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BETWEEN STATEHOOD AND SOMALIA: REFLECTIONS OF SOMALILAND STATEHOOD

I. INTRODUCTION

Since the early 1990s, Somalia has lacked the basic characteristics of a state as recognized by the international community.¹ At independence, Somalia—officially the Somali Republic after the union of former British Somaliland in the North and former Italian Somaliland in the South²—was regarded as one of the least likely African countries to fall into the category of a “failed state.”³ The majority of Somalians are ethnically Somali; they share a similar adherence to *Sunni* Islam and nomadic pastoralism.⁴ Below these surface similarities, however, a deep division in history exists between the northern Somaliland and the southern region.⁵ This division between the North and South has not only created tension in government, it has also led to civil war.⁶

Out of the ashes of the North-South violence, Somaliland emerged as a de facto state.⁷ Saddled with early political and economic challenges, Somaliland “has [since instituted] its own democratic government, police force, army, financial system, and currency.”⁸ During the same period, Somalia has effectively ceased to exist.

1. See *infra* notes 73–90, 133–45 and accompanying text.

2. See *infra* notes 8–25 and accompanying text.

3. Ian S. Spears, *Reflections on Somaliland & Africa’s Territorial Order*, 30 REV. OF AFR. POL. ECON. 89, 92 (2003). “In superficial terms, given that its commonalities in language, ethnic identity and religion make it unique among developing states, Somalia might once have been regarded as one of the least likely African countries to experience state breakup.” *Id.*

A “failed” state is characterized by a “government [that] is unable to discharge its basic governmental functions with respect to its populace and territory.” MICHAEL SCHOISWOHL, STATUS AND (HUMAN RIGHTS) OBLIGATIONS OF NON-RECOGNIZED DE FACTO REGIMES IN INTERNATIONAL LAW: THE CASE OF ‘SOMALILAND’ 26–27 (2004). Five basic governmental functions exist: (1) to exercise sovereign control over territory; (2) to have sovereign oversight and supervision of the nation’s resources; (3) to exercise the effective and rational collection of revenue; (4) to maintain adequate national infrastructure, such as roads and telephone systems; and (5) to have the capacity to govern and to maintain law and order. Ali A. Mazrui, *The African State as a Political Refugee: Institutional Collapse and Human Displacement*, in AFRICAN CONFLICT RESOLUTION: THE U.S. ROLE IN PEACEMAKING 9, 11 (David R. Smock & Chester A. Crocker eds., 1995).

4. MARK BRADBURY, AFRICAN ISSUES: BECOMING SOMALILAND 9 (2008). Many countries are multi-ethnic. In fact, ninety percent of the world’s countries have two or more ethnic groups. MILTON J. ESMAN, ETHNIC POLITICS 2 (1994).

5. BRADBURY, *supra* note 4, at 9.

6. See *infra* notes 32–41 and accompanying text.

7. Brad Poore, *Somaliland: Shackled to a Failed State*, 30 STAN. J. INT’L L. 117, 117 (2007).

8. *Id.*

This Note recognizes that under international law, Somaliland is subject to the rule of law of the parent state, a rule firmly established by the Supreme Court of Canada in *Reference re Secession of Quebec*.⁹ The Supreme Court of Canada, however, also developed remedial secession theory as a mechanism to enable a minority region to negotiate secession with the parent state.¹⁰

By using remedial secession theory as a baseline, this Note argues that a minority region that lacks internal self-determination and the right to negotiate for secession but otherwise meets the requirements for statehood should be permitted to declare independence. Part II of this Note summarizes the competing historical, economic, and political traditions of the Republic of Somaliland and the Somali Republic. Part III offers an overview of the competing theories of recognition under international law. Part IV begins with an analysis of unilateral secession theory followed by an analysis of remedial secession as a competing theory. Part V argues that, absent internal self-determination and the right to negotiate for secession, remedial secession theory offers an avenue to Somaliland independence. Finally, Part VI discusses the potential ramifications of non-recognition, specifically focusing on terrorism.

II. HISTORICAL SETTING

Beginning in the late nineteenth century, the British began colonizing Somaliland.¹¹ Because British interest was limited to coastal regions, its civil administration was rather lenient.¹² As a result, traditional societal structures were kept autonomous from British rule.¹³ To fund its administration, however, the British relied heavily on imperial treasuries, resulting in the stagnation of the colony.¹⁴

9. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 112–13 (Can.).

10. *Id.* at 86–88, 97–98.

11. SCHOISWOHL, *supra* note 3, at 111. The northern orientation and proximity of Somaliland to the Gulf states has long distinguished it from Somalia. Spears, *supra* note 3, at 93. In 1839, the British began to occupy the port of Aden in present-day Yemen. As a result, Somaliland became vital to the protection of shipping routes and the maintenance of a steady meat supply. To secure these routes, several treaties were executed between the British government and territorial leaders in Somaliland. BRADBURY, *supra* note 4, at 25–26.

12. SCHOISWOHL, *supra* note 3, at 111. British indirect rule was intended to reinforce stable governance while limiting resistance to colonialism. *Id.* at 28.

13. *See id.* at 111.

14. BRADBURY, *supra* note 4, at 30. “[B]etween 1920 and 1940 the colony stagnated: a few roads were cleared, some agricultural projects were started, a few schools were built and some students were sent to Sudan for education . . .” *Id.*

During this period, the Italian government was busy establishing its own “sphere of influence” in southern Somalia.¹⁵ Unlike the British in northern Somalia, however, the Italian government was focused on complete control of the territory.¹⁶ Because of these different administrative policies, the British North lagged far behind the Italian south in infrastructure and skilled labor.¹⁷

For a short period during the Second World War, the Italian government occupied British Somaliland.¹⁸ Within a year, however, British forces had reestablished control over the region.¹⁹ Following the war, British Somaliland was restored to protectorate status in 1948 while Italian Somaliland was placed under UN trusteeship.²⁰ The trusteeship was intended to bring Italian Somaliland to independence.²¹ During this time, British interest in the North began to wane, accelerating the timetable for independence.²²

15. SCHOISWOHL, *supra* note 3, at 98.

16. Peggy Hoyle, *Somaliland: Passing the Statehood Test?*, in IBRU BOUNDARY AND SECURITY BULLETIN 80, 80 (2000). “The Italians intended to plant a colony of settlers and commercial entrepreneurs in the region The motivation was threefold: to ‘relieve population pressure at home,’ to offer the ‘civilizing Roman mission’ to the Somalis, and to increase Italian prestige through overseas colonization.” FEDERAL RESEARCH DIVISION, SOMALIA: A COUNTRY STUDY 14 (Helen C. Metz ed., 1993). The Italians developed large-scale projects in southern Somalia including a widespread plantation system. *Id.*

17. *Id.* Under UN trusteeship, the pace of development in Italian Somaliland far outpaced that in British Somaliland. BRADBURY, *supra* note 4, at 31. While Somali development accelerated, British “benign neglect” left British Somaliland underdeveloped. Gérard Prunier, *Somaliland Goes It Alone*, 97 CURRENT HISTORY 225–28 (1998). This disparity in development was further exacerbated following India’s independence. BRADBURY, *supra* note 4, at 32. Ultimately, the different economic and political patterns established the groundwork for significant problems during reintegration. FEDERAL RESEARCH DIVISION, *supra* note 16, at 20.

18. Poore, *supra* note 5, at 123. From 1940 to 1941, the Italian military was able to unite the Ogaden region of Ethiopia with British and Italian Somaliland. FEDERAL RESEARCH DIVISION, *supra* note 14, at 14. Since colonization, the Somali clan had been divided under the political control of several foreign powers. Poore, *supra* note 5, at 123. The British exercised control over British Somaliland and the Somalis living in Kenya. Hoyle, *supra* note 12, at 80. The Italians controlled Italian Somaliland. *Id.* The French controlled French Somaliland, present day Djibouti. *Id.* The Ethiopians controlled the Somalis living in the Ogaden region of Ethiopia. *Id.* The Italian occupation represented the first reunification of a majority of the Somali clans since colonization. FEDERAL RESEARCH DIVISION, *supra* note 16, at 14.

