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Self-Determination in the Post-Cold War Era: A New Internal Focus?

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SELF-DETERMINATION IN THE POST-COLD WAR ERA: A NEW INTERNAL FOCUS?

YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY. Dordrecht: Martinus Nijhoff Publishers, 1994. xiv + 329 pp.

*Reviewed by Gregory H. Fox**

INTRODUCTION

Self-determination is a concept increasingly at war with itself. The doctrine is now generally understood as a binding principle of international law, drawing its normative force primarily from treaties but also from important sources of customary law.[1] At the same time, with the effective end of decolonization and the virtually unanimous refusal of states to recognize a right of secession, the legal norm appears to have been deprived of much of its content. Thus, one finds in respected legal authorities statements asserting both that achievement of self-determination is a crucial prerequisite to a peoples' enjoyment of all other human rights,[2] and that the traditional understanding of the right as a vehicle for independent statehood has been rendered essentially meaningless.[3] Self-determination, it seems, has become either everything or nothing.

Commentators and legal actors have responded to this crisis of meaning by devising a number of strategies designed to avoid one of two equally unsettling conclusions that seem to follow from the current state of normative incoherence: either that self-determination as a legal norm was relevant only to the specific historical period of decolonization or that its ascent into law was misguided from the start. Primary

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1. *See* Edward A. Laing, *The Norm of Self-Determination, 1941–1991*, 22 CAL. W. INT'L L.J. 209 (1992). In the 1993 Vienna Declaration and Programme of Action, the collected U.N. Member States declared that they considered "the denial of the right of self-determination as a violation of human rights . . . ." Vienna Declaration and Programme of Action, June 25, 1993, para. 2, U.N. Doc. A/Conf.157/24 (Part I) (1993); *reprinted in* 32 I.L.M. 1661, 1665 (1993).

2. *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, G.A. Res. 82, U.N. GAOR, 47th Sess., at 1, U.N. Doc. A/RES/47/82 (1992) (achieving right to self-determination is one among several "imperatives for the full enjoyment of all human rights").

3. James Crawford, *The Rights of Peoples: 'Peoples' or 'Governments'*, *in* THE RIGHTS OF PEOPLES 55, 56 (James Crawford ed., 1988).

among these strategies has been to view the right as operating solely within the territorial confines of existing states, manifesting itself not in the relations between colonies and metropolitan powers or states and self-defined "peoples" but in the structure of domestic political institutions. These institutions may include minority protection regimes, democratic political processes, safeguards for cultural rights, and various forms of federative autonomy. Viewing self-determination as an "internal" right may require a substantial reordering of a state's domestic law in order to achieve compliance; it would not, however, require the redrawing of its boundaries.

The legitimacy of an internal right to self-determination is as yet uncertain, in particular if it is to be regarded as wholly supplanting the traditional conception of an external right rather than merely coexisting as an alternative means of achieving political autonomy.[4] Yet if any argument for an internal right is to be accepted, a crucial threshold must be crossed. The "self" endowed with the right to determine its future must coincide with the territorial state. Granting the right to any substate entity, in this view, begins the slippery slope toward legitimizing secession. This fear arises from the range of options available to *bona fide* right-holders, which at least for colonial territories — and in the popular mind for others as well — included full independent statehood.[5] Recent practice has attempted to narrow this range.[6] However, an internal right avoids this debate entirely by excluding definitions of the self based on ethnic, racial, religious, linguistic, historic, or other criteria that in any way deviate from the boundaries of the state existing at the time the benefits of the right are claimed.

Of the many ways in which the international community has attempted to focus the right inward, the fostering of democratic gover-

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4. The viability of an internal right has clearly been enhanced by the transition to majority rule in South Africa and by progress toward resolution of the Palestinian question, the two mainstays of U.N. resolutions equating self-determination with independent statehood.

5. Resolution 1541 elaborated the obligations imposed upon U.N. Member States by Chapter XI of the U.N. Charter, concerned with colonial territories whose peoples had not yet "attained a full measure of self-government." U.N. CHARTER art. 73. Such an achievement could be said to occur through "(a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) integration with an independent State." G.A. Res. 1541, U.N. GAOR 4th Comm., 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).

6. In November 1991, the Badinter Commission of the International Conference on the Former Yugoslavia was asked for its opinion as to whether the Serbian populations of Bosnia and Croatia had the right to self-determination. The Commission answered that while they did indeed have such a right, its exercise could not (in the absence of agreement) result in changes to state borders existing at the time of independence. Rather, the right required acknowledgement of a peoples' cultural identity and their legal protection as minorities under relevant international instruments. Opinion No. 2, International Conference on the Former Yugoslavia Arbitration Commission, *reprinted in* 31 I.L.M. 1497, 1498–99 (1992) [hereinafter Badinter Opinion No. 2].

nance has by far attracted the most attention. An extensive normative and institutional framework has arisen to encourage transitions to democratic rule and the strengthening of existing democratic institutions. The primary vehicle for these efforts — the monitoring of elections and referenda — is the subject of Yves Beigbeder's new book, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transitions to Democracy.*[7] While Beigbeder has primarily written a survey of international practice, eschewing any serious attempt to situate election monitoring within a conceptual framework of interstate relations, the relation between democratization and self-determination haunts his discussion. Indeed the book's subtitle — "Self-Determination and Transition to Democracy" — suggests that Beigbeder plans to join the ongoing debate over the nature of the "self" and marshal an argument for a territorial self based on the abundance of multilateral practice he reviews.

Curiously, such an argument does not appear in the book. Beigbeder acknowledges a theory of "internal self-determination" which, he asserts, generally coincides with traditional democratic theory.[8] He also makes the rather obvious point that both internal and external self-determination "imply a democratic process."[9] In general though, internal democracy and self-determination pass each other unnoticed in Beigbeder's account, the former having a scant role in shaping conceptions of the latter.[10] As a result, the reader is given an answer to the debate over conceptions of the "self" without having been asked the crucial question: how can an idea grounded in claims for independent statehood against empires, colonizers, and hegemonic powers be transformed into a theory of domestic governance? Until such a conceptual link is supplied, it seems rather curious to write a book that treats self-determination and democracy as virtual siblings, for a purely external account of self-determination represents a claimed entitlement to *dismantle* existing territorial states, while democracy is an attempt to *reinforce loyalty* to existing states by including all citizens in a national process of deliberation and choice. Yet Beigbeder seems content to take monitored votes where he finds them, whether they be in established states, secessionist entities, or former colonial territories.

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7. YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994).

8. *Id.* at 18.

9. *Id.*

10. Chapter 1 is promisingly entitled "Self-Determination and Democracy," and Chapter 4 addresses "Democracy, Self-Determination and the United Nations." Both chapters, however, discuss these concepts one after the other, providing little if any sense of how the they relate in theory or have interacted in U.N. practice.

As it happens, I agree with what seems to be Beigbeder's view that an internal conception of self-determination is slowly gaining acceptance. Since international law is made by states, which have an obvious stake in their own territorial integrity, this should not be a surprising development. Yet it is a conception of the right that is challenged not only by the unleashing of nationalist passions that Professor Franck has termed "post-modern tribalism"[11] but by many scholars as well.[12] In this review, I would like to attempt to supply the conceptual link between self-determination and internal democracy missing from Beigbeder's account. This will involve not only making claims for an exclusively territorial self but reviewing the equally crucial question of which individuals belong to the territory. This step necessarily follows from the International Court of Justice's (ICJ or Court) definition of self-determination as "the need to pay regard to the freely expressed will of peoples"[13] — requiring one to ascertain precisely whom to ask. I will suggest that trends have emerged disfavoring ethnic or other criteria substantially supplied and adjudged by the groups seeking application of the right to their cause. Once this framework is made clear, Beigbeder's review of international practice in election monitoring may be recast as evidence that states are now willing to invest substantial resources, including increasingly scarce political capital, in the viability of an internal self.

I. THE NATURE OF THE SELF: AN EMERGING TERRITORIAL CONCEPTION

A. *The Competing Criteria*

Virtually all of the non-self-governing and trust territories that achieved independence in the post-war era retained their colonial-era boundaries.[14] To achieve self-determination, the only territorial relationship to be altered was that with the metropolitan power. Achieving independence, in other words, did not come at the expense of another sovereign state's territory or that of an adjacent colony. Decolonization,

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11. Thomas M. Franck, *Fairness in the International Legal and Institutional System*, 240 R.C.A.D.I. 125–49 (1993-III).

12. *See, e.g.*, Michael Walzer, *The New Tribalism*, DISSENT, Spring 1992, at 164; Angela M. Lloyd, Note, *The Southern Sudan: A Compelling Case for Secession*, 32 COLUM. J. TRANSNAT'L L. 419 (1994).

13. Western Sahara, 1975 I.C.J. 11, 33 (Oct. 16).

14. As Malcolm Shaw concludes, "a deterministic view was taken of the territory-people nexus." MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA 144 (1986).

therefore, did not present the conflict between self-determination and the principle of territorial integrity that is the distinctive feature of secessionist claims.

In order for post-colonial self-determination to achieve an equivalent equilibrium — in which the secessionists' trade-off between autonomy and territorial integrity is not implicated — a similar agreement would seem to be necessary on the precise nature of the self. An internal view of self-determination accomplishes this goal by equating the self with the existing territorial state. This remains a highly controversial proposition, though it is the crucial missing link in Beigbeder's implicit view that monitoring national elections is an example of self-determination. To oversimplify somewhat, the internal view is but one of three competing conceptions of the self now extant: (1) recognizing as a legitimate "self" any group claiming coherence as such, whether wholly self-defined or according to some objective criteria; (2) limiting groups qualifying under (1) to existing internal administrative boundaries of the state — the *uti possidetis* principle; or (3) equating the self and national boundaries as co-extensive. As the following discussion will suggest, international law appears to be moving toward the third conception on a variety of fronts.

