, violating what he argued was the accepted norm, the declaratory view.¹³⁸ In his view, by recognizing Bosnia, the international community was actually attempting to turn it into a state, violating the territorial integrity of Yugoslavia and impermissibly interfering in Bosnia’s internal affairs.¹³⁹ Kreca

¹³⁰ Rich, *supra* note 47, at 50.

¹³¹ *Id.*

¹³² *Id.* at 56.

¹³³ *Id.* at 51 (quoting President Izetbegovic (quoted in ABC NEWS, May 5, 1992)).

¹³⁴ Thomas D. Grant, Comment, *Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)*, 33 STAN. J. INT’L L. 305, 306 (1997).

¹³⁵ *Id.*

¹³⁶ *Id.* at 309.

¹³⁷ *Id.*

¹³⁸ *Id.* at 326.

¹³⁹ *Id.* at 328.

further suggested that, without external aid, Bosnia could not have survived; it was only foreign military intervention that allowed Bosnia to actually function as a state.¹⁴⁰ At the time recognition was granted, the international community envisioned, and later put in place, a long-term military presence to maintain Bosnia as a state.¹⁴¹ Thus, at the time of recognition, Bosnia was not clearly a viable independent state, and, in Judge Kreca's mind, recognition was illegally constitutive and disruptive of Yugoslavia's internal affairs.

The argument that the international community had adopted the constitutive theory when it recognized Bosnia is simple word play. States did not necessarily think that they were constructing a state through recognition, or even that recognition was an essential element of Bosnia's statehood. They might just as well have thought that recognition would help Bosnia attain the other attributes necessary for statehood, or that it would help Bosnia, having already fulfilled the requirements for statehood, maintain itself as a state. The recognition decisions could simply be viewed as reflecting a low standard for the requirements for statehood, in which case the decision would serve simply as an acknowledgment of statehood, consistent with the declaratory theory. Judge Kreca and Yugoslavia's general point, however, seems valid: these recognition decisions clearly required little effective control on the part of the state, and cast doubt on whether there is a real effective prohibition against "premature" recognition, or that the standards for "premature" recognition are ever actually met.

In the case of Bosnia, and to a lesser extent Croatia, the international community recognized entities that were considered illegal secessionist entities by their parent states; that were engaged in fierce military conflict against their parent states in the midst of their own "territory;" that were not in control of significant portions of their territory; and that were essentially reliant on external aid, including significant military support, for their continued existence as states. In recognizing Bosnia and Croatia, the international community was recognizing extremely weak entities as states, against the protest of their parent state, at least partially as a means to ensure their survival as independent

¹⁴⁰ *Id.* at 329–30.

¹⁴¹ *Id.* at 332.

entities. The cases of Bosnia and Croatia thus suggest that a prohibition against “premature” recognition may not be a strong, or perhaps even weak, principle of international law.

Alternatively, the “premature” recognition of Croatia and Bosnia may have been justified by the specific situation in Yugoslavia; that is, while there is a general prohibition against “premature recognition” in international law and practice, the prohibition falls away under certain circumstances, specifically, if the parent state is engaged in human rights abuses. In the case of Yugoslavia, the federal government’s record on human rights was atrocious, with the Serb-controlled government engaging in a strategy of ethnic cleansing that amounted to genocide.¹⁴² Given its behavior, the claims of the central government for respect for its territorial integrity and non-interference in its internal affairs ring somewhat hollow. It may be that the federal government was seen to have forfeited its rights to make these claims.

While this forfeiture principle may not be explicit in international law,¹⁴³ in the context of secession, a similar idea has at least been implied. The 1970 United Nations Declaration on Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations was designed to encourage decolonization, while simultaneously making it clear that any “right of self-determination of peoples” was primarily applicable in the context of decolonization.¹⁴⁴ But it also “hinted at the possibility that established states might forfeit their right to territorial integrity if they abused the rights of minorities,”¹⁴⁵ when it announced that:

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

¹⁴² See Raymond Detrez, *The Right to Self-Determination and Secession in Yugoslavia: A Hornets’ Nest of Inconsistencies*, in *CONTEXTUALIZING SECESSION: NORMATIVE STUDIES IN COMPARATIVE PERSPECTIVE*, *supra* note 1, at 122 (describing the international sympathy the Bosniaks received as a result of “policies of ethnic cleansing and other atrocities”).

¹⁴³ See, e.g., *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES*, § 202 (1987) (making no mention of such an exception to the rule against premature recognition).

¹⁴⁴ Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 *YALE J. INT’L L.* 1, 41 (1998).

¹⁴⁵ *Id.* at 42.

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 as to race, creed, or colour.¹⁴⁶

Such a statement leaves room to wonder what happens to the territorial integrity of a state that fails to respect the equal rights of its people. In the case of Yugoslavia, the crimes of the state went far beyond treating its people unequally, to the point of genocide, leaving its claim to territorial integrity in doubt.

The limitation on territorial integrity inherent in the Declaration on Friendly Relations is subject to two interpretations given its origin in decolonization: either the parent state loses its right to territorial integrity as a general matter as a result of its bad behavior, or the parent state loses its right to territorial integrity only over the areas in which the violations of equal rights occur. This first understanding is fully consistent with the sanction theory of recognition: while the parent state's bad behavior justifies recognition of the secessionist entity, there need be no nexus between the bad behavior and the territory or people of the secessionist entity. The second understanding, on the other hand, is not fully consistent with the sanction theory: it would vitiate the parent state's claim to territorial integrity only in regards to secessionist entities that the parent state had abused, and so would allow recognition of only such abused entities to serve as a sanction for the parent state's bad behavior.

More recent pronouncements have suggested that it is the first understanding, compatible with the sanction theory and requiring no nexus between the bad behavior and the secessionist entity, which limits a state's right to territorial integrity. In 2006, the U.N. Security Council adopted Resolution 1674, reaffirming "the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."¹⁴⁷ Paragraph 138 of the Outcome

¹⁴⁶ *Id.* at 42-43, (quoting the Declaration on Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, at 340, U.N. Doc. A/8018 (1970)).