19. Poore, *supra* note 7, at 123; *See also* Hoyle, *supra* note 16, at 89. After retaking control of British Somaliland, British forces were also able to take control of Italian Somaliland and the Ogaden region of Ethiopia. *Id.*

20. *Id.* Italian trusteeship of Italian Somaliland was to be administered until independence. *Id.* The trusteeship required Italy to “develop the colony’s political institutions, to expand the educational system, to improve the economic infrastructure, and to give the indigenous people freedom of the press and the right to dissent.” FEDERAL RESEARCH DIVISION, *supra* note 16, at 20.

21. BRADBURY, *supra* note 4, at 31.

22. *Id.* at 32. “In 1957 the first Legislative Council of Somaliland was formed and Somalis began to replace expatriate officials in government. In February 1960 elections were held for the Legislative

In the 1950s, Somali nationalism exploded.²³ As a result, the concept of a “Greater Somalia” obscured the underlying historical, political, and economic differences between the two regions.²⁴ This perception of harmony was also nurtured by a “common ‘colonial’ past, [and] a somewhat shared Somali culture.”²⁵ Ultimately, the two regions determined that unification offered an opportunity to overcome colonial domination and exploitation.²⁶

On June 26, 1960, British Somaliland declared independence,²⁷ and five days later, it united with Italian Somaliland to form the Somali Republic.²⁸ After unification, the North drafted an Act of Union, sending it to the capital, Mogadishu.²⁹ The document was never ratified by the legislative assembly in the South.³⁰ Instead, the South passed the Atto di Unione, which differed significantly from the North’s Act of Union.³¹ Following its passage, the North became increasingly “dissatisfied with the progress of the union argu[ing] that the act carried no force in the [N]orth because it had not been approved by the Somaliland legislature.”³²

Assembly and two months later Britain formally agreed to grant the Protectorate independence”
Id.

23. *Id.* at 31. During the 1950s, anti-colonial sentiment exploded throughout Africa. *Id.* In Somalia, this sentiment was fostered by the educated elite and exacerbated by emerging nationalist organizations. *Id.*

24. Mary J. Fox, *Somalia Divided: The African Cerberus (Considerations of Political Culture)*, 2 CIVIL WARS 1, 11 (1999). The leaders of Somalia entered the post-colonial era with no agenda for addressing underdevelopment. Instead, national leaders assumed integration would follow without considering the mechanisms for ensuring success as a unified territory. See AHMED I. SAMATAR, SOCIALIST SOMALIA: RHETORIC AND REALITY 48 (1988). See also I.M. LEWIS, A MODERN HISTORY OF THE SOMALI 179 (2002).

25. SCHOISWOHL, *supra* note 3, at 100. Italian and British Somaliland rushed headlong into immediate union—unconditional, unitary and poorly prepared . . . [t]his hasty decision put incredible, undeserved pressure on the politics and administration of the two territories. No committee had been appointed and charged with the official responsibility for drafting the legal instruments for the Union, and there was hardly any time for consultations.

Hussein M. Adam, *Formation and Recognition of New States: Somaliland in Contrast to Eritrea*, 21 REV. OF AFR. POL. ECON. 21, 23 (1994).

26. Poore, *supra* note 7, at 123.

27. SCHOISWOHL, *supra* note 3, at 113. At independence, Somaliland possessed a handful of educated individuals and a single secondary school. Poore, *supra* note 7, at 123–24. It did not have a single paved road, and its principle natural resource was livestock. *Id.*

28. SCHOISWOHL, *supra* note 3, at 113.

29. Adam, *supra* note 25, at 23.

30. *Id.*

31. *Id.*

32. BRADBURY, *supra* note 4, at 33. Northern dissatisfaction was also exacerbated by inequality in the government. Poore, *supra* note 7, at 125. “Somaliland’s Prime Minister became only the Minister of Education ‘in a cabinet heavily dominated by southerners,’ and Somaliland received just thirty-three seats in Parliament, in contrast to ninety-nine seats for southern Somalia.” *Id.* Additionally,

The North emphasized this dissatisfaction by boycotting the constitutional referendum.³³

On October 15, 1969, Somalia's parliamentary experiment came to an abrupt end with the assassination of President Sharmarke.³⁴ The new regime that seized power immediately suspended the constitution, imprisoned politicians, banned all political parties,³⁵ and systematically deprived the North of development funds,³⁶ causing a rapid deterioration in North-South relations.³⁷ In response to Barre's repressive regime, the Isaaq clan formed the Somaliland National Movement ("SNM").³⁸ In 1988, the SNM launched an offensive on Hargeysa and Burco.³⁹ In an

the North was only marginally integrated because the Atto de Unione was drafted by Italian and southern Somali politicians. *See* Adam, *supra* note 25, at 23–24.

33. BRADBURY, *supra* note 4, at 33. The Somali National League ("SNL") boycotted the constitutional referendum. Poore, *supra* note 7, at 125. In Somaliland, only 100,000 votes were cast with over 60 percent opposed to the constitution. *Id.* Because of the boycott, the north's vote represented slightly over five percent of the national vote. As a result, the south effectively exercised a veto on northern dissatisfaction. *Id.*

In December 1961, conflict between the two regions boiled over "when a group of British-trained junior army officers in the north rebelled in reaction to the posting of higher ranking southern officers . . . to command their units." FEDERAL RESEARCH DIVISION, *supra* note 16, at 27. Following their capture, the soldiers were brought before "[a] British judge presiding in Mogadishu . . ." Poore, *supra* note 7, at 126. The judge, however, "acquitted the officers on the grounds that the court had no jurisdiction over the State of Somaliland in the absence of an Act of Union." *Id.*

34. BRADBURY, *supra* note 4, at 35.

35. *Id.* at 35–36. Within a year of the coup d'état, the Barre regime instituted "scientific socialism." *Id.* at 36. The "Revolution" introduced an official Somali script, launched massive literacy campaigns, and pushed the nation into an ambitious program of social development. Poore, *supra* note 7, at 127. While the strategy struck a chord in Somalia, it also produced one of Africa's most repressive regimes. BRADBURY, *supra* note 4, at 36.

36. Adam, *supra* note 25, at 27. This policy made the North reliant on aid provided by local and foreign business elite.

37. Poore, *supra* note 7, at 126. Following the Ogaden War, a large population of Ogaden Somalis fled into northern Somalia. Hoyle, *supra* note 16, at 81. At its peak, more than one thousand refugees arrived daily. Poore, *supra* note 7, at 127. As a result, by 1981, Ogaden Somalis represented forty percent of the total northern population. *Id.* The majority of these refugees supported the Barre regime, sparking tribal conflicts. Hoyle, *supra* note 16, at 81. This also led many Northerners to feel disfavored for aid resources and civil service positions. *Id.* As anger intensified in the North, Barre quickly installed a refugee militia to control the region. *See id.* Eventually, northern Somalia "began to look and feel like a colony under a foreign military tyranny." Adam, *supra* note 25, at 27.

38. Poore, *supra* note 7, at 127–28. In January 1983, the SNM raided Mandheera Central Prison freeing one thousand political prisoners. *Id.* The Barre regime retaliated, "[i]n the urban centers" by accelerating "arbitrary arrests, detentions and executions." *Id.* at 128 (citation omitted) (quoting another source).

In the rural areas, the regime sought to undermine the SNM's support among nomads by destroying their livelihoods. Water points were declared off limits, closed, destroyed, poisoned, and mined. Commercial trucks were grounded, starving the rural community of food, medicines, and other consumer goods. Villages were razed to the ground and soldiers allowed to confiscate livestock without compensation.

Id. at 128–29.