1. The Self-Defined "Self"

The first alternative regards as a legitimate self any "people" demonstrating a coherent group identity. In theory, such a showing might be wholly subjective: the crucial characteristics asserted by a group as defining its identity could be accepted both as legitimate criteria and as being fulfilled by whatever historical or ethnographic data put forward by the group. But given that the legal doctrine of self-determination is a right vested in "peoples,"[15] a wholly subjective conception of the self is necessarily excluded. "People" is presumably a term with an ascertainable meaning that encompasses certain groups and excludes others. However difficult and controversial the process of definition may be, it is by its nature a search for an objective meaning.

Yet a review of the literature immediately reveals that objectivity provides little in the way of limits on potential candidates for "selves." Ethnicity is the most frequently mentioned basis for group identification,

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15. U.N. CHARTER art. 1(2); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 1, 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976) [hereinafter Political Covenant]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1, 993 U.N.T.S. 2, 2 (entered into force Jan. 3, 1976).

but other characteristics are often substituted or added, such as those demonstrating ties to a particular territory. Professor Brilmayer, for example, in evaluating competing claims to territory, would consider such factors as the immediacy of the group's historical grievance, the extent to which the group has kept its claim alive, whether the territory has been resettled by members of a state's dominant group, and the nature of the historical grievance undergirding the territorial claim.[16] While each of these categories may allow a compelling case of injustice to be made in a given case, their application is potentially limitless. In and of themselves, these categories place little in the way of a burden of proof on groups seeking recognition. As a result, few would be disqualified.[17] The promise of limits provided by use of the objective term "people" thus appears to be largely false.

Such a devolution to subjectivity is likely not only because the notion of a "people" is an elastic one, but also because it inheres in the current process of identifying such groups. The international community's primary means of bestowing collective legitimacy on a people or self — recognition through membership in international organizations — almost always occurs *after* a secessionist movement has succeeded. No regular institutional process exists to sort legitimate from illegitimate "selves" during the necessarily lengthy process of a struggle for independence. The result would be and now *is* confusion, as a great many secessionists and their parent states make conflicting claims against each other with no prospect of an authoritative body engaging in a test of those claims against whatever "objective" definition of the self has emerged. A definition, like this one, subject only to autointerpretation is little better than no definition at all.

As a result of these normative and institutional deficiencies, one finds scant support in the international community for viewing the self as any group claiming coherent identity and/or connection to a territory. While many international lawyers take the view that international law does not prohibit secession, few defend the existence of an affirmative right to secede from sovereign states.[18] Moreover, such a right cannot be

16. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 199–201 (1991).

17. Martti Koskenniemi argues that because "nationalism" is defined through ongoing political struggle, with legitimate nations emerging only after physical and rhetorical battles have been waged, *a priori* "[t]here are no general criteria by which nations can be recognised." Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241, 260–63 (1994).

18. Where such support exists, it is usually in cases of extreme human rights abuse in which no other remedies appear feasible. *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 100–01 (1979).

divined from the major sources of law from which a right to self-determination draws its normative force.[19] The drafters of the U.N. Charter were concerned primarily with the vast colonial empires existing at the end of the Second World War, not ethnic or other minorities within their borders.[20] The General Assembly's seminal Resolution 1514, which elaborates Member States' Charter obligations regarding self-determination, appears to preclude secession by asserting the equal importance of territorial integrity.[21]

More ambiguous is common Article 1 of the Economic and Political Covenants, which applies the right of self-determination to "all peoples" and not just those in colonial territories. Moreover, a number of State Parties to the Covenants sharply rejected India's declaration regarding Article 1, which provides that the right does not apply "to sovereign independent states or to a section of a people or nation — which is the essence of national integrity."[22] In its General Comment on Article 1 of the Political Covenant, however, the Human Rights Committee has suggested a generally internal focus by requiring State Parties to describe in their reports "the constitutional and political processes which in practice allow the exercise of this right."[23] The Committee has also effectively denied itself the opportunity to make precise findings on the contours of the right by holding that, because Article 1 grants rights to collective "peoples," an individual cannot raise self-determination claims under the Covenant's Optional Protocol.[24]

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19. For an excellent overview of these instruments, see Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT'L & COMP. L.Q. 867 (1989).

20. Committee I/1 of the San Francisco Conference reported that the principle of self-determination in the Charter "implied the right of self-government of peoples and not the right of secession." *Summary Report of Sixth Meeting of Committee I/1*, 6 U.N.C.I.O 296 (1945); *see also* John P. Humphrey, *Political and Related Rights*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW 171, 195–96 (Theodor Meron ed., 1984); CRAWFORD, *supra* note 18, at 90–91 (Charter's view of self-determination likely refers to states' right to choose their form of government without outside interference).

21. "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, 67, U.N. Doc. A/4684 (1960).

22. *Multilateral Treaties Deposited with the Secretary-General: Status as of 31 December, 1993*, at 116 (declaration), 134–37 (objections), U.N. Doc. ST/LEG/SER.E/12 (1994).

23. General Comment 12/21 (1984), *reprinted in* 9 Eur. H.R. Rep. 181 (1987); *see also* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 215 (1991).

24. *Kitok v. Sweden, Communication No. 197/1985*, *reprinted in Report of the Human Rights Committee*, U.N. GAOR, 43d Sess., Supp. No. 40, at 221, 228, U.N. Doc. A/43/40 (1988).

The Declaration on Friendly Relations also contains a clause asserting the primacy of territorial integrity over self-determination.[25] While the application of this trumping principle is limited to states "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour," there are at least two reasons to hesitate before reading this clause as suggesting an affirmative right to secession for groups living under nondemocratic regimes. First, early in the drafting process, the United States offered an alternative text which directly equated representative government with the fulfillment of self-determination; this proposal was rejected.[26] Second, read in context the clause appears to address racial issues, thereby limiting its application "only [to] Pariah states like South Africa, which oppresses its majority on racial grounds."[27]

Even if the normative core of the right to self-determination leaves any room for an auto-definition of the self, the international response to secessionist movements and the recent fragmentation of certain states has done little to advance such an interpretation. A review of the thirty major secessionist movements of the post-war era[28] reveals *no* formal support in the United Nations for those groups' demand for independent statehood.[29] Indeed, the United Nations nearly drove itself to the brink of constitutional breakdown and bankruptcy in dispatching troops to *prevent* the province of Katanga from seceding from the Congo.[30]

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25. The Declaration on Friendly Relations 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.

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, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 124, U.N. Doc. A/8028 (1970).

26. MORTON H. HALPERIN & DAVID SCHEFFER, SELF-DETERMINATION IN THE NEW WORLD ORDER 24 n.33 (1992).

27. Thornberry, *supra* note 19, at 877.

28. The list is taken from TED R. GURR, MINORITIES AT RISK 294–98 (1993).

29. This conclusion is based on a review of United Nations Yearbooks, which make note of all resolutions adopted by U.N. organs. *See* Alexis Heraclides, *Secessionist Minorities and External Involvement*, 44 INT'L ORG. 341, 346 (1990); JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 86–111 (1987).

30. Sally Morphet, *U.N. Peacekeeping and Election-Monitoring*, *in* UNITED NATIONS, DIVIDED WORLD 183, 197–99 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

Bilateral support for these movements presents a more complex picture; few states have accorded diplomatic recognition to secessionist groups while logistical support has been more common. However, "incumbent governments have tended to attract more support than insurgents have."[31] Western countries supported independence for the Baltic republics during the entire post-war era, but because this took the form of continuing to recognize previously independent states, its *opinio juris* value is unclear.[32] Iraqi Kurds have been given substantial military and humanitarian assistance, but talk of independence has been studiously avoided.[33] India for a time supported Tamil separatists in Sri Lanka, but in 1987 signed a peace accord with the Sri Lankan government which not only "signalled to the Tamils that it would not help them to establish a separate state" but led to India's becoming a direct target of attacks by the LTTE (Tamil Tigers).[34] The Tibetan struggle against China has received little more than rhetorical support.[35] To date, no state has recognized the break-away Russian republic of Chechnya, despite widespread condemnation of Russia's tactics in suppressing the rebellion.[36] On the other hand, Saudi Arabia supported the unsuccessful attempt by southern Yemenis to secede from the newly unified nation, though importantly it stopped short of formal recognition.[37] Perhaps of equal importance to the general reluctance of third parties to find a "self" endowed with rights in these cases is the virtually blanket refusal of states to do so when faced with secessionist movements of their own.[38] As Heather Wilson points out, "if the States most intimately

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31. Heraclides, *supra* note 29, at 353.

32. *See* discussion *infra* notes 48–53.

33. *Kurds Still Alone*, ECONOMIST, Nov. 21, 1992, at 51; *Solving the Kurds*, ECONOMIST, Oct. 31, 1992, at 17; *Independence by Stealth*, ECONOMIST, May 9, 1992, at 43.

34. S.W.R. de A. Samarasinghe, *The Dynamics of Separatism: the Case of Sri Lanka*, *in* SECESSIONIST MOVEMENTS IN COMPARATIVE PERSPECTIVE 48, 60–63 (Ralph R. Premdas et al. eds., 1990).