¹⁴⁷ S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006), available at <http://>

Document acknowledges that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”¹⁴⁸ Paragraph 139 acknowledges that “[t]he international community . . . has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”¹⁴⁹ However, “we are prepared to take collective action . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”¹⁵⁰ That is, if a state fails to protect its people, armed intervention, a clear violation of territorial integrity, is permitted.

The essential notions behind these commitments are that the parent state has a “responsibility” to protect its people and that the international community has a license to violate the territorial integrity of the parent state for the purpose of protecting the people when the state fails to fulfill its responsibility. It is not just that the people have a right to be protected, but that the state has a responsibility to protect them. When a state fails to protect, it forfeits its claim to territorial integrity. It is the abdication of this responsibility, rather than the suffering of a particular secessionist entity, that is at the heart of this commitment. This would be consistent with the sanction theory, which only advocates recognition in the wake of human rights abuses. Additionally, there is a requirement that the international community must act to protect people from human rights abuses. Under the sanction theory, that is exactly what the international community is doing when it recognizes a secessionist entity, whether or not the secessionist entity is the locus of the abuse. The Outcome Document suggests that the state loses its right to territorial integrity to the degree that the international community must violate its territorial integrity to fulfill the state’s failed obligation to protect its citizens. The international community’s actions are

www.un.org/News/Press/docs/2006/sc8710.doc.htm.

¹⁴⁸ 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/Res/60/1 (Oct. 24, 2005), available at <http://www.un.org/summit2005/documents.html>.

¹⁴⁹ *Id.* ¶ 139.

¹⁵⁰ *Id.*

limited to actions that will protect the abused population, not to actions that have some direct spatial relation to the abuse.

This broader loss of territorial integrity is essential, at least in armed intervention, to effectively protect the victims of abuse. If parent state A is launching missiles into territory B from various parts of the country, an armed intervention that simply sends troops into B, and does not further violate the territorial integrity of A, will be ineffective. In order to protect the people of B, it will be necessary for the armed intervention to target the sites throughout A's territory from which the missiles are launched. Stopping the abuse will involve a violation of A's territorial integrity as a whole—not just as to B, the precise target of the missiles. The justification for violating the state's territorial integrity is that doing so will stop the abuse; thus the state's territorial integrity is forfeited to the degree necessary to end the abuse.

The notion of general applicability is also consistent with the nature of other sanctions, such as political and economic ones. Political and economic sanctions are designed to deter bad behavior, and it is this bad behavior that justifies their imposition. Presumably, if they were not so justified, their imposition, like "premature" recognition, would constitute "an improper interference in the internal affairs of the parent state."¹⁵¹ But having been justified by human rights abuses, they are limited not to a particular area or a particular issue. Instead, they are limited by their purpose: to end such abuse. Economic sanctions need not be tailored to a particular geographic region or a particular abusive economic sector, but only to deterring bad behavior. Thus the limitation on territorial integrity, seemingly inherent in the Outcome Document and essential for the full operation of the sanction theory of recognition, is consistent with the general approach to responding to human rights abuses.

The case of Yugoslavia also lends support to the notion that a parent state's bad behavior leaves its territorial integrity jeopardized generally, and not just as to the territory in which the abuse occurs. While Yugoslavia had committed numerous human rights abuses, they occurred primarily within the territory of

¹⁵¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 202 cmt. f (1987).

Bosnia and Kosovo, and not in Slovenia and Macedonia.¹⁵² Nevertheless, despite the protests of the central Yugoslavian government that recognition of any entity within its territory would violate its territorial integrity, the international community signaled its willingness to consider for recognition, and eventually recognized, both Slovenia and Macedonia.¹⁵³ The cases of Slovenia and Macedonia suggest that Yugoslavia's bad behavior nullified its right to territorial integrity generally, and not only with respect to the territory in which its bad behavior had occurred.

On a related note, Lea Brilmayer has argued that secessionist entities

cannot be . . . evaluated without reference to claims to territory When a group seeks to secede, it is claiming a right to a particular piece of land, and one must necessarily inquire into why it is entitled to that particular piece of land, as opposed to some other piece of land – or to no land at all.¹⁵⁴

While in the general case, this may involve an evaluation of the group's "historical claim" to territory and numerous other factors,¹⁵⁵ the outcome of such an evaluation should not be determinative when the parent state is in the process of abusing human rights. In such cases, where the sanction theory recommends recognition, the secessionist entity's right to the land it is receiving need not be grounded on its own merits, but rather on the fact that the parent state's bad behavior has cost it the right to territorial integrity. In cases where the sanction theory recommends recognition, the secessionist entity's right to the land derives from the fact that the parent state, through its bad acts, has forfeited its right to the land, and the secessionist entity has earned it because recognizing the secessionist entity will serve as an effective sanction against the parent state, and not make the world worse off.

¹⁵² See Detrez, *supra* note 142, at 122 (discussing the reasons for giving particular groups in the former Yugoslavia the right to national self-determination and secession).

¹⁵³ See *supra* Section 3.2 (describing the process by which Slovenia and Macedonia were recognized by the international community).

¹⁵⁴ Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 201 (1991).

¹⁵⁵ *Id.* at 199.

Similarly, while the principle of *uti possiditis* generally constrains the recognition of secessionist entities by limiting recognition to secessionist entities along previously established territorial lines,¹⁵⁶ such considerations should be rejected in the case of a badly-behaved parent state. Some have argued that the doctrine is inapplicable to internal borders or to turning any non-international border into an international border, unless there is an international agreement or treaty stipulating that the principle be applied.¹⁵⁷ Even if the doctrine is applicable generally, it seems clear that if the human rights abuses of the parent state can justify armed intervention and other violations of territorial integrity, then they should also be able to justify the redrawing of interior boundary lines, which are frequently "arbitrarily drawn."¹⁵⁸ Just as a badly-behaved state loses its right to territorial integrity in a general sense, such a state should also lose any right to set interior boundaries that constrain recognition by the international community.