39. *Id.* at 129.

effort to undermine SNM support, Barre launched fighter pilots to bomb civilians throughout Somaliland.⁴⁰ Ultimately, the SNM resistance and government counterattacks left “50,000 dead in Hargeysa and hundreds of thousands dead in the rest of Somaliland.”⁴¹ The civilians that survived the regime’s bombings were rounded up in the streets and shot.⁴² Despite serious losses, in 1991 the SNM recaptured all major northern towns, bringing an end to North-South bloodshed.⁴³

In May 1991, the SNM convened the Great Conference of the Northern Peoples.⁴⁴ At the conference, Somaliland revoked the Act of Union, and declared independence.⁴⁵ Despite severing ties, Somaliland still faced considerable difficulties. Its infrastructure had been largely destroyed, a large amount of its population had fled, its army was without pay, and external aid was necessary to resurrect the economy.⁴⁶ The SNM administration was also charged with drafting a national constitution.⁴⁷

In light of these challenges, violence erupted.⁴⁸ To restore peace, the government expanded representation to include “some 500 persons representing elders, religious leaders, politicians, retired civil servants,

40. Spears, *supra* note 3, at 94; *see also* FEDERAL RESEARCH DIVISION, *supra* note 16, at 51. As a result of the bombings, the towns of Hargeysa and Burco were completely destroyed.

41. Poore, *supra* note 7, at 129.

42. *Id.* Since then, mass graves have been uncovered, demonstrating the “most extreme attempt at genocide against the dominant Isaaq clan.” *Id.* (citation omitted) (quoting another source). Following their discovery in 1997, the government of Somaliland has sought to preserve these mass graves as reminders of the atrocities committed by southerners. *See* Spears, *supra* note 3, at 94; *see also* BRADBURY, *supra* note 4, at 250. Offering their rationale for preserving the mass graves, a prominent Somalilander explained:

It’s very important that we at least go and see those graves and feel sorry that this kind of thing can happen to human beings The only crime they were guilty of was just being human beings who wanted to decide on their own destiny; who called themselves Somalilanders and wanted to live where they had always lived, Somaliland, and not be part of any other kind of administration. Because the union with our brothers in Somalia just ended up in aerial bombings, killings and atrocities.

Id. at 94–95. Spears, *supra* note 3, at 94–95.

43. Poore, *supra* note 7, at 129. On January 27, 1991, just two days prior to the SNM taking control of northern Somalia, the battle for Mogadishu culminated in the overthrow of Siad Barre. BRADBURY, *supra* note 4, at 78.

44. SCHOISWOHL, *supra* note 3, at 116.

45. *Id.* When the “Grand Conference of the Northern Peoples” was convened, secession was not on the agenda. BRADBURY, *supra* note 4, at 80–81. The SNM was fearful that the international community would be unwilling to recognize the regime. However, various factions were determined to cut ties with the South. *Id.*

46. SCHOISWOHL, *supra* note 3, at 117.

47. BRADBURY, *supra* note 4, at 83.

48. Fighting began in Burco and spread to Berbera after government troops attempted to establish control over the port. Mark Bradbury et al., *Choosing Politics Over Violence*, 30 REV. OF AFR. POL. ECON. 455, 459 (2003). The conflict lasted ten months and resulted in one thousand deaths. BRADBURY, *supra* note 4, at 87.

intellectuals, businessmen, and others.”⁴⁹ These representatives agreed to establish a bicameral legislature to work with the President under an interim Constitution.⁵⁰ At the conclusion of this interim term, the Assembly of Elders appointed Mohamed Egal to be President.⁵¹

Despite making positive strides, the fragility of Somaliland was exposed when full-scale civil war erupted.⁵² The underlying conflict centered on “unresolved issues of power sharing, historical divisions within the SNM,” and resource competition.⁵³ The civil war between Clans in the North displaced over 180,000 people.⁵⁴

The civil war halted only after a second national reconciliation conference.⁵⁵ At the conference, held in Hargeisa between October 1996 and February 1997, President Egal was reelected, opposition parties were given a greater role in government,⁵⁶ and an interim constitution was adopted.⁵⁷ On May 31, 2001, a national referendum was held on the constitution and independence.⁵⁸ It was “reported that 1.18 million people voted, with 97.9 per cent approving the constitution.”⁵⁹

In 2002, President Egal died during surgery.⁶⁰ Clan violence appeared possible because Vice President Kaahin was of the Gadabuursi Clan, a

49. Poore, *supra* note 7, at 130.

50. *Id.* Furthermore,

Article 10 of the National Charter established a government structure with an executive council as Government (*Golaha Xukuumadda*) on the one hand, and a bicameral legislature on the other. The Parliament consists of an Assembly of Elders (*Guurti*) as a non-elected upper house (*Golaha Guurtida*), and an Assembly of Representatives as an elected lower house (*Golaha Wakillada*); the judiciary, auditor general, and the central bank were established as independent agencies.

SCHOISWOHL, *supra* note 3, at 119. Seats in the upper and lower houses of the legislature were proportionally allocated to the various clans. Bradbury et al., *supra* note 48, at 461. The Assembly of Elders plays an important role in Somaliland because it has the power to convene conferences, represent communities, and decide on political measures to resolve problems. *Id.*

51. SCHOISWOHL, *supra* note 3, at 119. During the first eighteen months of the Egal administration, progress was made in establishing government institutions, demobilizing the militia, creating a monetary system, and stabilizing the economy. Bradbury et al., *supra* note 48, at 461.

52. BRADBURY, *supra* note 4, at 115.

53. SCHOISWOHL, *supra* note 3, at 120. Control over the port of Berbera and its revenues ignited violence in 1992; control over the Hargeysa airport and its revenues created the spark in 1994. *Id.* at 118.

54. Bradbury et al., *supra* note 48, at 461.

55. *Id.*

56. *Id.*

57. SCHOISWOHL, *supra* note 3, at 122.

58. *Id.* “With Article 2 of the constitution affirming Somaliland’s independent status, the constitutional referendum of 31 May 2001 was effectively a vote on the status of Somaliland.” Bradbury et al., *supra* note 48, at 463.

59. Bradbury et al., *supra* note 48, at 463. It was widely reported by international observers that the referendum adhered to international standards. *Id.*

60. *Id.* The death of President Egal “generated an outpouring of nationalist sentiment.” *Id.* His

different clan family than President Egal's Clan.⁶¹ Power passed peacefully, however, and later that year, district elections were held.⁶² Presidential elections followed, resulting in the reelection of President Kaahin by 280 votes.⁶³ The narrow margin, again, presented the possibility of violence, but election results were appealed democratically.⁶⁴

Since this conference, "Somaliland has experienced a period of uninterrupted security."⁶⁵ On June 26, 2010, Somaliland celebrated its 50th anniversary of independence from Great Britain with presidential elections.⁶⁶ After a tightly contested race, which independent observers recognized as well-organized and fair,⁶⁷ President Kaahin was defeated by Ahmed Mohamud Silaanyo of the Isaaq Clan.⁶⁸ Importantly, this election marked the second peaceful transition of power, as well as the second peaceful transition between clan families since 1991.⁶⁹ Ultimately, Somaliland has demonstrated its resilience and has demonstrated that a return to violence is unlikely.

funeral was observed by both supporters and opponents. *Id.*

61. *Id.*

62. *Id.* at 466. District elections involved the selection of 332 Councillors in the six regions of Somaliland. These elections determined the three parties to contest parliamentary and presidential elections. Several problems existed in the electoral process because both voters and electoral officials lacked experience. *Id.* at 466–67.

63. Poore, *supra* note 7, at 133. Due to the problems experienced during district elections, polling stations were expanded, prison sentences were imposed for double voting, and polling officials were moved to stations away from their homes to prevent vote rigging. Bradbury et al., *supra* note 48, at 468. Despite voting reform, problems surfaced because of meager international financial support, voter illiteracy, and the limited differentiation between political platforms. *Id.* at 466–69.