35. HALPERIN & SCHEFFER, *supra* note 26, at 11–12; W. Gary Vause, *Tibet to Tienanmen: Chinese Human Rights and United States Foreign Policy*, 42 VAND. L. REV. 1575, 1587–97 (1989).

36. Mike Trickey, *Russians and Chechens Extend Tenuous Truce*, MONTREAL GAZETTE, Feb. 16, 1995, at A13.

37. *See* David Killion, *Saudi Meddlers in Yemen*, N.Y. TIMES, July 30, 1994, at 19. Indeed, during the course of the short civil war, which ended in July 1994, no state recognized the secessionist Democratic Republic of Yemen (DRY). 40 KEESING'S RECORD OF WORLD EVENTS 40078 (1994). Additionally, the Security Council passed two resolutions in which it urged the end to all outside supplies of arms to the DRY. *See* S.C. Res. 931, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/931 (1994); S.C. Res. 924, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/924 (1994).

38. The Czech-Slovak split of 1993 did not involve a government recognizing a secessionist movement but a mutual decision by both sides to divide the country. While Ethiopia

involved with a situation which other States claim is subject to new rules of international law deny the existence of these new rules, their denial must cast grave doubt upon the legal character of these rules in a system which depends on practice and consent for its development."[39]

Finally, it may be argued that the normative value of third party support for secessionist movements must be tempered by the ICJ's holding that unilateral intervention in domestic conflicts is prohibited when it bears "on matters in which each State, by the principle of State sovereignty, to decide freely."[40] Acts falling within this formulation are illegal and cannot, by definition, contribute to the growth of a legal rule. This argument is complex, for it begs the monumentally difficult question of whether a state's denial that a group within its territory constitutes a legitimate "self" is one such internal "matter." The question of whether unilateral declarations of "selfhood" by such groups have legal effect — that is, whether a state *cannot* deny self-determination to a group objectively constituted as a self — is precisely the issue that third party support for the groups is invoked to clarify.

This circular reasoning may perhaps be broken when the international community as a whole has spoken on the question, as when it recognizes a liberation movement as the "legitimate representative" of a people.[41] In that case, a state's denial of self-determination would not be an internal "matter" in the ICJ's formulation, and at least some third party assistance would be permitted. But even in such a case of collective action, the designation of a legitimate self comes not from the acts of third parties but by the international community's collective act of recognition. Short of such an act, there is simply no authoritative way to determine whether a "self" exists and, consequently, whether the parent state's right to be free from externally supported aggression is supersed-

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did allow Eritrea to hold a referendum on secession in 1993 — resulting in an overwhelmingly favorable vote and eventual independence for the territory — the government that permitted the secession was not the same government that had opposed Eritrean nationalism during the 30-year civil war. Indeed the new government had close ties with the secessionist groups; one of its early acts was to promulgate a National Charter that "accepted the right of the Eritrean people to self-determination." GOVERNMENT OF ERITREA, ERITREA: BIRTH OF A NATION 5 (1993).

39. HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 126 (1988).

40. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 108 (June 27).

41. Thus, when the U.N. General Assembly recognized the African National Congress and other groups as representing the people of South Africa, third party states were encouraged to provide assistance. G.A. Res. 6(I), U.N. GAOR, 31st Sess., Supp. No. 39, at 10, 14, U.N. Doc. A/31/39 (1976) (appealing to Member States "to provide all assistance required by the oppressed people of South Africa and their national liberation movements during their legitimate struggle").

ed.[42] Given such indeterminacy, it would be imprudent to argue that the Court's general rule against intervention should be superseded in cases of purely unilateral action. As noted, a general rule of nonintervention renders any assistance to secessionists devoid of normative value.

The dissolutions of the Soviet Union and the Socialist Federal Republic of Yugoslavia, despite giving birth to a myriad of new states ultimately recognized by the international community, have made only uncertain contributions to a substate conception of the self. The strongest *opinio juris* that could have emerged from either break-up would have been statements of an entitlement to self-determination before *the fact* of independent statehood was clearly evident. Established conceptions of the self have followed this pattern. Resolution 1514 was such a general statement regarding colonial territories, as was the General Assembly's recognition of SWAPO,[43] the ANC,[44] and the PLO[45] as "legitimate" representatives of peoples well before independence (or majoritarian elections) were presented to the Assembly as a *fait accompli*. Similarly, the OAU's decision to seat a POLISARIO delegation in November 1985 represented a statement that the people of the Western Sahara held *rights against* those actively denying their aspirations toward autonomy — notably Morocco.[46] Recognition after statehood has been achieved, or after the state resisting independence finally acquiesces, does not necessarily affirm a prior right to seek independence. It may simply constitute a recognition by states or international organizations that according to the prevailing declarative theory, a new state has come into existence and must be dealt with as such.

International reaction to the break-up of the Soviet Union — and in particular the Baltic states, whose departure precipitated its dissolution — generally fell into this second weaker category.[47] While the United

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42. *See* WILSON, *supra* note 39, at 117 (While Third World states are willing to extend premature recognition to colonial territories, where a group seeks secession from a sovereign state, "the principle of territorial integrity and fear for their own vulnerability determines their policies.").

43. *See* G.A. Res. 146, U.N. GAOR, 31st Sess., Supp. No. 39, at 130, U.N. Doc. A/31/39 (1976). Beigbeder correctly points out that it was rather inconsistent for the Assembly to designate SWAPO as the "sole and authentic" representative of the Namibian people while the Security Council was at the same time attempting to organize elections to determine precisely that question. BEIGBEDER, *supra* note 7, at 153.

44. *See* G.A. Res. 6(I), *supra* note 41.

45. *See* G.A. Res. 3210, U.N. GAOR, 29th Sess., Supp. No. 31, at 3, U.N. Doc. A/9631 (1974).

46. David Seddon, *Morocco at War*, *in* WAR AND REFUGEES: THE WESTERN SAHARA CONFLICT 98, 111 (Richard Lawless & Laila Monahan eds., 1987).

47. *See Self-Determination: Secession, Autonomy and Integration*, *in* CONTEMPORARY INTERNATIONAL LAW ISSUES: OPPORTUNITIES AT A TIME OF MOMENTOUS CHANGE 57, 59

States had, in principle, never recognized the incorporation of the Baltics into the Soviet Union, this was mostly a status of symbolic significance.[48] In the aftermath of the August 1991 coup, President Bush announced not that preexisting relations with the Baltics would continue in some heightened fashion but that the United States was "prepared immediately to *establish* diplomatic relations with their governments."[49] More importantly, prior to President Yeltsin's decree of August 24, 1991 recognizing the independence of Latvia and Estonia (Russia had recognized Lithuania in 1990), only Iceland had established diplomatic relations with a Baltic state, and that was with Lithuania.[50] The European Community waited until August 27 to call for the establishment of relations.[51] The United States extended recognition on September 2.[52] The CSCE and the United Nations waited still longer — until after independence had been affirmed by the State Council of the Soviet Union on September 6 — to admit the Baltics to membership.[53]

Recognition of the former Yugoslav republics unfolded in a similar fashion. The unraveling of the Socialist Federal Republic of Yugoslavia (SFRY) began formally on September 27, 1990 when the Slovenian Parliament declared it would no longer recognize federal legislation as binding.[54] Slovenes voted overwhelmingly for independence in a referendum on December 23, as did Croatia on May 19, 1991, Macedonia on September 9, and Bosnia (in a disputed vote boycotted by Bosnian

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(René Lefeber ed., 1994) (remarks of Bart Driessen); Lawrence S. Eastwood, Jr., Note, *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299, 321 (1993).

48. It was also one of limited *opinio juris* value, since virtually every other state in the world *had* recognized their incorporation. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 131 (1990). Moreover, speaking to the Supreme Soviet of the Ukraine on August 1, 1991, as pressure for Baltic independence was intensifying, President Bush warned against promotion of "a suicidal nationalism based upon ethnic hatred." *The U.S. Commitment to Reform*, 2 DEP'T ST. DISPATCH, Aug. 12, 1991, at 596, 597. U.S. policy throughout the period leading up to independence had as its highest priority preserving President Gorbachev's precarious hold on power. "The Baltics' achievement of independence after the August 1991 aborted coup in Moscow can obscure the fact that U.S. policy at no point really advanced — and may have retarded — the cause of independence for the Baltics." HALPERIN & SCHEFFER, *supra* note 26, at 29.

49. *U.S. To Establish Diplomatic Relations with Baltic States*, 2 DEP'T ST. DISPATCH, Sept. 2, 1991, at 647 (emphasis added).

50. FACTS ON FILE YEARBOOK 1991 640.

51. *Id.*

52. *U.S. to Establish Diplomatic Relations with Baltic States*, *supra* note 49, at 647.

53. 38 KEESING'S RECORD OF WORLD EVENTS 38419 (1991).