The international community is certainly familiar with the notion of redrawing internal boundaries in the formation of new state boundaries when states are guilty of human rights abuses, most notably in the case of post-World War II West and East Germany. And the standard in current practice seems to be subject to modification. The European Community claimed to apply the principle of *uti possiditis* in recognizing new states emerging from Yugoslavia.¹⁵⁹ During the initial round of recognition decisions, Kosovo was denied recognition perhaps in part because it was merely a "former autonomous province" and not one of Yugoslavia's "federal units."¹⁶⁰ But, as will be discussed *infra*, Kosovo eventually gained recognition, reflecting either a lowering

¹⁵⁶ See Ved P. Nanda, *Self-Determination and Secession Under International Law*, 29 DENV. J. INT'L L. & POL'Y 305, 313 (2001) (arguing that the principle of *uti possiditis* should be inapplicable when certain preconditions, like pre-agreements on border, are not met).

¹⁵⁷ See Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. U. L. REV. 50, 58-65 (2000) (arguing that the principle of *uti possiditis* is not, as claimed by the Badinter Commission, recognized as a general principle applicable to all cases of independence).

¹⁵⁸ See Halim Moris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 ILSA J. INT'L & COMP. L. 201, 214 (1997) (discussing self-determination arguments in favor of secession).

¹⁵⁹ Nanda, *supra* note 156, at 312.

¹⁶⁰ Rich, *supra* note 47, at 61.

of the standards of the boundaries necessary under the doctrine of *uti possiditis* or perhaps a notion that *uti possiditis* ceases to apply in the face of a badly-behaved parent state. If *uti possiditis* ceases to apply for badly-behaved states, then the sanction theory operates in harmony with this principle. If, however, *uti possiditis* operates generally, but with flexible standards, the sanction theory merely requires that international law lower its standards for administrative boundaries—for instance to the level of a conglomeration of townships, rather than provinces—when confronted with badly-behaving states.

International law and practice thus reflect either that there is no true prohibition against “premature” recognition or that the territorial integrity-based objections underlying the rule against “premature” recognition fall away in the case of states that commit human rights abuses, allowing “premature” recognition to the degree that it is calculated to deter such abuses, considerations that seem equally applicable to the principle of *uti possiditis*. Either stance on “premature” recognition is compatible with the sanction theory of recognition, which advocates recognition of secessionist entities only in the face of human rights violations by the parent state where it can be argued that the parent state has forfeited its right to territorial integrity and non-interference through its bad acts. International law and practice on territorial integrity thus appear to do little to constrain the sanction theory of recognition; to the degree that they do so, they should be moved in a direction that does not limit the international community’s use of this powerful tool for enforcing good behavior.

3.4. *Alternative Theories of Recognition*

In cases where parent states have not committed human rights abuses, in cases where the circumstances are such that recognition would not serve as an effective sanction, or in cases where the parent state has acquiesced to a secessionist movement, the sanction theory of recognition would not provide grounds for recognition. Instead, all of these cases could be met with non-recognition or could be governed by an alternative theory providing guidance for recognition decisions in such situations. In these types of cases, the sanction theory is indifferent as to how states choose to make their recognition decisions.

In cases where the parent state has committed abuse, and where recognition of a secessionist entity would effectively

sanction the parent state without making the world worse off, the sanction theory will conflict with any alternative theories that counsel non-recognition. Thus, the sanction theory requires that these theories be rejected in such cases. By focusing primarily on the secessionist entity and not on the parent state, these alternative theories allow the parent state to violate human rights with impunity, knowing that recognition of the secessionist movement will not be granted, no matter how bad the parent state's behavior. Whether constructed with the declaratory or constitutive theory in mind, these additional requirements blunt the effectiveness of recognition as a sanction against human rights abuses, eliminating one of the few tools that the international community has to deter such behavior.

The most straightforward alternative theories are based on the declaratory model's notion that recognition should be granted if and only if an entity meets the requirements of statehood.¹⁶¹ As discussed above, the most frequently cited outlines for these requirements are those put forth in the Montevideo Convention.¹⁶² If those requirements are adopted, along with the declaratory model's notion that states must recognize all entities that meet the requirements for statehood, we are left with a theory that suggests that all entities that meet the Montevideo Convention requirements, and only such entities, should be granted recognition.

While territory and population are clearly necessary for the secessionist entity to even qualify as an "entity," requiring more than a potential government with some degree of effective control ties the hands of the international community. If more is required of the secessionist entity the parent state can continue its abuse, knowing that the international community is prohibited from granting recognition to the secessionist entity in an attempt to stop the bad behavior. This view thus seems to ignore the reality of the situation: that the international community has very few tools at its disposal for deterring bad behavior. Given the importance of deterring states from violating human rights, and given the scarcity of deterrence methods, the international community should not bind itself to recognizing only states in complete

¹⁶¹ See GRANT, *supra* note 12, at 4 ("When the attributes which international law holds to define a state come to obtain within a community, existing states should declare that fact by according the community recognition.").

¹⁶² Montevideo Convention, *supra* note 3.

“effective control.” Instead, all that should be necessary is that the secessionist entity be capable of potentially controlling its territory after recognition is granted, and not be the type of entity whose recognition will lead to negative consequences greater than the positive consequences brought about by the sanction effects of recognition.

From a practical perspective, requiring effective control not only allows abusive parent states to continue their bad behavior in certain situations, but it also creates strong incentives for all states to prevent internal entities from possessing anything approaching effective control. This would lead states to avoid, for instance, the creation of autonomous units within themselves or the delegation of authority to local administrations, which seems, on the whole, to be a significantly negative consequence.¹⁶³ The sanction theory, on the other hand, would not change the incentives for such political arrangements, but would cabin itself to providing incentives for the parent state not to commit human rights abuses.