64. Bradbury et al., *supra* note 48, at 469. Given the slim lead maintained by President Kaahin, it is not surprising an electoral challenge occurred. During the challenge, Kulmiye

presented evidence of mathematical errors in the [Somaliland Electoral Commission's] final calculations. To his credit the chairman of Kulmiye did not accuse the [Somaliland Electoral Commission] or the government of malpractice. He resisted intense pressure from within his party to form an alternative government, stating that he had no intention of taking Somaliland down the path of Mogadishu, and committed Kulmiye to a peaceful resolution of the crisis.

Id. Because of this commitment to democracy, the Supreme Court was given the task of reviewing the election results. *Id.*

65. *Id.* at 462.

66. *Somaliland's Elections: Not so Failing*, THE ECONOMIST, July 3, 2010, at 45, 45, available at http://www.economist.com/node/16488840?story_id=16488840&fsrc=rss. The Elections were "marked with enthusiasm and little violence by its 1.07[] [million] registered voters (from a population of around 2.5[] [million])." *Id.*

67. *Id.*

68. AGENCE FRANCE-PRESSE, *New President of Somaliland Fights for Recognition*, N.Y. TIMES (July 3, 2010), http://www.nytimes.com/2010/07/04/world/africa/04somaliland.html?_r=1&scp=1&sq=somaliland&st=cse. "Silaanyo, a member of the dominant Issa[q] clan, studied economics in Britain and served in the government of former Somali president Mohamed Siad Barre." *Id.* This transition to the dominant Isaaq tribe marked the second peaceful transition between different tribal groups since independence. *Id.*

69. *Id.*

III. GAINING RECOGNITION AS A STATE

A. *Theories of Recognition*

Two competing branches of statehood theory exist, each emphasizing the importance of recognition differently.⁷⁰ Declaratory theory is premised on the objective criteria outlined under the Montevideo Convention.⁷¹ Conversely, constitutive theory provides that statehood is dependent on recognition by the international community.⁷² Despite widespread competition over theory application, no consensus has emerged.⁷³

1. *Declaratory Theory*

Declaratory theory is favored by most commentators, including the International Court of Justice (“ICJ”).⁷⁴ Under declaratory theory, statehood is recognized when four conditions are met, regardless of international consent.⁷⁵ For a state to be recognized under the criteria initially contemplated at the Montevideo Convention, it must have (a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relations with the other states.⁷⁶

First under these criteria, a territory-seeking statehood must demonstrate that it possesses a permanent population.⁷⁷ Permanence

70. William T. Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT’L L.J. 115, 118 (2009).

71. *Id.* See also 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, 214 (2007).

72. *Id.*

73. *Id.* at 118–19.

74. Eggers, *supra* note 71, at 214; Worster, *supra* note 70, at 119. The Second Circuit recently applied the standard outlined at the Montevideo Convention in *Kadic v. Karadzic*. *Kadic v. Karadzic*, 70 F.3d 232, 236–37 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996). The court was asked to determine whether a self-proclaimed republic, referred to as Srpska, was a state whose leadership could be liable for various atrocities carried out by its leaders. *Id.* It concluded that “Srpska met the definition of a state by noting that it ‘is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments.’” Eggers, *supra* note 68, at 214 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995)).

75. Poore, *supra* note 7, at 136.

76. The Montevideo Convention outlines the characteristics of a state in the international community. Statehood under the Montevideo Convention consists of four elements: “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.” Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 3100, 165 L.N.T.S. 20, 25 (1936) [hereinafter “Montevideo Convention”].

77. *Id.* This does not mean that the state is comprised of a single “people.” Rather, the state may include several distinct “peoples.” DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 58 (2002).

consists of two points: (1) a permanent population that intends on inhabiting the territory permanently,⁷⁸ and (2) a habitable territory.⁷⁹

The second criterion for statehood, a defined territory, is lenient.⁸⁰ Despite the importance of territorial sovereignty, it is not a necessary prerequisite.⁸¹ In addition, the external boundaries of the state need not be explicitly defined.⁸² In the *North Sea Continental Shelf Cases*, the ICJ held that there is “no rule that the land frontiers of a State must be fully delimited and defined, and often . . . for long periods they are not”⁸³

The third criterion is the existence of a government.⁸⁴ A state is not required to follow any particular pattern of governance,⁸⁵ however, it must assert authority effectively.⁸⁶ Effective governance consists of two points: (1) internal governance, and (2) external governance.⁸⁷ Internal governance is premised on the government’s ability “to establish and maintain a legal order”⁸⁸ External governance focuses on the government’s ability to act autonomously.⁸⁹ Ultimately, it is “[t]he

78. *Id.* at 58–59. For example,

[w]here a group of people occupies an island or an uninhabited territory not with the intention to move there but, for instance, solely for the purpose of gaining monetary benefits, there can be no question of statehood. The same applies with regard to a population which completely consists of refugees who have no other intention but to return to their home country. But the fact that large numbers of nomads are moving in and out of the country, as in the case of Somalia, is in itself no bar to statehood as long as there is a substantial number of permanent inhabitants.

Id.

79. *Id.* An often cited example is Antarctica, which has a defined territory but does not have a permanent population. SCHOISWOHL, *supra* note 3, at 13.

80. Montevideo Convention, *supra* note 76.

81. RAIČ, *supra* note 77, at 59. *See also* Island of Palmas Case, (Neth. v. US), 20 R. Int’l Arb. Awards 829, 838–40 (Perm. Ct. Arb. 1928).

82. “Even though Israel’s boundaries have yet to be decisively delineated, Israel unquestionably exists as a state.” Hoyle, *supra* note 16, at 82. In determining statehood, “it is enough that [the] territory has sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the state actually exercises independent public authority over that territory.” *Deutsche Continental Gas-Gesellschaft v. Polish State*, 5 ANN. DIG.11, 15 (Germano-Polish Mixed arbitral Trib. 1929).

83. *N. Sea Continental Shelf Cases*, (F.R.G. v. Den./Neth.), 1969 I.C.J. 3, 33, ¶ 46 (Feb. 20).

84. Montevideo Convention, *supra* note 73.

85. *Western Sahara Case*, Advisory Opinion, 1975 I.C.J. 3, 43–44 (Oct. 16). “No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.” *Id.*

86. SCHOISWOHL, *supra* note 3, at 14–15. The international community recognized Croatian sovereignty even though large parts of its territory were controlled by non-governmental forces. Hoyle, *supra* note 16, at 82.

87. SCHOISWOHL, *supra* note 3, at 15.

88. *Id.*

89. *Id.*

existence of functioning . . . administrative and legislative organs [that] will in general be a strong indicator for effective governance.”⁹⁰

The final criterion for statehood is the capacity to enter into international relations.⁹¹ This language, however, betrays a requirement largely viewed as a consequence of statehood.⁹² As a result, theorists have argued whether this requirement entails the *capacity* or the *ability* to enter into relations.⁹³ In the opinion of the American Law Institute, this requirement refers to the *capacity* to enter into international relations.⁹⁴

Ultimately, under declaratory theory, once the territory has met all four conditions, recognition as a state is mandated regardless of international consent.⁹⁵ In practice, however, it is more likely the state will not obtain “international rights on the international plane until [it is] recognized.”⁹⁶ As a result, declaratory theory may simply subject the state to a series of subjective criteria before providing the international community final veto power.

2. Constitutive Theory

Constitutive theory argues that statehood is not automatic, but rather requires recognition in the international community.⁹⁷ This approach “stems from the shift in international law doctrine from natural law to the positivist theory, which is centered on *consent* as the essential element”⁹⁸ Ultimately, while declaratory theory draws support from theorists,

90. *Id.* at 16. “[I]t has been argued that ‘if an entity has its own executive and other organs, conducts its foreign relations through its own organs, has its own system of courts and legal system and, particularly important, a nationality law of its own, then there is *prima facie* evidence of Statehood.’” *Id.* (citation omitted) (quoting another source).