54. Marc Weller, *Current Developments: The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

Serbs) on October 14.[55] Warfare had been raging since June 1990 when federal troops attacked the provisional Slovenian militia.[56] By December 7, 1991, the cohesion of the federal structures had deteriorated to such an extent that the Badinter Commission of the European Community determined that the governmental organs of the SFRY "no longer meet the criteria of participation and representativeness inherent in a federal State" and that, as a result, "the Socialist Federal Republic of Yugoslavia is in the process of dissolution."[57]

Yet the response of the international community up through the time the Badinter Commission made its finding (and for a short time thereafter) was, by and large, to work at holding the old federal structures together. When the U.N. Security Council first addressed the matter on September 25, 1991, a number of Member States described the conflict as an internal one and justified their votes in favor of an arms embargo solely on the grounds that it had been requested by the SFRY representative.[58] In June 1991, the CSCE voiced its support for the "territorial integrity" of the federal state.[59] In August, the European Community proposed an arbitration procedure that involved a committee with members appointed by the federal presidency, thus making the implicit assumption that the presidency retained an important degree of legitimacy.[60] The United States repeatedly opposed early recognition of the republics, a position it maintained through mid-December 1991.[61] In December the Coordinating Bureau of the Non-Aligned Countries denounced "all attempts aimed at undermining the sovereignty, territorial integrity and international legal personality of Yugoslavia."[62] Also in December — at a time when Germany had begun making clear its intention to offer early recognition — Secretary-General Boutros-Ghali urged forbearance until an overall peace settlement could be reached.[63]

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55. Opinion No. 1, Conference on Yugoslavia Arbitration Commission, *reprinted in* 31 I.L.M. 1494, 1496–97 (1992) [hereinafter Badinter Opinion No. 1].

56. Weller, *supra* note 54, at 570.

57. Badinter Opinion No. 1, *supra* note 55, at 1496–97.

58. *Provisional Verbatim Record*, U.N. SCOR, 46th Sess., 3009th mtg. at 28–29 (statement of Mr. Shamuyarira, Zimbabwe), 33–36 (statement of Mr. Al-Ashtal, Yemen), 45–46 (statement of Mr. Solanki, India), 49–50 (statement of Mr. Qian Qichen, China), U.N. Doc. S/PV.3009 (1991).

59. Robert Mauthner, *Crisis Policy and Baltics Cause CSCE Disputes*, FIN. TIMES, June 20, 1991, at 2.

60. Weller, *supra* note 54, at 576.

61. HALPERIN & SCHEFFER, *supra* note 26, at 36.

62. *Letter from the Permanent Representative of Yugoslavia to the President of the Seucirty Council*, U.N. SCOR, 46th Sess., Annex, at 2, U.N. Doc. S/23289 (1991).

63. *Report of the Secretary-General Pursuant to Security Council Resolution 721*, U.N. SCOR, 46th Sess., Annex IV, at 21, U.N. Doc. S/23280 (1991) (warning against "early,

Germany and Italy recognized Slovenia and Croatia on December 23; other states and international organizations followed over the next five months, culminating in the admission of Croatia, Slovenia, and Bosnia-Herzegovina to membership in the United Nations on May 22, 1992.[64]

While this attenuated process might be read as affirming these states' right to secession, the repeated attempts to achieve peace by discouraging fragmentation do not suggest that was a motive in extending recognition. Formal recognition came at a time when any right to secede (if it indeed existed) had already been exercised. The establishment of relations is more plausibly attributable to states' realistic assessment that diplomatic relations with the republics could only be carried out through their newly established governments (most of which had been or would soon be elected). Alternatively, some states may have judged that the republics would be better protected against external aggression if they were Member States of the United Nations. In either case, there was virtually no prospect that the old federal system might be resuscitated. The former republics were, in fact, states and had to be dealt with as such.[65] Given such practical necessities of the moment, coupled with earlier efforts to forestall recognition, the ultimate decision to treat the republics as sovereign implies little about their independence having been achieved pursuant to a legal right.

This view of the Yugoslav crisis finds support in another aspect of the international community's reaction: the consistent refusal of those drafting peace plans for Bosnia to suggest its partition into ethnic mini-states. The Security Council set the parameters for negotiated solutions by declaring that "the borders of Bosnia and Herzegovina are inviolable."[66] The body initially and primarily charged with devising a settlement, the International Conference on the Former Yugoslavia, thus declared at its inaugural London Conference in August 1992 that any political settlement in Bosnia must "respect . . . the integrity of present frontiers, unless changed by mutual agreement."[67] While the Vance-Owen Plan of January 1993, the so-called HMS Invincible Plan of

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selective recognition" of the republics in a letter from the Secretary-General to the Minister for Foreign Affairs of the Netherlands).

64. The exception was Macedonia, which was admitted to the U.N. on April 8, 1993.

65. It is crucial to note that even German and Italian recognition on December 23 came *after* the dates on which, according to the Badinter Commission, Croatia, Slovenia, and Macedonia became successor states to the SFRY. Croatia and Slovenia became successor states on October 8, 1991, and Macedonia became a successor state on November 17, 1991. Opinion No. 11, International Conference on the Former Yugoslavia Arbitration Commission, *reprinted in* 32 I.L.M. 1586, 1589 (1993).

66. S.C. Res. 757, U.N. SCOR, 47th Sess. at 1, U.N. Doc. S/RES/757 (1992).

67. *Statement on Bosnia* (Aug. 27, 1992), *reprinted in* 31 I.L.M. 1537 (1992).

September 1993, and the plan devised by the five nation "Contact Group" in July 1994 all suggested a variety of provincial and federal schemes clearly aimed at separating the three dominant ethnic groups, none attempted to alter Bosnia's existing boundaries or to endow the ethnic subunits with any degree of international personality.[68] None of the international bodies involved in negotiations has accepted the Bosnian Serb position that the self-proclaimed Serbian Republic is entitled either to independence or to join the Federal Republic of Yugoslavia in pursuit of a "Greater Serbia."

It may be that in attempting to support the cohesion of multiethnic states such as the Congo, Nigeria, the Soviet Union, or the SFRY, the international community is now fighting a losing battle against centrifugal nationalist forces. Yet the normative assumptions underlying that fight continue to discourage auto-defined conceptions of the self that are subjective in all but name.

2. The Self Defined by Former Internal Boundaries: *Uti Possidetis Juris*

A second conception of the self might limit claims to territories defined by the internal administrative boundaries of the parent state. This is generally referred to as the principle of *uti possidetis juris*,[69] which first emerged in boundary treaties between former Spanish colonies in Latin America in the early nineteenth century and was later

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68. While the Vance-Owen Peace plan proposed dividing the state into ten ethnically defined provinces, it provided that those provinces would not "have any international legal personality and may not enter into agreements with foreign States or with international organizations." *Agreement Relating to Bosnia and Herzegovina*, U.N. SCOR, 48th Sess., Annex II, at 21, U.N. Doc. S/25479 (1993). The Vance-Owen Plan was endorsed by the Security Council in Resolution 820. S.C. Res. 820, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/820 (1993). The second plan, which made more concession to ethnicity by proposing three constituent republics held together in a central Union, nonetheless endowed only the Union with international personality; the constitutional arrangements provided that only the Union might apply for membership in international organizations and become party to Bosnia-Herzegovina's treaties in force. *See Letter from the Charge d'Affaires A.I. of the Permanent Mission of Croatia to the President of the Security Council*, U.N. SCOR, 48th Sess., U.N. Doc. S/26377/Add.1 (1993). The third plan, drafted by the United States, the European Union, and Russia in July 1994, proposed dividing Bosnia between Bosnian Serbs and a newly-formed Muslim-Croat federation. The agreement establishing the federation was "based on the sovereignty and territorial integrity of the Republic of Bosnia and Herzegovina." FRAMEWORK AGREEMENT FOR THE FEDERATION, Part I (Establishment) (on file with author). While the precise relation of the federation to Bosnian Serb territory is not yet clear, U.S. Secretary of State Warren Christopher described the arrangement as preserving "the state of Bosnia as a single state within its international boundaries . . . ." Roger Cohen, *New Bosnia Peace Plan Has Serb Corridor*, N.Y. TIMES, July 6, 1994, at A3.

69. Beigbeder does not mention *uti possidetis*, even in his discussion of colonial-era monitoring.

accepted by most African states in the OAU's 1963 Cairo Declaration.[70] *Uti possidetis* also guided the United Nations in several cases of decolonization where parties urged deviation from colonial boundaries. In the case of British Togoland, French Togoland, and the Gold Coast, for example, the U.N. rejected calls to hold a plebiscite of ethnic Ewes, who straddled the three territories.[71] As a result, Ewes now live both in Ghana and Togo. The U.N. General Assembly has consistently called for the unity of the Comoros Islands, despite claims to self-determination by Catholic Mayotte against the predominantly Muslim population of the other islands.[72] Calls to alter boundaries so that all ethnic Somalis would live in one state were also rejected; Somalis are now dispersed among Somalia, Kenya, and Djibouti.[73] There have been some exceptions to this practice,[74] but in the vast majority of transitions from colony to state, the U.N. did not even call for a plebiscite, as it never seriously considered any alternative to the independence of the territories other than independence in accordance with existing colonial boundaries.[75]

In the colonial context, *uti possidetis* served to protect new states from incessant boundary disputes and endless armed conflicts, once the colonial powers had left.[76] It did so by excluding claims of overlapping historical title or ethnic kinship from determinations of territorial sovereignty. The doctrine freezes title to territory at the time of independence, a moment sometimes referred to as the "critical date."[77] Disputes over territory are thus focussed solely on what the boundaries were (or were intended to be if no actual delimitation had occurred) at that moment.

There are two sets of problems, however, with using *uti possidetis* as a meaningful limitation on otherwise unlimited auto-definitions of the

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70. *See* Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6 (Feb. 3) (separate opinion of Judge Ajibola); Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 564–68 (Dec. 22); 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 498–510 (2d ed. 1951).

71. SHAW, *supra* note 14, at 111–12.

72. G.A. Res. 18, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/18 (1994) (recalling similar resolutions dating to 1973).