Other theories place additional requirements, beyond statehood, on secessionist entities for the granting of recognition. Because these alternatives make recognition, and even the threat of recognition, unavailable in certain circumstances where the parent state is committing human rights abuses, these theories impair the efficacy of recognition as a potential sanction and should be rejected. One theory, somewhat similar to the Montevideo requirements, is the notion that only federal units should be granted recognition.¹⁶⁴ Seemingly drawing its strength from a preference for maintaining territorial integrity¹⁶⁵ (odd, given that recognition of even a federal entity is disrupting the territorial integrity of the parent state), this view that federal boundaries should be maintained, seems, for a time, to have driven the non-recognition of Kosovo as a state, as discussed above.¹⁶⁶ In addition to providing states with incentives to avoid federalization,¹⁶⁷ this

¹⁶³ See Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31, 43–44 (1997) (arguing against any theories of secession that dispose states to act in ways that preclude potentially beneficial decentralization).

¹⁶⁴ See GRANT, *supra* note 12, at 91 (noting that federal units generally have an easier time securing self-determination, in the face of the territorial integrity principles, than other pieces of the parent state).

¹⁶⁵ *Id.*

¹⁶⁶ See *supra* Section 3.3.

¹⁶⁷ Buchanan, *supra* note 163, at 43–44.

requirement dulls the power of recognition as a sanction and suffers from a significant case of moral randomness.

Other requirements should be rejected for similar reasons. Crawford has proposed, as a criterion for statehood, a requirement that appears to be better stated as a condition for recognition: that the new entity be independent in the sense that it was not formed "under belligerent occupation," is not under "substantial external control," and does not suffer from "[s]ubstantial illegality of origin."¹⁶⁸ Secessionist entities are considered to be illegal in origin under this theory if they arise:

outside of the accepted rules of international law, particularly in regards to the use of force . . . in violation of a colonial entity's right to self-determination . . . without the consent of the existing sovereign state . . . [or are] based fundamentally on the denial of certain civil and political rights to the large majority of its population¹⁶⁹

In a similar vein, Sunstein and Amar have each proposed restrictions on recognition based on a notion that secession must be legal under the constitutional or local law of the parent state.¹⁷⁰

While these restrictions may be worthwhile for crafting a general theory of secession, they should be rejected in the context of parent states that are committing human rights abuses. As with other requirements, they reduce the effectiveness of recognition as a sanction by making it unavailable in certain situations, leaving the parent state's behavior uncontrolled. Further, while many of the norms behind these requirements may have strong pull in other contexts, they lose much of their force when the parent state is committing human rights abuses: the consent of the parent state and respect for the constitutional or local law of the parent state seem particularly inapposite, as does concern for the right to self-determination of a colonial entity that is engaging in serious human rights abuses. At least some external control also seems forgivable in the sense that the alternative is to leave the secessionist entity under the control of an abusive state. The same could be said for allowing the secessionist entity to have arisen

¹⁶⁸ Grant, *supra* note 39, at 437.

¹⁶⁹ PEGG, *supra* note 40, at 48.

¹⁷⁰ See Grant, *supra* note 134, at 316 (attributing Sunstein and Amar's proposed requirement to the "special U.S. concern for the written constitution").

through some degree of violation of international law, given that refusing to recognize the secessionist entity will leave it under the control of a parent state with a proven record of violating international law itself.

Others have argued that the right to secession and independence, and presumably the right to recognition, hinges on advancing “national self-determination.”¹⁷¹ Under these theories, “political and cultural (or ethnic) boundaries must, as a matter of right, coincide.”¹⁷² Regardless of the justification for such a theory in other contexts, it should be rejected as an additional criterion for recognition when utilized as a sanction. Such a requirement would reduce the effectiveness of the sanction, and would insulate the parent state from punitive recognition whenever the secessionist entities within its borders were either nationally diverse or merely an incomplete subset of a particular nationality within the parent state. There are numerous existing states that are nationally heterogeneous, or which contain only a fraction of a particular nationality, and, in the face of the parent state’s bad behavior, there is nothing inherently wrong with recognizing one more.

Finally, democracy has been proposed as a requirement for the recognition of secessionist entities.¹⁷³ While demanding evidence that the people of the secessionist entity actually desire to secede, as in the case of Bosnia,¹⁷⁴ seems reasonable, demanding “proof of democratic institutions” seems unwise. Such a requirement would disqualify secessionist entities from recognition and thus allow the parent state to continue its bad behavior with knowledge that, until the secessionist entity had gone through the arduous task of developing democratic institutions, the secessionist entity could not be recognized and thus the parent state could not be sanctioned. Further, as with the requirements of local autonomy and federalization, a requirement of democracy could create incentives for parent states to avoid democracy both generally and at a local level to prevent

¹⁷¹ See Margaret Moore, *Introduction: The Self-Determination Principle and the Ethics of Secession*, in NATIONAL SELF-DETERMINATION AND SECESSION 1, 7 (Margaret Moore ed., 1998) (providing an overview of this theory).

¹⁷² *Id.* (internal quotation omitted).

¹⁷³ See GRANT, *supra* note 12, at 94 (discussing how state practice has accreted a criterion of democracy to the prerequisites of statehood).

¹⁷⁴ See Lowe & Warbrick, *supra* note 103, at 434 (citing Bosnia as an example where “there was inadequate evidence that the people were in favour of independence”).

secessionist entities from building the capability to develop their own democratic institutions or transform the parent state's democratic institutions into their own.¹⁷⁵ While democracy is an excellent aspiration for the international community, in the context of parent states that commit human rights abuses, demanding it of secessionist entities seems to be a case of the best being the enemy of the good.