91. Montevideo Convention, *supra* note 76.

92. SCHOISWOHL, *supra* note 3, at 17.

93. Hoyle, *supra* note 16, at 82. Ian Brownlie has argued that this criterion is merely a proxy for the criterion of independence. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 73 (5th ed. 1990).

94. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 201 cmt. e (1987). “An entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so.” *Id.*

95. Poore, *supra* note 7, at 136.

96. Worster, *supra* note 70, at 119.

97. *Id.* at 120.

98. SCHOISWOHL, *supra* note 3, at 33. The constitutive approach stems largely from a shift from natural law to positivism, which focuses on “*consent* as the essential element from which obligations under international law derive.” *Id.* Under positivism, the international community must consent to the admission of a new state because recognition creates additional obligations for existing states. In addition, new states are not bound by international law until consent is given. *Id.*

constitutive theory appears to more accurately reflect reality.⁹⁹ This contention is borne out by the observation that “only states sit on the United Nations Security Council, [and] only states petition the International Court of Justice”¹⁰⁰

Despite the importance of recognition under constitutive theory, ardent supporters “do not claim that recognition creates the State.”¹⁰¹ Instead, existing states merely act as the gatekeepers to ensure that de facto states meet the criteria outlined under the Montevideo Convention.¹⁰² This de facto gatekeeper function makes recognition a political instrument, with powerful states effectively exercising veto power.¹⁰³ It also means that until international “personality” is granted, the state is not attributed any rights or duties.¹⁰⁴ Ultimately, in absence of international recognition, a de facto state is unlikely to achieve complete statehood.¹⁰⁵

B. *Uti Possidetis*

After a state is recognized, the doctrine of *uti possidetis* “provides that new States will come to independence with the same borders that they had

99. Worster, *supra* note 70, at 120, 133–34. For example, Taiwan arguably meets the criteria set forth under the Montevideo Convention, but because of political circumstances, the international community has failed to recognize its statehood. Hoyle, *supra* note 16, at 82.

100. Worster, *supra* note 70, at 132.

101. RAIČ, *supra* note 77, at 30. “It may well be possible to reconcile the declaratory theory with positivism, and it is certainly true that many writers have been both declaratory and positivist.” James Crawford, *Outside the Colonial Context, in SELF-DETERMINATION IN THE COMMONWEALTH* 1, 17 (W.J.A. Macartney ed., 1988).

102. See RAIČ, *supra* note 77, at 29–31.

Where the facts are clear . . . the evidentiary value of recognition or non-recognition is not strong enough to affect the outcome; in such circumstances recognition is declaratory. But in *borderline cases*, where the facts are unclear, the evidentiary value of recognition can have a decisive effect; in such circumstances *recognition is semi-constitutive*.

SCHOISWOHL, *supra* note 3, at 42–43.

International personality requires a difficult determination of fact and law. As a result, recognition cannot be automatic. Rather, recognition requires:

someone to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.

HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 55 (1948).

103. Worster, *supra* note 67, at 120–21. Political maneuvering means that a failed state may remain viable as a political tool in the international community. Poore, *supra* note 5, at 136. It also means that “where doubts remain as to the factual fulfillment of the requirements necessary for statehood . . . recognition assumes an important (political) function: it translates international politics determined by domestic policies into international law.” SCHOISWOHL, *supra* note 2, at 43.

104. RAIČ, *supra* note 77, at 30.

105. Hoyle, *supra* note 16, at 82.

when they were . . . territories of one colonial power.”¹⁰⁶ This allowed colonial powers to limit fragmentation while maintaining the stability of international borders.¹⁰⁷ During decolonization, the consensus in Africa was to deny secession.¹⁰⁸ This intention was emphasized in the Charter of the Organization of African Unity, which affirmed the principle of respect for the “sovereignty and territorial integrity of each State and for its inalienable right to independent existence.”¹⁰⁹ And, the Cairo Resolution, which reaffirmed that “all the states undertake to respect the boundaries existing at . . . independen[ce].”¹¹⁰

An international boundary is established and assumes permanence through treaty or acquiescence.¹¹¹ As post-colonial boundaries are formalized, *uti possidetis* is replaced by the concept of “territorial integrity.”¹¹² Under the Covenant of the League of Nations, member states were required to “preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.”¹¹³ Similarly, the UN prohibits challenging the territorial integrity of the state through the threat or use of force.¹¹⁴ In the context of Africa, “territorial integrity” has resulted in a reluctance to support self-determination.¹¹⁵

IV. SECESSION

A. *Unilateral Secession*

Under international law, absent exceptional circumstances, a minority population is not afforded the right to unilateral secession.¹¹⁶ Exceptional circumstances exist where people are oppressed or subject to colonial

106. RAIČ, *supra* note 77, at 296.

107. Poore, *supra* note 7, at 137.

108. SCHOISWOHL, *supra* note 3, at 174–75.

109. Charter of the Organization of African Unity art. 3, May 25, 1963, 479 U.N.T.S. 74.

110. Resolutions Adopted by the First Session of the Assembly of Heads of State and Government held in Cairo, O.A.U Res. AHG/16(I), July 21, 1964.

111. RAIČ, *supra* note 77, at 296–97.

112. *See* Cambodia v. Thailand, 1962 I.C.J. 6, 14 (15 June). *See also* Beagle Channel Arbitration between the Republic of Argentina and the Republic of Chile (Argentina v. Chile), Report and Decision of the Court of Arbitration, 52 I.L.R. 121, 131 (1977), available at http://untreaty.un.org/cod/riaa/cases/vol_XXI/53-264.pdf.

113. RAIČ, *supra* note 77, at 293.

114. U.N. Charter art. 2, para. 4.

115. SCHOISWOHL, *supra* note 3, at 175–76. “The OAU has not abstained from its rigid reference to the principles of territorial integrity . . . in the case of Somaliland.” *Id.* at 176.

116. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 103–05 (Can.).

rule.¹¹⁷ Majority support within the secessionist region, however, is not sufficient.¹¹⁸ In the *Åland Islands Question*, the League of Nations held that “international law does not recognize the right of national groups . . . to separate themselves from the state of which they form part by the simple expression of a wish.”¹¹⁹ More recently, the UN has refused to admit a secessionist region against the wishes of the parent state.¹²⁰ As a result, secession is primarily governed by the law of the parent state.¹²¹

B. Remedial Secession

The concept of remedial secession is primarily focused on the “right of a people to participate . . . in the decision-making processes of the State.”¹²² Absent effective mechanisms, a minority population is often excluded from the economic and political processes of the state.¹²³ They may also be subjected to domination or subjugation.¹²⁴ Under remedial secession theory, these exclusions from participation in the government enable the minority region to form a state to govern itself.¹²⁵ With the

117. *Id.* at 104–05.

118. Poore, *supra* note 7, at 138. “Case law does not support the idea that a secessionist region has an inalienable right to unilateral secession because a majority of the population in that region desires it. The Basque and Catalan regions in Spain and the Quebec region of Canada are cases in point.” *Id.*; see also *Åland Islands Question*: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7.21/68/106 (1921) [hereinafter *Åland Islands Question*].

119. *Id.* “In the *Åland Islands* case, the League of Nations appointed two bodies of experts to examine whether . . . the community inhabiting the *Åland Islands* . . . [was] free to secede from Finland and join the Kingdom of Sweden.” SCHOISWOHL, *supra* note 3, at 72 n.252.

120. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 390 (2006).

121. *Id.* at 391. International law contains no explicit conditions pertaining to the legality of secession. However, the United Nations Security Council has frequently characterized both the Katangan and Rhodesian secessions as illegal. *Id.* at 389.

122. RAIČ, *supra* note 77, at 237.

123. Poore, *supra* note 7, at 139.

124. See RAIČ, *supra* note 77, at 241. Buchheit argues that secession is warranted in the case of “a denial of political freedom and/or human rights.” BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 94 (1978). This argument is reinforced by the *Vienna Declaration*, which requires that the government represent “the whole people belonging to the territory without distinction of any kind.” *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter “*Vienna Declaration*”], available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en).