73. SHAW, *supra* note 14, at 110–11; 119–20.

74. The case of the Cameroons is arguably an exception. The territory was administered by the British as two separate units, and the U.N. Trusteeship Council agreed to this effective partition, which allowed the south to vote in a plebiscite to join Cameroon while the north voted to join Nigeria. However, the separate administration ofthe two territories does distinguish the disposition of the Cameroons from a complete abandonment of prior colonial boundaries. *See id.* at 112–13.

75. *Id.* at 144.

76. *See Territorial Dispute*, 1994 I.C.J. at 83–86 (separate opinion of Judge Ajibola).

77. *Frontier Dispute*, 1986 I.C.J. at 568.

self. The first is whether the doctrine in fact represents a substantive limitation on the exercise of the right to self-determination after the end of decolonization. The doctrine as it emerged in Latin America and Africa functioned as a limit on conflicting claims by states to territory on their common borders. Serving this function, it guided several ICJ judges in adjudicating the border disputes between ex-colonial territories presented in the *Frontier Dispute* (Burkino Faso v. Mali) and *Territorial Dispute* (Libya v. Chad) cases. This *interstate* conception of the doctrine follows from its origins both in treaties between and among Latin American states and in the OAU's foundational documents. As the President of Mali declared at the 1964 Cairo Conference, the doctrine impelled African states to "renounce any territorial claims."[78] Thus, the doctrine as traditionally understood did not limit claims by secessionist groups *within* states seeking to alter national boundaries. If it did, states would be prohibited from voluntarily agreeing to such a group's secessionist claims — a restriction not only inconsistent with U.N. practice[79] but contradicted by the very ICJ opinions giving general expression to the doctrine.[80] Alternatively, *uti possidetis* might be seen as encompassing an obligation to prevent only *unwanted* secessions, thereby preserving the option of consensual break-up. But the doctrine modified in this fashion becomes a tautology: if a secession is unwanted it will, by definition, be opposed by the parent state. A norm reduced to this marginal status would add nothing to actions already taken by states in its absence and would therefore retain little if any value as an independent check on auto-definitions of the self.

The Badinter Arbitration Commission suggests a possible way out of this conundrum through a radical restatement of the doctrine. In its opinions, as guided by various declarations of the European Community on the Yugoslav conflict, the Commission described *uti possidetis* not as a norm addressed to parent states but as restraining the secessionists themselves from claiming territory beyond internal administrative

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78. *Territorial Dispute*, 1994 I.C.J. at 88 (separate opinion of Judge Ajibola) (quoting the President of Mali).

79. The U.N.'s supervision of the referendum on independence in Eritrea, for example, was premised on an agreement between Ethiopia and Eritrean nationalists that Ethiopia would permit independence upon a favorable vote. *Letter from the Secretary-General to the President of the General Assembly*, U.N. GAOR, 47th Sess., Annex I, at 2, U.N. Doc. A/C.3/47/5 (1992).

80. A prohibition on consensual modification of borders would be inconsistent with a corollary to the critical date principle; namely, that a critical date later than the moment of independence may arise by, for example, a subsequent adjudication or a boundary treaty. Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 351, 401 (Sept. 11).

boundaries.[81] By this the Badinter Commission could not have meant to *legitimize* secessions that *do* adhere to internal borders; that would impinge the territorial integrity of the parent state.[82] A more plausible reading of its short opinions is that secessionists, if successful, cannot claim a legal right to territory beyond prior internal boundaries, though the secession itself is an act neither sanctioned nor condemned by international law.[83] On this view, *uti possidetis* does function to limit the self to internal boundaries but does not speak to the range of autonomy options available to such an entity.

So conceived, *uti possidetis* does not become operative until after a secession has occurred, since the prior question of whether or not the secession may occur is one the doctrine does not address. Confining *uti possidetis* to a point late in the process of a state's unraveling may pose problems for the Badinter approach. If a secession is indeed a *fait accompli*, the declarative theory of statehood would leave no doubt that the new entity is a state; it need not be recognized by the international community, but neither can the fact of statehood be denied by the withholding of recognition.[84] Of course, if the international community can muster the will not only to withhold recognition but apply sanctions designed to persuade the secessionists to give up territory beyond the old internal borders, then the integrity of those borders may be defended successfully. If, however, the international community cannot maintain a united front (as it could not on the former Yugoslav republics), then any claim by the parent state to territory taken by the secessionists in contravention of *uti possidetis* may quickly become moot, regardless of the equities involved.

The *Northern Cameroons* case is instructive in this regard.[85] In that case, Cameroon sought an order from the ICJ invalidating the incorporation into Nigeria of the Northern Cameroons Trust Territory, which the United Kingdom had administered separately from the Southern Cameroons despite the fact that only a single trusteeship agreement with

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81. The Commission affirmed the right of Serbian populations in Croatia and Bosnia-Herzegovina to self-determination but added that "it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise." Badinter Opinion No. 2, *supra* note 6, at 1498.

82. According to Professor Pellet, the actual author of the Badinter opinions, "[u]n tel droit [of secession] n'existe pas en droit international et aucun des avis de la Commission ne le consacre." Alain Pellet, *Note Sur la Commission D'Arbitrage de la Conference Europeenne Pour la Paix en Yougoslavie*, 37 ANN. FRANÇAIS DE DROIT INT'L 329, 341 (1991).

83. *See* Franck, *supra* note 11, at 148–49.

84. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 88–91 (4th ed. 1990).

85. Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15 (Dec. 2).

the U.N. existed.[86] Cameroon brought the claim after a plebiscite had been held in which the inhabitants of the North choose to join Nigeria rather than Cameroon. Cameroon's fundamental objection was based on *uti possidetis*: it claimed the trust territory should have been administered as one unit and consulted as such on its future.[87] The Court pointed out that not only had the plebiscite already occurred but that the General Assembly had accepted the results and voted to terminate the trusteeship agreement.[88] Whatever rights might have been claimed under the agreement had thereby been terminated, and a judgment purporting to enforce those rights would not have been "capable of effective application."[89]

While not all successful secessions will receive the legitimating imprimatur of the General Assembly, many will (and have been) preceded by plebiscites of more or less convincing authenticity. Other secessions may receive bilateral support or support from regional organizations.[90] Yet even absent such external affirmation, *Northern Cameroons* suggests that the more time that passes after the split and the more relations with the secessionist territory are functionally structured around the fact of its autonomy, the more an *ex post* declaration that boundaries were impermissibly altered becomes incapable of "effective application."

A second problem with using *uti possidetis* as a limitation on defining the self is that it simply does not exclude secession as an option; instead, it merely reduces the number of territorial units threatening the unity of parent states from *any* group claiming ethnic cohesion to the old internal administrative units. Such a reduction may provide little solace to regimes in parent states. For example, because of its several hundred distinct ethnic groups, Nigeria is a good example of the extreme fragmentation that would result from an unlimited right of secession.[91] Nigeria contains twenty-one constituent states.[92] Should they each claim status as a "self," Nigeria's territorial integrity would hardly be

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86. *Id.* at 26.

87. *Id.*

88. G.A. Res. 1608, U.N. GAOR, 15th Sess., Supp. No. 16A, at 10, U.N. Doc. A/4684/Add.1 (1961).

89. *Northern Cameroons*, 1963 I.C.J. at 33.

90. In the Western Sahara, for example, while the General Assembly has affirmed the territory's right to self-determination, the Organization of African Unity seated a delegation from the Sahrawi movement Frente Popular para la Liberación de Saguia el-Hamra y de Rio de Oro (POLISARIO) as the territory's representative. Morocco immediately resigned from the OAU in protest. Seddon, *supra* note 46, at 111.

91. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, NIGERIA: A COUNTRY STUDY 97 (Helen C. Metz ed., 5th ed. 1992).

92. *Id.* at 237.

better secured than if international law placed no limit on their claims to autonomy. In other words, by continuing to allow substate definitions of the self, and despite professing to be "neutral" on the remedy of secession,[93] international law ensures that claims of right to secession will continue to be raised.

3. The Self as Coinciding with the Territorial State

A third view of the self has gained prominence with the end of decolonization and the assimilation of virtually all territory on earth within the jurisdiction of some sovereign state. This view regards the entire territorial state as the self. Any exercise of the right must therefore take place within its borders, since there is no other entity (absent acts of aggression by other states) against which the right to self-determination might be asserted. For this reason, such a view of the right is often referred to as "internal" self-determination.

Internal self-determination takes as an important premise the view that struggles for autonomy often find their roots in the failure of national political institutions to address the interests of minority groups. Such failure might take the extreme form of active persecution or a milder form of an inability to affect national policy, such as may occur in the case of minorities in states with winner-take-all electoral systems. In most cases, both mild and extreme forms exist in the historical memory of the residents of a secessionist territory.[94] Internal self-determination attempts to ameliorate such histories of exclusion by creating inclusive political processes through which, collectively, the entire population may chart its own destiny. It "enables the people of a country to choose their political system, their political, economic and social institutions and their political leaders, or to make important constitutional political decisions."[95] In cases of decolonization the people of the territory are consulted only once; where the self is a sovereign state, however, consultation is ongoing, bolstered by the legal assurances of participation that an institutionalized democratic system entails.