Alternative theories may also require any number of factors in addition to recognition. To the degree that they insulate a parent state from the sanction of recognition by making it impossible for a secessionist entity to be recognized, they should be resisted. One instance of such a combination of requirements was the European Community's "Declaration on the Guidelines on Recognition of new States in Eastern Europe and the Soviet Union," discussed above.¹⁷⁶ As their name suggests, of course, the Guidelines were not a general theory of recognition, but were crafted for a specific situation and were inherently tied up with a particular region and political situation. Furthermore, they required not only that the secessionist entities be democratically constituted, but also that they accept "the appropriate international obligations," commit themselves "to a peaceful process and to negotiations,"¹⁷⁷ and meet a number of additional criteria: demonstrate their "respect for the provisions" of the U.N. Charter and other international law documents;¹⁷⁸ provide sufficient "guarantees for the rights of [] ethnic and national groups and minorities;"¹⁷⁹ "respect [] the inviolability of all frontiers" and acknowledge that they could "only be changed by peaceful means and by common agreement;"¹⁸⁰ commit to "disarmament and nuclear non-proliferation" as well as "security and regional stability;"¹⁸¹ and express their willingness to "settle by agreement, including . . . arbitration, all questions concerning State succession and regional

¹⁷⁵ See Buchanan, *supra* note 163, at 43 (generally discouraging any requirement that creates perverse incentives undermining morally sound principles of international law).

¹⁷⁶ See *supra* Section 3.2.

¹⁷⁷ Lowe & Warbrick, *supra* note 38, at 477 (quoting the Declaration of Guidelines on Recognition of New States in Eastern Europe and the Soviet Union).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

disputes.”¹⁸² In other pronouncements, the European Community also made it clear that the states had to accept “provisions on human rights suggested by the EC Conference on Yugoslavia and the continued work of the Conference and . . . the work of the Security Council in Yugoslavia,”¹⁸³ and adopt “constitutional and political guarantees ensuring that it has no territorial claim towards a neighboring Community State, including the use of language which implies territorial claims.”¹⁸⁴

While this laundry list of requirements might appear quite difficult to meet, in fact, most of the requirements required little more than commitments and promises. The notion of conditioning recognition on promises extracted from the secessionist entity works perfectly well with the sanction theory to the extent that it is clear to all parties involved that the promises can be extracted. Given the desire of the secessionist entity to achieve recognition, they will have incentives to make the promises and conform to them, and the moment of recognition is an excellent time to extract such promises for the good of the international community and for the population of the secessionist entity.¹⁸⁵ Further, as long as the parent state knows that the only promises that will be demanded of the secessionist entity are of the type that the secessionist entity is already willing to make without delay, then conditioning recognition on such promises will form no barrier to deterrence, and can simply increase the utility gained from the recognition decision by having it serve simultaneously as a deterrent and as a mechanism to encourage the secessionist entity to make positive commitments. As long as the secessionist entity can make the promises easily, the parent state will know that such requirements will not form an effective bar to recognition, and thus will not give the parent state license to commit human rights abuses for fear of recognition. Any promises that would effectively disqualify secessionist entities from recognition, however, should be rejected, as they will simply serve to allow the parent state to continue its bad behavior. Additionally, while requiring commitments like those laid out by the European Community is quite appealing, promises are, after all, only promises.

¹⁸² *Id.*

¹⁸³ *Id.* at 478.

¹⁸⁴ *Id.*

¹⁸⁵ BUCHANAN, *supra* note 3, at 170.

These theories all have much to say for themselves; in situations where the sanction theory does not apply, the international community may wish to adopt one of these alternatives, or some combination of them. But in situations where the sanction theory recommends recognition, the international community should reject their added requirements. The positive effects for human rights brought about by using recognition as a sanction are simply too weighty to be ignored.

4. THE SANCTION THEORY IN USE

4.1. Introduction

In addition to providing a better way to think about recognition and its benefits to the international community, recent practice suggests that the sanction theory of recognition is becoming one of the standard modalities for the enforcement of human rights. While recent practice is not inconsistent with other alternative theories, its consistency with the sanction theory provides evidence that the impulses behind this theory have come to influence the thinking of the international community. In addition to the recognition of states in the former Yugoslavia, discussed above, which appears to have come in response to the central government's mistreatment of its people,¹⁸⁶ the recognition decisions in the cases of Somaliland, Chechnya, and Kosovo all lend support to this notion.

4.2. Somaliland

The Republic of Somaliland is a secessionist entity within the borders of Somalia. During the colonial period, the Republic of Somaliland was a British colony, while the rest of modern-day Somalia constituted Somalia Italiana, an Italian colony.¹⁸⁷ In June of 1960, Somaliland gained its independence from Britain, and was quickly recognized as a state by the United Nations.¹⁸⁸ In July, Somaliland united with the newly independent Somalia Italiana to

¹⁸⁶ See *supra* Sections 3.2.-3.3. (examining the sanction theory via the recognition of Slovenia, Croatia, Bosnia, and Macedonia).

¹⁸⁷ Alison K. Eggers, Note, *When Is a State a State? The Case for Recognition of Somaliland*, 30 B.C. INT'L & COMP. L. REV. 211, 212 (2007).

¹⁸⁸ *Id.*

form the modern-day Somalia.¹⁸⁹ Prior to colonization, Somaliland had a history “as a stable state,” something neither Somalia Italiana nor Somalia as a whole could claim.¹⁹⁰ Almost immediately after unification, the people of Somaliland held a referendum in which they voted strongly against unification and for independence, but the referendum went unheeded.¹⁹¹

Unified, “[n]orthern grievances against southern domination began appearing almost immediately [T]he south monopolized all the key political posts The centralization of government in Mogadishu [in the south] . . . meant that economic and political opportunities also became concentrated there. Additionally, the south provided the country’s flag, its constitution, and its national anthem.”¹⁹² When Siad Barre came to power in 1969, Somaliland’s fortunes “took a dramatic turn for the worse.”¹⁹³ Somaliland “suffered from extensive and systematic human rights violations during Barre’s regime,”¹⁹⁴ which lasted until early 1991.¹⁹⁵

In the eighteen years since Barre’s fall, Somalia has seen nothing but fighting and failed governments;¹⁹⁶ its government has suffered a “complete collapse,”¹⁹⁷ and it currently lacks any “sort of governmental structure.”¹⁹⁸ Somaliland, on the other hand, has been “a comparative picture of stability and good governance.”¹⁹⁹ As for its eligibility for recognition, Somaliland “easily meets the criteria set forth by the Montevideo Convention,”²⁰⁰ including possessing a government in effective control of its territory and with the capacity to enter into foreign relations.²⁰¹ Somaliland “has

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² PEGG, *supra* note 40, at 88.