125. RAIČ, *supra* note 77, at 234. Furthermore,

the right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights . . . With regard to paragraph 1 of article 1 [of the *Human Rights Covenants*], States parties should describe the constitutional and political processes which in practice allow the exercise of this right.

Id. (emphasis added).

exception of *Reference re Secession of Quebec*, however, no international body has recognized a legal remedy through which a minority region may enforce its right to self-determination.¹²⁶

In *Reference Re Secession of Quebec*, the Supreme Court of Canada subjected “the potentially destructive issue of secession to the rule of law.”¹²⁷ The Court held that if a “clear majority” of a minority region favors secession, then the parent state government has a duty to negotiate the possible secession.¹²⁸ In conducting negotiations, the government must consider the rule of law, democracy, federalism, and the protection of minority rights.¹²⁹

Where a minority group is “denied meaningful access to the government to pursue their political, economic, social and cultural development” it may be able to secede unilaterally.¹³⁰ In this regard, the concept of remedial secession mirrors “dissolving secession.” Dissolving secession posits that “a State [may be created] without the consent of the former sovereign, *which in view of its collapse and lack of effective (central) governance has at least temporarily de facto ceased to exist as a State.*”¹³¹ Absent remedial or dissolving secession, state dissolution could effectively deny a minority region the right to petition for the right to secede.

The concept of “internal colonialism” provides another variation of remedial secession theory. Under the internal colonialism approach, the

See also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976 [hereinafter ICCPR], *available at* <http://www2.ohchr.org/english/law/ccpr.htm>. Article 1(1) of the ICCPR, provides that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Furthermore, under Article 1(3) of the ICCPR, “[t]he States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right . . .” *Id.*

See also African [Banjul] Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 Rev. 5 (1982), *entered into force* Oct. 21, 1986 [hereinafter African Charter], *available at* http://www.achpr.org/english/_info/charter_en.html. Under Article 20(1) of the African Charter, “[a]ll peoples . . . shall have the unquestionable and inalienable right to self-determination.” It continues by emphasizing that accordingly all peoples “shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.” *Id.*

126. *Cf.* Poore, *supra* note 7, at 140.

127. *Id.* at 139 (citation omitted) (quoting another source).

128. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 97–98 (Can.).

129. *Id.* at 85.

130. *Id.* at 121.

131. SCHOISWOHL, *supra* note 3, at 50 (emphasis in original). Generally, the international community will be “confronted with a factually collapsed ‘parent’ State, which continues to exist on the presumption of continuity, while one part of it (or more) breaks away to form a State on its own.” *Id.* at 51.

“right to territorial separation of a people within an existing State is closely linked to certain elements of the traditional concept of colonialism.”¹³² Internal colonialism has also been applied in certain circumstances to minority populations within a parent state.¹³³

A territory is *prima facie* non-self-governing if it is geographically separate and ethnically distinct from the “country administering it”. Geographical separateness has usually been taken to require separation across land or sea . . . but there is no good reason why other defining characteristics, including historical boundaries or *de facto* boundaries . . . might not also be relevant.¹³⁴

In the case of historical boundaries or ethnic groups, the minority region must be placed in the position or status of a subordinate.¹³⁵ This subordinate status of the minority population causes internal colonialism to bear a striking resemblance to remedial secession theory.

Ultimately, however, the concept of “[r]emedial secession envisions a scheme by which . . . international law recognizes a continuum of remedies ranging from protection of individual rights, to minority rights, and ending with secession as the ultimate remedy.”¹³⁶ It is the severity of the treatment of the minority population that will legitimize the right to self-determination.¹³⁷ Therefore, the existence of certain circumstances permits remedial secession, but also explicitly prohibits unilateral secession.¹³⁸

132. RAIČ, *supra* note 77, at 326 (citation omitted).

133. *Id.* at 326–27.

134. RAIČ, *supra* note 77, at 327 (citation omitted) (quoting another source). *See also* T.M. Franck, *Postmodern Tribalism and the Right of Secession*, PEOPLES AND MINORITIES IN INT’L LAW 13–14 (Brolmann et al. eds., 1993). In the case of a minority region, which is “persistently and egregiously . . . denied political and social equality” it is conceivable that international law will define such repression as colonialist in nature. As a result, if repression is recognized as colonial, the minority region would be given the right of decolonization. *Id.*

135. *Id.*

136. BUCHHEIT, *supra* note 124, at 222. Related to remedial secession is the concept of “the democratic entitlement” theory. However, while remedial secession theory appears similar to the democratic entitlement theory, the two theories differ concerning the secession process. Under the democratic entitlement theory, the minority group is able to “opt out” based on displeasure with the majority. Poore, *supra* note 7, at 138. However, under remedial secession theory, negotiations must occur between the minority region and the government. *See Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 86–88 (Can.). The duty to negotiate is triggered when a “clear majority” of the region favors secession. *Id.* Ultimately, these negotiations will be determined by principles of constitutionalism and the rule of law, democracy, federalism, and the protection of minority rights. *Id.* para. 85.

137. *Id.*

138. RAIČ, *supra* note 77, at 234.

V. THE RECOGNITION AND SECESSION OF SOMALILAND

A. *Theories of Recognition*

1. *Somaliland Under Declaratory Theory*

The Republic of Somaliland meets the requirements set forth under the Montevideo Convention. It has a permanent population, a defined territory, a functioning government, and has the ability to enter into relations with other states. As a result, declaratory theory should recognize the Republic of Somaliland as a state within the international community.

Somaliland meets the first criterion with its growing, yet defined, population despite the nomadic nature of its inhabitants. In 1999, Somaliland had a defined population of 3,390,000.¹³⁹ Since then, Somaliland's defined population has likely experienced a marked increase due to continued repatriation.¹⁴⁰ As the population of Somaliland has grown, various clan families have started to significantly identify with the territory.¹⁴¹ Indeed, Somaliland's large nomadic population poses no impediment to recognition because a substantial number of permanent inhabitants remain.¹⁴²

The second criterion is met because the territorial boundaries of Somaliland stretch 68,000 square miles, corresponding roughly to its colonial boundaries.¹⁴³ The territory includes five former regions of Somalia, however, its eastern border has been the subject of constant dispute.¹⁴⁴ As a result of this territorial conflict, "it might be contested that Somaliland has a clearly defined territory."¹⁴⁵ Nevertheless, international law does not require definitively drawn boundaries.¹⁴⁶

139. SCHOISWOHL, *supra* note 3, at 166.

140. *Id.* The population of Somaliland likely increased after violence with Somalia subsided and the nation's civil war concluded. *Id.*

141. Hoyle, *supra* note 16, at 83.

142. SCHOISWOHL, *supra* note 3, at 166. "There is no discernable reason why Somaliland's population should in this respect be treated differently than Somalia's, which has been said to qualify as a State despite its nomadic people." *Id.* at 166 n.623; *see also* RAIČ, *supra* note 77.

143. Hoyle, *supra* note 14, at 80. Ethiopia recently signed an agreement for use of the Port of Berbera. This agreement demonstrates the territorial integrity of Somaliland. Eggers, *supra* note 71, at 218.

144. SCHOISWOHL, *supra* note 3, at 166. Puntland, a semi-autonomous region within Somalia, lies directly to the east of Somaliland, and has continued to emphasize its control over the regions of Sanaag, Sool, and Buhoodle. Hoyle, *supra* note 16, at 81.