In recent years, the international community has begun describing three aspects of such an inclusive political process as manifestations of the right to self-determination. The first, as Beigbeder discusses at length, is democratic elections, which are the primary form of consultation required by the right. The Cambodia Settlement Accords, for exam-

93. Franck, *supra* note 11, at 149.

94. GURR, *supra* note 28, at 124–29.

95. BEIGBEDER, *supra* note 5, at 18.

ple, declare the parties' intent to "ensure the exercise of the right to self-determination of the Cambodian people through free and fair elections."[96] However, for an international community facing an explosion of secessionist claims, elections serve not only as a consultative device but also as a means of fostering a civic, as opposed to an ethnic, sense of identity on the part of the citizenry. In so doing, they help legitimize national, nonethnic, and nonsectarian political institutions as vehicles for expressing one's group identity, that is, to make the national "self" not just a legal construct but one to which citizens feel an actual sense of connection. The post-Cold War era has seen the rapid growth of such nation-building efforts, particularly in states experiencing various forms of civil unrest.[97] United Nations organs have consistently singled out free and fair elections as essential to this transformative process.[98]

The second element is protection of minority rights, which traces its pedigree to the minority regimes of the interwar period[99] but is also the

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96. *Final Act of the Paris Conference on Cambodia*, U.N. SCOR, 46th Sess., Annex, U.N. Doc. A/46/608 & S/23177, *reprinted in* 31 I.L.M. 180, 181 (1992). This phrase was reiterated by the Security Council in its resolution establishing the United Nations Transitional Authority in Cambodia. *See* S.C. Res. 745, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/745 (1992).

97. *See* Sonia K. Han, Note, *Building a Peace that Lasts: The United Nations and Post-Civil War Peace-Building*, 27 N.Y.U. J. INT'L L. & POL. 837 (1994).

98. *See, e.g.*, S.C. Res. 968, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/968 (1994) (international assistance to resolve the conflict in Tajikistan "must be linked to the process of national reconciliation, including *inter alia* free and fair elections"); S.C. Res. 957, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/957 (1994) (calling on parties to Mozambique conflict to base reconciliation "on a system of multi-party democracy and the observance of democratic principles which will ensure lasting peace and political stability"); S.C. Res. 919, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/919 (1994) (welcoming South Africa's "first all-race multiparty election and the establishment of a united, democratic, non-racial government"); G.A. Res. 149, U.N. GAOR 3d Comm., 48th Sess., at 1, U.N. Doc. A/RES/48/149 (1993) (reconciliation process in El Salvador requires support for the "democratization process under way"); G.A. Res. 150, U.N. GAOR 3d Comm., 48th Sess., at 3, U.N. Doc. A/RES/48/150 (1993) (urging Myanmar to "allow all citizens to participate freely in the political process . . . and to accelerate the process of transition to democracy, in particular through the transfer of power to the democratically elected representatives"); G.A. Res. 151, U.N. GAOR 3d Comm., 48th Sess., U.N. Doc. A/RES/48/151 (1993) (condemning events in Haiti "which abruptly and violently interrupted the democratic process in that country"); G.A. Res. 152, U.N. GAOR 3d Comm., 48th Sess., at 3, U.N. Doc. A/RES/48/152 (1993) (urging comprehensive political solution to Afghan crisis based, *inter alia*, "on the free exercise of the right to self-determination by the people, including free and genuine elections"); *Assistance to Georgia in the Field of Human Rights*, Hum. Rts. Comm'n. Res. 1993/85, U.N. ESCOR, 49th Sess., Supp. No. 3, at 252, U.N. Doc. E/1993/23 (1993) (encouraging Georgia to continue the "process of democratization, including elections"); *Support for the Restoration of Democracy in Peru*, Hum. Rts. Comm'n. Res. 1992/12, *in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Fourth Session*, U.N. Doc. E/CN.4/1993/2, at 46 (1992) (praising Peru's decision "to choose a democratic constituent congress by means of an election to be accompanied by every guarantee of the free expression of the popular will").

99. The Permanent Court of International Justice stated:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them

subject of more recent legal instruments.[100] Even where elections are free and fair, minority groups may by definition find few of their views reflected in national policy, particularly if a state does not follow a proportional representation electoral system.[101] Groups effectively excluded from meaningful participation in this fashion, or through outright discrimination, are increasingly granted protections that focus on their group status. These rights include not only those of a political nature but also certain protections of groups' cultural integrity.[102] In contrast to rights concerned solely with political participation, minority rights more closely approximate the collective nature of the right to self-determination. Indeed, when the Badinter Commission was asked to render an opinion as to whether Serbian populations in Croatia and Bosnia were

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> in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B), No. 64, at 17 (Apr. 6). In 1930, the Permanent Court defined a "community" (or minority) as:

> a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

Advisory Opinion No. 17, Greco-Bulgarian "Communities", 1930 P.C.I.J. (ser. B), No. 17, at 21 (July 31).

100. *See* International Covenant on Civil and Political Rights, *supra* note 15, art. 27, 999 U.N.T.S. 171, 179; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 135, U.N. GAOR 3d Comm., 47th Sess., U.N. Doc. A/RES/47/135 (1992) [hereinafter Minorities Declaration)]; THORNBERRY, *supra* note 23. The European Community's December 16, 1991 Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union require as a prerequisite to recognition the existence of "guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE." 31 I.L.M. 1485, 1487 (1992).

101. The General Assembly has also extended some of these protections to noncitizens, augmenting states' traditional obligation under international law not to harm aliens present within their territory. Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, G.A. Res. 144, U.N. GAOR, 40th Sess., Annex, U.N. Doc. A/RES/40/144 (1985) [hereinafter Minorities Declaration]. Article 5(f) guarantees to aliens "[t]he right to retain their own language, culture and tradition."

102. The Minorities Declaration, for example provides that states shall take measures:

> to create favorable conditions to enable persons belonging to minorities to express their charactaristsics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

Minorities Declaration, *supra* note 101, art. 4(2); *see also* Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431 (1991).

entitled to self-determination, it answered almost solely by reference to "the — now peremptory — norms of international law [that] require States to ensure respect for the rights of minorities."[103]

Third, international organizations are beginning to involve themselves in the construction of autonomy regimes within states.[104] The various plans involving federation, union, and confederation proposed for Bosnia by international mediators are the most comprehensive examples. An international plan for the Krajina Serbs of Croatia would create a loose federal structure allowing home rule over a variety of crucial issues.[105]

Unlike self-determination in the era of decolonization, the emerging internal right has not evolved a distinct jurisprudence of its own. As these three categories of rights suggest, an internal right functions not so much as an independent source of entitlements but as an analytical organizing principle. Its own unique contribution consists mainly of refocussing autonomy claims from the expectation of independence brought on by the success of decolonization to modes of participation in the domestic political arena. This shift is made possible by the emerging international consensus on the value and legitimacy of democratic processes. The particular legal guarantees represented by an internal right draw on the jurisprudence of other human rights concerned more specifically with pluralism and nondiscrimination in domestic politics — in particular, the three mentioned above. In short, internal self-determination functions as an omnibus interpretive tool, weaving together a variety of more particular rights in order to demonstrate that a principled co-existence is possible between claims to group autonomy and the maintenance of states' territorial integrity.[106]

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103. Badinter Opinion No. 2, *supra* note 6. Professor Pellet restates the Commission's holding in even stronger terms:

> Le principe du droit des peuples à disposer d'eux-mêmes est un principe « à géométrie variable »; il ne confère pas de droit à l'indépendance aux peuples ne se trouvant pas dans une situation coloniale; il constitue en revanche le fondement du droit des minorités à se voir reconnaître une identité propre . . . .

Pellet, *supra* note 82, at 343.

104. *See* Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1542 (1991).

105. Roger Cohen, *Plan for Croatia Would Give Serbs Autonomy in Some Areas*, N.Y. TIMES, Jan. 30, 1995, at A3.

106. This refocussing of the right is evident in recent General Assembly resolutions. At the Forty-Eighth Session, the Assembly's resolution on self-determination focussed almost exclusively on the few remaining cases of decolonization, South Africa (and states against which it was accused of committing aggression) and the Israeli occupied territories. The only non-apartheid-related independent state mentioned is Mozambique, and the Assembly strongly suggests its recognition of an internal right by praising, under the general heading of "the

One might object to such a conception of self-determination that it represents a retreat from the right's ascent into binding law. An internal right that offers no specific guarantees of its own, it could be argued, is drained of the determinacy necessary to any meaningful notion of "right" under law.[107] However, this argument misses the crucial role of the right as an organizing principle, particularly for so-called "failed states" seeking reconstruction assistance from the international community. For these states — often stricken by years of civil war, human rights abuses, external intervention, and decimated infrastructures — only a combination of peace among the warring factions, establishment of democratic processes, guarantees of non-interference, and economic aid can ensure that they may begin to function in a meaningful way as autonomous political societies. This, at least, has been the United Nations' working assumption in structuring its missions to South Africa, Cambodia, Mozambique, Angola, El Salvador, and elsewhere. Internal self-determination speaks to each of these remedial measures and suggests that unless each is applied to dysfunctional states, they will continue on their self-destructive path. Thus, far from being drained of meaning, internal self-determination for these states involves a multiplicity of crucial meanings, each of which is essential to achieving true autonomy.

B. *Advantages of an Internal Doctrine of Self-Determination*

It is clearly an internal right's avoidance of legitimizing secessionist claims that is responsible for its emergence. Other attempts to deal with such claims systematically have largely failed: the international community is not willing to recognize all groups claiming status as a self or to attempt distinctions between claimants that, it recognizes, will inevitably be regarded as arbitrary. An internal right allows the international community to discourage secession — as it did in the Soviet Union and Yugoslavia — while at the same time working actively to reverse the exclusions from national political processes thought to produce much of the disaffection manifest in secessionist claims.