¹⁹³ *Id.*

¹⁹⁴ MICHAEL SCHOISWOHL, STATUS AND (HUMAN RIGHTS) OBLIGATIONS OF NON-RECOGNIZED *DE FACTO* REGIMES IN INTERNATIONAL LAW: THE CASE OF ‘SOMALILAND’ 163 (2004).

¹⁹⁵ PEGG, *supra* note 40, at 89–90.

¹⁹⁶ SCHOISWOHL, *supra* note 194, at 105–10.

¹⁹⁷ Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L L. REV. 107, 113 (2002).

¹⁹⁸ SCHOISWOHL, *supra* note 194, at 110.

¹⁹⁹ PEGG, *supra* note 40, at 90–91.

²⁰⁰ Eggers, *supra* note 187, at 217.

²⁰¹ *Id.* at 217–19.

suffered from a distinct lack of external assistance” and its independence cannot be challenged.²⁰² Somaliland’s government has “broad popular support,” albeit with “some opposition,” and it is structured in a democratic manner,²⁰³ under a constitution adopted democratically.²⁰⁴ Furthermore, “the government has undertaken considerable efforts to satisfy at least the minimum international human rights standards.”²⁰⁵

Somaliland thus seems to meet most of the requirements proposed by the theories of recognition that focus on the intrinsic merits of the secessionist entity: it meets the Montevideo Convention criteria, it is independent, it is democratically constituted, its boundaries were set in the past, and it has shown respect for at least a base level of human rights. Moreover, the parent state from which it is attempting to secede can barely be called a state at all; more accurately, it is a power vacuum that remains in the wake of a state’s complete collapse. Despite all this, Somaliland has not been recognized as an independent state.²⁰⁶ “Just cause” and “just cause plus” theories of recognition also seem to suggest that recognition should be granted: in addition to Somaliland’s commitment to basic human rights standards, it suffered decades of abuse at the hands of its parent state, followed by fifteen years in which the supposed parent state has fulfilled none of the requirements of a parent state.²⁰⁷

Somaliland’s non-recognition, however, is completely consistent with the sanction theory of recognition. The sanction theory recommends recognition when it would serve as an effective sanction for the bad behavior of a secessionist entity’s parent state. But it is difficult, given Somalia’s complete collapse, even to talk about Somalia as a state at all; given its situation, it is certainly not the type of entity that can be sanctioned. Somalia is incapable of doing anything, let alone being deterred (or punished, for that matter). Furthermore, sanctioning Somalia would have no general deterrent effect, as states in similar situations are just as

²⁰² PEGG, *supra* note 40, at 96–97.

²⁰³ *Id.* at 94.

²⁰⁴ SCHOISWOHL, *supra* note 194, at 133–35.

²⁰⁵ *Id.* at 136.

²⁰⁶ PEGG, *supra* note 40, at 91.

²⁰⁷ *But see*, SCHOISWOHL, *supra* note 194, at 163–64 (arguing that Somaliland no longer has a just cause to secede because the government that abused Somaliland is no longer in power).

inherently impossible to sanction. The international community's non-recognition of Somaliland is completely consistent with the sanction theory of recognition because recognizing Somaliland would not serve as an *effective* sanction.

4.3. *Chechnya*

The history of the relationship between Russia and Chechnya for the past 200 years is ugly, with violence rampant through Russia's attempts first to colonize Chechnya, then to consolidate its control through various methods.²⁰⁸ Russia's most horrendous behavior occurred under Stalin's rule, when the entire population of Chechnya—over 400,000 Chechens—was forcibly removed by the Russian military.²⁰⁹ In addition to those killed for resisting or for being too “logistically complicated” to move, tens of thousands died during the “resettlement” process and over 100,000 died after being relocated.²¹⁰ After Stalin's death, the Chechens returned, and while tensions ran high between the Chechens and the Russians that had replaced them, they managed an “uneasy... co-existence.”²¹¹

As the Soviet Union was crumbling, Dzhokhar Dudaev was democratically elected President of Chechnya. Upon his inauguration in November 1991, he declared Chechnya independent.²¹² While the Russian military briefly attempted to remove Dudaev from power, they failed to do so, and Russian troops vacated Chechnya.²¹³ From then until 1994, Chechnya had “de facto” independence.²¹⁴ In December of 1994, Russia attacked, leading to a twenty-month war with over 45,000 killed.²¹⁵ Twenty-seven thousand civilians were killed in Russian attacks on Grozny alone.²¹⁶ Much of the Russian military action in Chechnya appears

²⁰⁸ See generally TONY WOOD, *CHECHNYA: THE CASE FOR INDEPENDENCE* 19-39 (2007) (outlining tragic historical events that confronted Chechens from the sixteenth century to the nineteenth with emphasis on Russian invasions).

²⁰⁹ *Id.* at 36-38.

²¹⁰ *Id.* at 37-38.

²¹¹ *Id.* at 43.

²¹² *Id.* at 51.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 59.