145. SCHOISWOHL, *supra* note 3, at 166.

146. *Id.*

Somaliland also has a clearly defined government, thereby meeting the third criterion. The government has held a referendum on the constitution and staged several peaceful elections.¹⁴⁷ In addition, the

[g]overnment appears to have “general control of its territory, to the exclusion of other entities[;”] and to have established “some degree of maintenance of law and order[;”] furthermore, there seems to be internal stability, popular support for the government as evidenced by a free vote, and a working constitution.¹⁴⁸

Despite exercising territorial control, Somalia has never recognized Somaliland independence. Absent recognition, the threat remains that Somalia could reconsolidate the region. It is unlikely, however, that Somalia could exert control over the region to the exclusion of the government of Somaliland.¹⁴⁹

Finally, Somaliland has exhibited the ability to enter into relations with other states. Since independence, “numerous states have received delegations from Somaliland, and international organizations have to some extent created semi-formal relationships.”¹⁵⁰ In addition, Somaliland exhibited state-like behavior when it “signed a long-term use agreement . . . for use of [the] Port of Berbera” with Ethiopia.¹⁵¹ Ultimately, the government of Somaliland has shown it can control internal policies, and no rival parties have challenged its external voice. While Somaliland has struggled to establish diplomatic ties, this inability does not limit its capacity to enter into relations.¹⁵²

147. Eggers, *supra* note 71, at 218. Somaliland’s presidential election was closer than the one between George W. Bush and Al Gore. Following the election, the court system was charged with conducting a recount to declare the winner. Despite some unhappiness over the procedure, the population and the candidates accepted the decision. *Id.* Following the presidential elections, parliamentary elections were held, and “were accepted and endorsed by all three political parties.” *Id.*

148. SCHOISWOHL, *supra* note 3, at 166. Less significant, Somaliland has adopted a flag, a coat of arms, and a national anthem. In addition, the Government has issued currency, stamps and passports. Hoyle, *supra* note 16, at 83.

149. SCHOISWOHL, *supra* note 3, at 167. “Moreover, it has been suggested, that the threshold of effectiveness is lowered in cases of ‘dissolving secession,’ where the ‘mother’ State continues to exist merely on the basis of a presumption under international law.” *Id.* (citations omitted).

150. *Id.* “Somaliland has been received by ministers and governmental representatives in foreign states, including the United Kingdom and the United States.” Eggers, *supra* note 68, at 219. During his term, President Kaahin also visited the United Kingdom, Germany, Ethiopia, Kenya, Tanzania, Rwanda, Zambia, and Uganda to press for independence. *Id.* More importantly, however, Ethiopia recently established an embassy in Somaliland. *Id.*

151. *Id.* at 218.

152. *Id.* at 219. Somaliland has struggled to enter into relations because the international community continues to recognize the territorial integrity of Somalia. As a result, Somaliland “cannot enter into formal trade agreements with other nations and has understandable difficulty in seeking, and

2. Somaliland Under *Uti Possidetis*

The concept of *uti possidetis* underscores the complexity of the relationship between Somalia and Somaliland. If *uti possidetis* is strictly construed such that Somaliland's border is defined by that of its colonial past, the secessionist claims of Somaliland are strengthened: the Atto de Unione between Somaliland and Somalia altered colonial boundaries, in violation of *uti possidetis*.¹⁵³ Despite this violation, a claim for independence under *uti possidetis* may prove illusory since unification occurred five decades ago. Moreover, the international community supports the legality of Somalia's and Somaliland's union, presenting a further obstacle to secession.¹⁵⁴

Despite international support of the union, Somaliland's separation from Somalia would not be the first dissolution in Africa.¹⁵⁵ The concept of state dismemberment is not new to the international community; in fact, the international community recently allowed the dismemberment of Yugoslavia into constituent republics.¹⁵⁶ This strategy of dissolution appears even more applicable where a voluntary union has failed.¹⁵⁷

B. Theories of Secession

1. Unilateral Secession

Under international law, a minority region is not afforded the right to unilateral secession.¹⁵⁸ Rather, the minority region is subject to the law of the parent state.¹⁵⁹ In the case of Somaliland, it would be subject to rule of law in Somalia; the "vote for independence by ninety-seven percent" of

certainly securing, any sort of assistance from world financial organizations." Poore, *supra* note 5, at 133 (citation omitted) (quoting another source).

153. *Id.* at 141–42. The original union would be delegitimized because borders creating the Somali Republic clashed with those delineated during colonization. *Id.* at 142.

154. *Id.*

155. *Id.* Several African unions have dissolved since decolonization. These include the unions between "Egypt-Syria (1958–61), Mali-Senegal (1960), and Senegal-Gambia (1982–89)." *Id.* at 142; see also Iqbal Jhazbhay, *Somaliland: Africa's Best Kept Secret, a Challenge to the International Community?* 12(4) AFR. SEC. REV. 79 (2003), available at <http://www.iss.co.za/pubs/ASR/12No4/Jhazbhay.pdf>.

156. Poore, *supra* note 7, at 142. Further, the international community recently allowed the dismemberment of another African nation, Sudan. Jeffrey Gettleman, *After Years of Struggle, South Sudan Becomes a New Nation*, NY TIMES (July 9, 2011), <http://www.nytimes.com/2011/07/10/world/africa/10sudan.html?pagewanted=all>.

157. *Id.*

158. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 103–05 (Can.).

159. *Id.*

the population of Somaliland would be insufficient to enable unilateral secession.¹⁶⁰ While international law also envisions the right to petition for secession, in the case of Somaliland, the ability to petition Somalia creates an “impasse . . . from which to apply for secession.”¹⁶¹

2. Remedial Secession

Under international law, no remedies exist for a minority region to independently enforce the right of self-determination.¹⁶² The Supreme Court of Canada in *Reference re Secession of Quebec* envisioned that the parent state and the minority region would negotiate the terms of secession.¹⁶³ However, the Court “[did] not explicitly address what happens when a central government is unable (as opposed to unwilling) to negotiate.”¹⁶⁴

Despite the absence of an enforcement mechanism, the international community has adopted several instruments characterizing the right of self-determination, such as the ICCPR,¹⁶⁵ the Friendly Relations Declaration,¹⁶⁶ the OSCE Helsinki Final Act,¹⁶⁷ the African Charter on

160. *See id.* para. 143.

161. *See Eggers, supra* note 71, at 217.

162. RAIČ, *supra* note 77, at 326.

163. *Reference re Secession of Quebec*, para. 97.

164. Poore, *supra* note 7, at 144.

165. ICCPR, *supra* note 125. Under article 1(1) of the ICCPR, “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” *Id.* art. 1(1). Further, article 1(3) of the ICCPR states that “[t]he States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.” *Id.* art. 1(3).

166. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/Res/2625 (Oct. 24, 1970) [hereinafter *Friendly Relations Doctrine*], available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>. Under the *Friendly Relations Declaration*, the right to self-determination is not consummated once independence has been attained. The *Friendly Relations Declaration* states:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples* as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Id. at 124 (emphasis added).

167. Conference on Security and Co-operation in Europe Final Act, 14 I.L.M. 1292 (1975) [hereinafter *Helsinki Final Act*], available at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf. Principle VIII states:

Human and Peoples' Rights,¹⁶⁸ and the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights.¹⁶⁹ The Friendly Relations Declaration is particularly relevant to Somalia because it limits the protections of territorial integrity to "sovereign and independent States *conducting themselves in compliance with the principles of equal rights and self-determination* of peoples"¹⁷⁰ Somalia's extensive violations of equal rights and self-determination undermine its right to territorial integrity. During ratification of the Atto de Unione, Somaliland was denied the right to freely determine its political status. The original referendum on the Somali Constitution was denied by a majority of the population of Somaliland.¹⁷¹ However, the large population differential between the two regions allowed Southern Somalia to effectively exercise veto power.¹⁷²

Somaliland has also been denied the right to pursue economic development. Because the Somali government is the sole body recognized to act on the international plane, Somaliland cannot negotiate with international monetary institutions.¹⁷³ As a result, when Somali beef was boycotted, for example, Somaliland was forced to bear this economic burden.¹⁷⁴

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

Id. para. 2.