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universal realization of the right to self-determination," Mozambique's "establishment of lasting peace and democracy." G.A. Res. 94, U.N. GAOR 3d Comm., 48th Sess., U.N. Doc. A/RES/48/94 (1993). The resolution makes no mention of the numerous secessionist struggles underway. In contrast to this parsimonious narrowing of self-determination, the Assembly is becoming increasingly vocal in its statements concerning human rights generally. The Assembly affirmed the "universality, objectivity and non-selectivity" of human rights, G.A. Res. 125, U.N. GAOR 3d Comm., 48th Sess., U.N. Doc. A/RES/48/125 (1993), and urged "all States that have not yet done so to become parties to" the Political and Economic and Social Covenants, and to the Optional Protocols to the former. G.A. Res. 119, U.N. GAOR 3d Comm., 48th Sess., U.N. Doc. A/RES/48/119 (1993).

107. FRANCK, *supra* note 48, at 50–66.

The movement to an internal right is not without its costs. If it is true that "[s]ecessionist demands, unlike claims about domestic political fairness, cannot be satisfied through domestic political reforms,"[108] then secessionists may be seen as being disfavored in this attempted balancing of autonomy and territorial integrity. This perception may be particularly acute in cases where discrimination against the secessionists has been longstanding and brutal. Some scholars who favor an internal right have nonetheless concluded that in certain cases of acute discrimination the doctrine may prove unjustly rigid and so have argued that an "escape hatch" of secession should be preserved in such extreme cases.[109]

Leaving room for exceptional cases has undoubted appeal, and the force of the argument for an "escape hatch" might be taken as an important critique of the internal view. One may be certain that virtually all secessionists will argue that their circumstances are "exceptional," leaving few cases subject to the general rule of territorial integrity. If accepted, this critique leaves little room for the internal view to offer outcomes that are both just and feasible: if no escape hatch is permitted, then the most subjugated minorities are condemned to remain governed by their oppressors; if escape in exceptional cases is permitted, every case will become "exceptional," and the exception will swallow the rule.

The force of this argument may perhaps be blunted if one notes that it would apply with equal force to virtually all conceptions of self-determination that are not auto-defining. Formulae that attempt to distinguish among deserving "selves" on historical, demographic, or geostrategic grounds will equally founder between the competing imperatives of doing justice to peoples and maintaining existing state boundaries. Any determination that one people's claim is more compelling than another will be based on comparisons between historical injustices that, while perhaps defensible in absolute terms, seem wholly arbitrary as relative bases for distinctions: who can say whether one people has "suffered more" than another?

The unique virtue of the internal view is that while in the short term it may also produce cases with arguably unjust outcomes, it proposes a conception of the state/self designed to remedy those injustices. This capacity rests on a conceptual parity between national and international systems so conceived. In Martti Koskenniemi's useful typology, the internal view of an ordered, democratic political process accords with a

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108. Brilmayer, *supra* note 16, at 177.

109. Frederic L. Kirgis, Jr., *Editorial Comment; The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994) ("[A] claim of a right to secede from a repressive dictatorship *may* be regarded as legitimate.").

juridical conception of the state system as a product of law rather than of subjective cultural passions.[110] The juridical state suggests an ascertainable, "agnostic" model of interstate relations which is controllable because it owes both its existence and legitimacy to law. The U.N. collective security system, which supplants the unilateral use of force as a means of advancing national interests, is perhaps the best illustration of an international community grounded in the rule of law.[111] If within each state the political order is based not on a romantic sense of "authentic community" but on an inclusive process of legal decisionmaking, a similarly rule-based international community is on more secure ground criticizing national orders that exclude or discriminate against minority "peoples." Neither system allows itself to be redefined through extralegal claims of historic injustice, communal authenticity, or collective destiny. But remedies do exist. In the case of secession, as with collective security, injustices are confronted systemically rather than *ad hoc*. While denying secession, the internal view seeks to remedy the exclusions from participation in national politics that give rise to secessionism in the first place. "For this (liberal) view, the presence or absence of those [inclusive political] procedures and their proper functioning is the core of national self-determination."[112]

There are, in addition, two further responses to the claim that an internal view is unduly statist in its rejection of secessionism. The first is that an internal right directly challenges the legitimacy of regimes unresponsive to the opinions and diversity of their citizenries. Exclusionary undemocratic regimes are, under this and other theories, illegal under international law.[113] In declaring a regime illegal, an internal right becomes nearly as adversarial to the interests of states as a right to secession permitting their dismemberment.[114] States, after all,

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110. Koskenniemi, *supra* note 17, at 249–57.

111. On this issue, see Thomas M. Franck & Faiza Patel, *U.N. Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 63–66 (1991).

112. Koskenniemi, *supra* note 17, at 249.

113. For a more extended discussion of this question, see Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 546–47, 596–97 (1992).

114. The case of South Africa is illustrative. The apartheid regime was condemned as violating a preemptory norm of international law; effectively excluded from all multilateral organizations; the subject of a multilateral arms embargo and numerous bilateral trade embargoes; unable to carry on bilateral relations with most states in the world; and witness to a declaration that its outlawed opposition groups were the "legitimate representatives of the South African people" by the United Nations General Assembly. *See* JAN C. HEUNIS, UNITED NATIONS VERSUS SOUTH AFRICA (1986). In sum, South Africa was unable to function as a full member of the international community. Of course, not all declarations of regime illegitimacy will or need to go this far. However, the principle of illegitimacy presents no

function through their governments. When regimes both remove disabilities placed on previously oppressed minority groups and subject themselves to popular scrutiny through elections, their survival is doubtful. Not only are their own citizens likely to vote for change, but the international community is also increasingly willing to help structure electoral processes that may lead to incumbents' removal. Beigbeder certainly demonstrates this to be true. Moreover, the U.N. Security Council has on several occasions deemed acts of domestic oppression to be a "threat to the peace" and invoked the Charter's collective security apparatus in response.[115] In demanding adherence to human rights norms in such cases, the international community has sided with individuals and minorities against their governments in the same way the General Assembly sided with colonial peoples against their metropolitan rulers in Resolution 1514 and its progeny.

Second, even if an internal right is regarded as serving primarily to preserve existing state structures, such a choice is neither surprising nor unusual; international law, made by and for states, has traditionally favored principles of order over those derived from notions of justice.[116] This perspective is implicit in the *uti possidetis* principle, which rejects justice-based claims concerning arbitrary boundaries, historic title, unjust acquisition of territory, and forced migration of peoples (either into or out of territories) in favor of the stability represented by a single "critical date." It is further implicit in the intertemporal law doctrine, by operation of which the principles of self-determination and nonacquisition of territory by force are not applied retroactively.[117] Territorial conquests of the pre-Charter era are thus accepted as given facts and may not serve as bases for appeals to contemporary norms. An internal right, similarly cognizant of the impossibility of addressing such justice-based claims in any manner that will be widely accepted, accepts contemporary boundaries as immutable facts.

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barriers to such an array of ostracisms and would perhaps even permit even more extreme acts. The Security Council-sanctioned invasion of Haiti rested in no small degree on the "illegal" usurpation of power by the military regime, which had nullified the effects of an election the U.N. had itself monitored and pronounced "free and fair."

115. S.C. Res. 940, U.N. GAOR, 49th Sess., U.N. Doc. S/RES/940 (1994) (condemning acts of the "illegal de facto regime" in Haiti); S.C. Res. 794, U.N. GAOR, 47th Sess., U.N. Doc. S/RES/794 (1992) (focussing on "the magnitude of the human tragedy caused by the conflict in Somalia"); S.C. Res. 788, U.N. GAOR, 47th Sess., U.N. Doc. S/RES/788 (1992) (brutality of civil war in Liberia).

116. *See* Jean Salmon, *Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle*, *in* THE MODERN LAW OF SELF-DETERMINATION 256–57 (Christian Tomuschat ed., 1993). For a theoretical defense of this position, see FRANCK, *supra* note 48, at 208–46.

117. *Western Sahara*, 1975 I.C.J. at 39.

II. WHO BELONGS TO THE TERRITORY?

The nature of an internal right is only partially clarified when the "self" is held to coincide with the territorial state. In order for meaningful consultation to occur, it must next be determined which individuals belong to the territory. Only then can one ascribe real meaning to Judge Dillard's oft-quoted restatement of the self-determination principle: "it is for the people to determine the destiny of the territory and not the territory the destiny of the people."[118] As an internal right gains acceptance, and questions of defining territory thereby recede, the focus on the individuals constituting the "self" will take on an added importance.

In the international electoral activity Beigbeder surveys, this issue arises most frequently as a question of voter eligibility. The body of international law that has traditionally served as the gatekeeper for the opportunity to vote is that regarding citizenship. Its relevance is made clear by the Political Covenant, which in contrast to its guarantees of other rights limits the right to political participation to "citizens."[119] If international law went no further than this and prescribed no criteria regarding eligibility for citizenship, a country determined to limit its electorate could easily do so without violating the Political Covenant's prohibition on discriminatory treatment among citizens. It would simply limit citizens to those likely to vote in its favor. International concern over citizenship laws in the three Baltic republics arose precisely because of those laws' potential to disenfranchise substantial portions of the populations.[120]

Traditional international law "leaves it to each State to lay down the rules governing the grant of its own nationality."[121] The two most preva-

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118. *Id.* at 122 (separate opinion of Judge Dillard).