²¹⁶ *Id.* at 71.

to have been indiscriminate or specifically targeted at civilians.²¹⁷ Dudaev himself was far from a model leader,²¹⁸ and the Chechens' conduct in the war was far from exemplary.²¹⁹ Nevertheless, the Chechens eventually defeated the Russians, and as of 1996, Chechnya was once again *de facto* independent.²²⁰ This independence was far from perfect, with widespread violence and corruption, but it lasted in full for three years, until 1999.²²¹ Russia eventually invaded again, this time successfully taking power, but not without bombing marketplaces and lines of fleeing refugees, holding civilians in detention camps for torture and execution, and targeting civilians for various "barbaric acts."²²²

At no point during Chechnya's various moments of *de facto* independence did another state recognize it as an independent state, with the exception of Afghanistan's Taliban government.²²³ Its *de facto* independence from 1991-1994, and to a lesser extent, its second *de facto* independence from 1996-1999, would seem to justify recognition under a Montevideo Convention-based theory of recognition.²²⁴ Recognizing Chechnya would also seem to be consistent with the goal of advancing self-determination. And while the behavior of the Chechens in the war against Russia might disqualify it from recognition under a "just cause plus" theory of recognition, Russia's indisputably worse behavior undoubtedly justified recognition under a simple "just cause" theory of recognition.

The international community's non-recognition of Chechnya, however, is completely consistent with the sanction theory of recognition. The sanction theory only requires recognition when doing so would serve as an effective sanction for the bad behavior of the parent state, and where recognition would not make the world worse off. Recognizing Chechnya, however, fails for two reasons: it would not serve as an *effective* sanction, and it might

²¹⁷ *Id.* at 71-72.

²¹⁸ *See id.* at 60-66 (detailing problems with Dudaev's leadership, particularly economic policy failures).

²¹⁹ *See, e.g., id.* at 72-73 (describing a Chechen raid on a Russian hospital).

²²⁰ *Id.* at 75.

²²¹ *Id.* at 81-94.

²²² *Id.* at 97-121.

²²³ Thomas D. Grant, *Current Development: Afghanistan Recognizes Chechnya*, 15 AM. U. INT'L L. REV. 869, 869-71 (2000).

²²⁴ GRANT, *supra* note 12, at 29.

make the world worse off. As for serving as an effective sanction, recognition can only be effective if the new state, once recognized, can remain independent of the parent state. If the parent state can simply overrun the new state and reincorporate it into its own territory, then the recognition will have been in vain. Given Russia's success in regaining control of Chechnya following its second *de facto* independence, it seems unlikely that recognition, without foreign military aid, could have stopped Russia. Similarly, given Russia's aggressiveness and military power, it is unclear that even a significant foreign military presence in a newly recognized Chechnya could have kept it independent of Russia, and thereby made recognition an effective sanction.

Furthermore, even if a large foreign military presence could have stopped Russia from quashing Chechnya's independence, the likely result would have violated the requirement that the recognition decision not make the world worse off. Not only would the recognition have raised the already high tensions between the West and Russia, a nuclear superpower, but it also would have likely led to significant and ongoing conflict between Russia and the foreign military presence that would be necessary to secure Chechnya's independence. Given these enormous consequences, and Chechnya's own bad behavior, it seems unlikely that the possible deterrent effect achieved by recognition of Chechnya would be justified: it would likely make the world worse off.

Thus, despite Russia's bad behavior, the sanction theory of recognition would not have recommended recognition for Chechnya at any point. Given Russia's aggressiveness and military might, recognition of Chechnya would likely not have secured its independence, thereby negating the deterrent effect of recognition, as well as the subsidiary goal of incapacitating the parent state with regards to the secessionist entity. Further, given the bloody conflict that would have likely ensued had the international community provided the requisite military support to keep Chechnya independent, and thus made recognition an effective deterrent, the negative consequences of recognizing Chechnya would likely have outweighed the positive sanction effects of recognizing Chechnya. Therefore, the recognition decision would have made the world worse off. As Russia remains aggressive and militarily powerful, it is unlikely that the sanction theory would ever recommend recognition of Chechnya, or any

secessionist entity within Russia's borders, regardless of Russia's bad behavior throughout its territory.²²⁵

4.4. Kosovo

For centuries, there has been conflict between the Kosovar Albanians and the Serbs, with the Serbs claiming that Kosovo is part of Serbia, and the Kosovar Albanians claiming a status as an independent nation.²²⁶ Nevertheless, the Kosovar Albanians were unable to gain recognition as an independent nation throughout the 20th century, and Kosovo was considered part of Yugoslavia.²²⁷ When communist Yugoslavia was established in the wake of World War II, the Kosovar Albanians "were granted a degree of autonomy within Serbia."²²⁸ Eventually, under Yugoslavia's 1974 constitution, Kosovo was granted "significant autonomy. Although it was technically still within Serbia, in reality the region was granted a status similar to that of the constituent republics of the federation."²²⁹

The Kosovar Albanians, however, desired the status of an actual republic, but their demands were met with violence and repression.²³⁰ Eventually, in 1989, Kosovo's autonomy was extinguished, and its people were "exposed to massive abuse of their human rights and civil liberties."²³¹ After watching other secessionist entities within Yugoslavia gain recognition as states while its own requests for recognition went unheeded,²³² in 1998, Kosovo turned to the Kosovo Liberation Army and guerilla

²²⁵ Almost identical statements could be made about the international community's continuing non-recognition of Tibet and Taiwan. While China has committed human rights abuses throughout its territory, and many theories of recognition would impel the acknowledgment of Tibet and Taiwan as new states, the sanction theory would not counsel recognition. Given China's aggressiveness and military might, recognition would not serve as an effective sanction, and would likely make the world worse off.

²²⁶ Agon Demjaha, *The Kosovo conflict: A perspective from inside*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION* 32, 32-33 (Albrecht Schnabel & Ramesh Thakur eds., 2000).