168. African Charter, *supra* note 125. Article 20(1) of the African Charter states: "[a]ll people . . . shall have the unquestionable and inalienable right to self-determination." *Id.* art. 20(1). Further, all people "shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen." *Id.*

169. Vienna Declaration, *supra* note 124. The Vienna Declaration reaffirms that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development." *Id.* ¶ 2. Further, the Vienna Declaration recognizes

The right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

Id.

170. Friendly Relations Doctrine, *supra* note 166 (emphasis added); Poore, *supra* note 7, at 146 (emphasis added). In *Åland Island*, the League of Nations determined that secession might be available as a "last resort when the State lacks either the will or the power to enact and apply just and effective guarantees" of minority rights. *Åland Islands Question*, *supra* note 118, at 4.

171. Adam, *supra* note 25, at 25.

172. Poore, *supra* note 7, at 144.

173. SCHOISWOHL, *supra* note 3, at 137.

174. *Id.* Since Saudi Arabia lifted its livestock ban, Somaliland has suffered from another "ban on livestock exports from the Horn of Africa to the Gulf states . . . for fear of Rift Valley fever."

Somaliland's situation differs markedly from the process envisioned in *Reference re Secession of Quebec*, in which the Supreme Court of Canada intended secession to be subject to the rule of law.¹⁷⁵ Because the population of Quebec exercised the right to internal self-determination, it was denied the ability to unilaterally secede.¹⁷⁶ Nevertheless, the population of Quebec was granted the right to negotiate with the Canadian government for secession.¹⁷⁷ In contrast, in Somaliland these channels are completely unavailable. Since Somaliland declared independence, Somalia has been engulfed in violence.¹⁷⁸ During this period, the government has struggled to maintain the vital public functions of the state.¹⁷⁹ More importantly, Somalia, "possessing no national government [has lacked] all of the attributes of statehood."¹⁸⁰ As a result, the rest of the country has been left without any protections afforded by the state. It has also left Somaliland without the right to internal self-determination. Ultimately, remedial secession would allow the people of Somaliland to recognize the political, social, and economic rights they have been denied since 1969.

VI. CONCLUSION

While recognition under traditional statehood theory has proven limited, Somaliland maintains hope that it will eventually be recognized.¹⁸¹ Since independence, Somaliland has recognized widespread democratic success. Its electoral process has been widely celebrated by western observers, and it is a nation that continues to grow economically, politically, and socially.¹⁸² Though Somaliland would benefit from recognition, the international community continues to leave it unrecognized.¹⁸³

Somaliland: The Nation Nobody Knows, THE ECONOMIST, Apr. 14, 2001, at 42, 42.

175. Poore, *supra* note 7, at 139.

176. *Id.* at 145.

177. *Id.*

178. Hoyle, *supra* note 16, at 85.

179. *Id.* Somalia has "no police force, judiciary, civil service, electricity or postal service." *Id.* Further, many government facilities have been looted or destroyed. *Id.*

180. *Id.* at 83.

181. AGENCE FRANCE-PRESSE, *supra* note 68.

182. Bradbury et al., *supra* note 48, at 475–76.

183. The international community's failure to recognize Somaliland may also threatens international security. Following the events of September 11th, the United States has been especially cognizant of "failed" states. Cf. Poore, *supra* note 7, at 121. A failed state poses a potential risk because it is "unable to discharge its basic governmental functions with respect to its populace and territory." SCHOISWOHL, *supra* note 3, at 26–27. In many cases, this lack of government oversight enables terrorist organizations to exploit the lawless territory. Poore, *supra* note 7, at 121. This lawlessness was underscored by Greg Mills in a recent report "linking regional terrorism to the

The international community has expressed concern that secession would open the door for numerous minority regions to claim independence. For example, “Russia has been unsympathetic to calls for recognition because recognition of Somaliland would have direct implications on Russia’s position on Chechnyan independence.”¹⁸⁴ However, strict application of remedial secession theory avoids permitting Chechnyan secession. Under remedial secession theory, Chechnya would still be required to negotiate with Russia for secession. As a result, remedial secession will only present a risk where the parent state has effectively ceased to exist. In all other circumstances, remedial secession theory merely reaffirms the right of a minority region to internal self-determination and the right to negotiate for secession.

The Republic of Somaliland faces an unproductive choice between attempting reconciliation with a failed state or continued non-recognition by the international community. While each choice offers the potential for

disintegration of the Somali state,” and alleging that attacks have been “carried out by an Al-Qaeda cell, some members of which may still be at large in Mogadishu.” *Id.* (citations omitted) (quoting another source). “For almost four years the radical al Shabaab movement has been engaged in a violent struggle with the UN-backed transitional government for control of Somalia, which has had no effective administration since Mohamed Siad Barre’s regime collapsed in 1991.” Paul Armstrong, *Somali Militants Ready to Terrorize the World?*, CNN (July 23, 2010), <http://edition.cnn.com/2010/WORLD/africa/07/13/somalia.alshabaab.profile/?fbid=x0K4R4wIN0V>. In [July,] al Shabab claimed responsibility for a bomb attacks in Kampala that killed 74 people. *Id.* Recently, al Shabaab has gained control over much of central and southern Somalia. It has also solidified its connection with Osama bin Laden after he made statements calling for Muslims to “help the Somali mujahedeen fight until Somalia is an Islamic state.” *Id.* While the deterioration of Somalia poses a significant international security threat, a stable government in Somaliland would reduce this threat by “giv[ing] terrorists less room to maneuver and less flexibility in their operations.” Poore, *supra* note 7, at 121.

Moreover, the challenge of preventing piracy in the Horn of Africa may also be compounded by a failure to recognize Somaliland. Even without international recognition, Somaliland has been able to successfully capture, try and sentence individuals accused of piracy. Unrepresented Nations and Peoples Org., *Somaliland: Court Sentences Pirates to 15 Years in Prison* (Feb. 16, 2010), <http://www.unpo.org/content/view/10727/142/>. “Somaliland and Kenya are the only two countries in the Horn of Africa to have successfully captured, tried and sentenced people accused of piracy in the region.” *Id.* Despite this success, piracy is a major business bringing £20 million from ransom payments per year. David Blair, *Somali Pirate Port Becomes Boomtown*, THE TELEGRAPH (Nov. 18, 2008), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3479001/Somali-pirate-port-becomes-boom-town.html>. In Puntland, an autonomous region directly to the east of Somaliland, piracy ranks among the biggest currency earners and job creators:

Piracy has created an abundance of employment in the port of Eyl. All this creates jobs especially for people who refit and maintain fast boats. When hostages are brought to the port, they must be fed during their long period of captivity. Some restaurants in Eyl have reportedly been established especially for this purpose. Meanwhile, new villas are springing up along the coast and the town’s streets are filled with expensive cars.

Id. Absent recognition, the lure of significant wealth offered through piracy may prove too enticing a business for Somaliland, one of the world’s more impoverished countries. Poore, *supra* note 7, at 117.

184. *Id.* at 121.

equal rights and self-determination in the future, both routes come marked with innumerable pitfalls and potential disasters. Ultimately, this Note recognizes that under international law, Somaliland is subject to the rule of law of the parent state. Further, it recognizes that under constitutive theory, Somaliland fails to meet the requirements for international recognition. However, this Note proposes that where a “minority region” has met the requirements for recognition under declaratory theory, and the parent state is unable to negotiate for secession, the minority region should be permitted to seek equal rights and self-determination through remedial secession.¹⁸⁵

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185. Friendly Relations Declaration, *supra* note 166; *see also* ICCPR, *supra* note 125; Helsinki Final Act, *supra* note 167; African Charter, *supra* note 125; Vienna Declaration, *supra* note 124.

* J.D. (2011), Washington University School of Law; B.A. (2008), DePauw University. Dedicated to my parents, without whose encouragement and support my academic endeavors would not have been possible. I would also like to thank my wife, Jennifer, for her great patience, love and support while I was working on this Note. And, finally, I am forever indebted to Dr. Kay Blalock for not only opening her home to me but also for her friendship and assistance in the development of this Note.