²²⁷ *Id.* at 33.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² See Detrez, *supra* note 142, at 123-25 (examining the international community's inconsistent approach "in addressing the question of national self-determination" with respect to national communities in Yugoslavia).

warfare to attain independence.²³³ Serbia responded with ethnic cleansing,²³⁴ forcibly deporting over 800,000 Kosovar Albanians, murdering over 10,000, and raping many more.²³⁵ As a result of large-scale NATO air strikes and the threat of a ground invasion, Serbia eventually agreed to withdraw its troops from Kosovo and allow the U.N. to establish a “protectorate” there.²³⁶ Since that time, over 16,000 troops have attempted to keep the peace in Kosovo,²³⁷ although they have not been completely successful in stopping Kosovar Albanian reprisals against Serb civilians.²³⁸

Kosovo was not immediately granted recognition in the wake of Serbia’s withdrawal. Nevertheless, the Kosovar Albanians perceived that “NATO’s humanitarian intervention and the establishment of Kosovo as an international trusteeship in everything but name appeared to set the track for an inevitable move to independence.”²³⁹ After years of deadlock and dodging the question, the U.N. proposed a plan for an independent Kosovo.²⁴⁰ On February 17, 2008, Kosovo declared its independence,²⁴¹ and while Serbia and many other states continue to contest its independence, by March 19, 2008, over 30 countries had recognized it as a new state.²⁴²

Understanding the U.N. trusteeship as a long path towards recognition, Kosovo would likely have gone unrecognized under a Montevideo Convention-based theory of recognition: without the

²³³ Demjaha, *supra* note 226, at 34.

²³⁴ *Id.* at 34–37.

²³⁵ Arne Johan Vetlesen, *The logic of genocide and the prospects of reconciliation*, in *KOSOVO BETWEEN WAR AND PEACE* 37, 43 (Tonny Brems Knudsen & Carsten Bagge Lausten eds., 2006).

²³⁶ Demjaha, *supra* note 226, at 35–39.

²³⁷ See Thomas Omestad, *Kosovo Deadline Passes, Making Independence Likely*, U.S. NEWS AND WORLD REP., Dec. 10, 2007, available at <http://www.usnews.com/articles/news/2007/12/10/kosovo-deadline-passes-making-independence-likely.html>.

²³⁸ Demjaha, *supra* note 226, at 37.

²³⁹ Tonny Brems Knudsen, *From UNMIK to self-determination? The puzzle of Kosovo’s future status*, in *KOSOVO BETWEEN WAR AND PEACE*, *supra* note 235, at 156, 160.

²⁴⁰ Omestad, *supra* note 237.

²⁴¹ Associated Press, *Kosovo Declares Independence*, MSNBC, Feb. 18, 2008, <http://www.msnbc.msn.com/id/23203607/>.

²⁴² Douglas Hamilton, *Neighbors’ Kosovo Recognition Deals Blow to Serbia*, REUTERS, Mar. 19, 2008, available at <http://www.reuters.com/article/worldNews/idUSL172863120080319>.

support of NATO and the U.N., Kosovo was unable to protect its people from Serbia's military, and thus could not be said to have had a government that was in effective control of its territory. On the other hand, Kosovo's recognition is in line with "just cause" theories of recognition,²⁴³ although its violent origins and subsequent misbehavior toward Serb civilians might undermine its claim to recognition under a "just cause plus" theory of recognition.

The sanction theory of recognition, however, would certainly recommend recognition of Kosovo. In light of the international community's earlier recognitions of Bosnia, Macedonia, Slovenia, and Croatia, opposed by Serbia and discussed above,²⁴⁴ the international community was fully cognizant of its ability to effectively sanction Serbia through recognition; it was fully capable of effectively guaranteeing the independence of newly recognized states in the face of Serbian opposition. Further, Serbia's atrocious human rights abuses were exactly the type of behavior that the sanction theory of recognition is designed to deter.

The recognition of Kosovo can be understood as a sanction for Serbia's bad behavior not only in Kosovo, but also for Serbia's earlier bad behavior in Bosnia and Croatia. Recognizing Kosovo can also be understood as a sanction not only for bad behavior *qua* bad behavior, but also as a sanction for bad behavior insofar as it represented a willful refusal to reform. Under the sanction theory, the international community's recognition of Bosnia, Croatia, Slovenia, and Macedonia was a signal for Serbia to reform its bad behavior. In ignoring this signal by engaging in further human rights abuses in Kosovo, Serbia's bad behavior amounted to flouting the international community's demand that it reform its behavior and threatened to undermine the general deterrent power of the sanction theory of recognition. Thus, the recognition of Kosovo is consistent not only with the sanction theory of recognition generally, but also with a desire to protect the efficacy of the sanction theory as a tool for combating human rights abuses.

²⁴³ Detrez, *supra* note 142, at 132.

²⁴⁴ See *supra* Section 3.2.-3.3. (examining the sanction theory of recognition and the principle of territorial integrity via the recognition of Slovenia, Croatia, Bosnia, and Macedonia).

5. CONCLUSION

The cases of Somaliland, Chechnya, Kosovo, and the other secessionist entities discussed throughout this Article are not intended to prove that the sanction theory of recognition has been expressly adopted by the international community. Instead, they simply show that the international community has behaved in ways that are quite consistent with the sanction theory of recognition in many cases, and that many of the considerations driving the sanction theory of recognition appear to be driving the actual recognition decisions made by the international community. In addition to these cases, international practice and international law appear to be generally compatible with the adoption of the sanction theory of recognition with only minor modification.

Given this consistency with law and practice, the sanction theory of recognition should be adopted by the international community. In those cases where a parent state has committed human rights abuses, and recognition of a secessionist entity would serve as an effective sanction without making the world worse off, intrinsic considerations should be put aside and recognition should be granted. The international community is justified in harming the interests of the parent state and violating its territorial integrity in such cases because the parent state has violated its essential obligations as a state and thus forfeited its right to object. More fundamentally, the international community is justified in adopting the sanction theory of recognition because its returns are so great. The international community has very few tools at its disposal for enforcing good human rights behavior on the part of states. The sanction theory, by shifting the focus of recognition decisions from the intrinsic merits of the secessionist entity to the bad behavior of the parent state, while rejecting any requirement of a nexus between the bad behavior and the secessionist entity, maximizes the benefits that can be achieved through recognition, and transforms recognition into a powerful tool to combat human rights abuses.