119. Political Covenant, *supra* note 15, art. 25, 999 U.N.T.S. at 179.

120. In Estonia, for example, almost 40% of the population was not eligible to vote in the September 1992 elections because persons of non-Estonian ethnicity were denied automatic citizenship after independence from the Soviet Union. Under the revived 1938 citizenship law, approximately 950,000 Estonian residents were considered citizens and approximately 600,000 considered foreigners. NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, PRE-ELECTION SURVEY MISSION TO ESTONIA 17 (1992). *See generally* Andras Fehervary, *Citizenship, Statelessness and Human Rights: Recent Developments in the Baltic States*, 5 INT'L J. REF. L. 392 (1993).

121. Nottehbohm (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6). This principle is repeated in Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 (1937), which provides that "[i]t is for each State to determine under its own law who are its nationals." The Convention goes on to limit this general principle, however, by stating that nationality laws shall be recognized by other states only if they are "consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality." Only twenty states have ratified the Convention.

lent bases for granting nationality are *jus solis* (birth within the state) and *jus sanguinis* (nationality of one or both parents).[122] The emergence of an internal right to self-determination raises an important challenge to this rule: if certain crucial aspects of the processes by which states determine their political future are now questions of international human rights law, may a state legally manipulate participation in those processes for political purposes? That is, may large numbers of people be included in or excluded from an electorate based on considerations other than *jus solis* or *jus sanguinis*? While there has been no explicit challenge to the broad rule of state discretion in granting nationality, recent international practice, roughly divisible into two broad categories, suggests that increasingly they may not.[123]

A. *Affirmative Norms*

In two peacekeeping missions of the post-Cold War era, the United Nations has been granted plenary authority to determine the eligibility criteria for voting in national elections.[124] Beigbeder extensively canvasses these two ground-breaking operations but unfortunately devotes almost no attention to the eligibility question.[125] The first mission was that of the United Nations Transition Assistance Group (UNTAG) to Namibia. The framework for voter eligibility in Namibia was set by Security Council Resolution 435 of September 29, 1978, which charged UNTAG with a mandate to "ensure the early independence of Namibia through free and fair elections under the supervision and control of the United Nations."[126] The five nation Western "Contact Group" which had precipitated UNTAG's creation supplemented Resolution 435 in 1982 with a set of Constitutional Principles that provided that "[e]very adult Namibian" would be eligible to vote.[127]

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122. RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 32–33 (2d ed. 1994).

123. *See id.* at 154–59; 175–77.

124. The U.N. mission to monitor the referendum on self-determination in the Western Sahara is currently stalled on precisely this question of voter eligibility. *Report of the Secretary-General: The Situation Concerning Western Sahara*, U.N. Doc. S/1994/283, at 6–9 (1994). Morocco, which occupied the territory shortly after the International Court handed down its advisory opinion in 1975, has attempted to inflate the voter rolls through inclusion of persons not present in the territory at the time of the last census. Because the question is as yet unresolved, I do not consider the Western Sahara operation as a precedent on this issue. If the Moroccan view prevails, however, and a substantial number of persons neither born nor resident in the territory becomes eligible to vote on the territory's future, U.N. practice will take a significant turn away from the norms represented by the Namibia and Cambodia operations.

125. BEIGBEDER, *supra* note 7, at 151–63 (Namibia); 197–212 (Cambodia).

126. S.C. Res. 435, U.N. SCOR, 33d Sess., U.N. Doc. S/RES/435 (1978).

127. *Letter from the Representatives of Canada, France, Germany, Federal Republic of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the Secretary General*, U.N. SCOR, 37th Sess., Annex, at 1, U.N. Doc. S/15287 (1982).

How precisely to define an "adult Namibian" produced a lively debate among the parties, primarily between SWAPO (the largest party and ultimate victor in the election) and the South African authorities, which under Resolution 435 retained administrative control over the territory. SWAPO and some outside observers argued that the many Namibian refugees living in adjacent countries, often for decades, should be permitted to vote. Further, they opposed the large numbers of white South Africans claiming permanent residence in the territory based only on a short civil service posting or other tenuous connection.[128] South Africa, on the other hand, expressed concern that, along with repatriated refugees, SWAPO would arrange for the registration of large numbers of Angolan Ovambos "who are linguistically and otherwise indistinguishable from the members of the same population living in Namibia on the other side of an ill-marked and easily crossed border."[129] Both sides were concerned over the implications of registering persons in Walvis Bay, a South African enclave whose status had specifically been left undecided by the Security Council.[130]

The final formula took account of these concerns, and in general attempted to restrict registration to actual permanent residents of Namibia. On June 30, 1989, the Administrator-General declared eligible any 18-year old who was (i) born in Namibia; (ii) ordinarily resident in Namibia as of the date of registration and had been so for an immediate prior period of four years; or (iii) the natural child of a person born in Namibia. Those seconded to the territory for service in the South African government could qualify as "ordinary residents" if, in addition to meeting the normal criteria, they swore an intention to remain in the territory after it became an independent state. Residents of Walvis Bay were permitted to register if they had been born in Namibia proper.[131]

Wholly excluded from these criteria were issues of race or ethnicity; connection to the territory was the defining characteristic. Disguised ethnic criteria, such as might appear if connection to the territory over many generations was required, was also excluded by permitting even

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128. *See* Paul C. Szasz, *The Electoral Process*, *in* THE NAMIBIAN PEACE PROCESS: IMPLICATIONS AND LESSONS FOR THE FUTURE 144 (Herbert Weiland & Matthew Braham eds., 1994); NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, NATION BUILDING: THE U.N. AND NAMIBIA 30 (1990) [hereinafter NATION BUILDING]; REPORT OF THE FIRST OBSERVER MISSION OF THE COMMISSION ON INDEPENDENCE FOR NAMIBIA 27–28 (1989).

129. Szasz, *supra* note 128, at 144.

130. NATION BUILDING, *supra* note 128, at 30. Pending final disposition of the matter, South Africa and Namibia agreed to a joint administration of Walvis Bay in October 1992. Under the agreement, residents retained their prior citizenship. *Agreement Between the Government of the Republic of Namibia and the Government of the Republic of South Africa on the Joint Administration of Walvis Bay and the Off-Shore Islands, reprinted in* 32 I.L.M. 1152 (1993).

131. AG Proclamation No. 19, Extraordinary Official Gazette of South West Africa No. 5740, at 4–5 (June 30, 1989).

first generation Namibians to vote. The prescriptive value of the Namibian experience was enhanced by two factors. First, a draft version of the voter registration law was circulated for a comment period prior to its official promulgation. After some seventy organizations submitted comments, extensive changes were made in the draft law, including adding the requirement that civil servants swear their intention to remain in an independent Namibia.[132] A large number of highly critical human rights organizations thus had input into the final content of the law. Second, the Security Council demanded in Resolution 640 that all proclamations issued during the UNTAG operation "conform with internationally accepted norms for the conduct of free and fair elections."[133] The Secretary-General's Special Representative in Namibia, apparently satisfied that the voter registration law fulfilled this criterion, certified that this and all other aspects of the electoral process had been free and fair.[134]

The United Nations Transitional Authority in Cambodia (UNTAC) faced much stronger pressure to disassociate voters from territory. Virtually all the political factions in Cambodia exerted intense pressure on the U.N. to ensure that ethnic Vietnamese were excluded from the voter rolls.[135] Most adamant were the Khmer Rouge, who regularly threatened and carried out violent attacks on so-called "Vietnamese settlers" in Cambodia.[136] The legal framework for voter registration was set initially by the 1991 Paris Accords, which enfranchised all eighteen year olds either born in Cambodia or the child of a person born in Cambodia.[137] This formulation, while reflecting some ethnic sensitivity in its exclusion of Vietnamese nationals who entered the country after the Vietnamese invasion in 1979, remained centered on links to the territory. Those born to Vietnamese parents in Vietnam would be excluded, but those born to Cambodian refugee parents, or who were

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132. NATION BUILDING, *supra* note 128, at 30.

133. S.C. Res. 640, U.N. SCOR, 44th Sess., U.N. Doc. S/RES/640 (1989).

134. NATION BUILDING, *supra* note 128, at 63–64.

135. Reginald Austin, Director of UNTAC's Electoral Component, remarked he had "discovered that there is a very deep concern among all Cambodians with the possibility of persons whom they regard as foreigners being able to register to vote and to swamp the electoral roll." *An Interview with the Chief Electoral Officer*, ELECTORAL COMPONENT NEWSLETTER, Aug. 21, 1992, at 2 [hereinafter ELECTORAL NEWSLETTER](on file with author); *see also* Sara Colm, *Factions, UNTAC Debate Electoral Law*, PHNOM PENH POST, July 10, 1992, at 1 (collected anti-Vietnamese remarks of various party representatives).

136. Nate Thayer, *Fighting Words*, FAR EAST ECON. REV., Aug. 20, 1992, at 8–9; *Third Progress Report of the Secretary-General on the United Nations Transitional Authority in Cambodia*, U.N. Doc. S/25124, at 21 (1993) [hereinafter *Third Report*].

137. Agreement On a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, Annex 3, para. 4, *reprinted in* 31 I.L.M. 183, 197 (1992) [hereinafter Settlement Agreement].

refugees themselves, would be eligible to vote.[138] The Paris Accords vested final authority to approve the electoral laws in the Secretary-General's Special Representative in Cambodia.[139]

As soon as the UNTAC operation began, however, the Special Representative came under intense pressure from the Cambodian parties to narrow the Paris criteria. In April 1992, UNTAC produced a draft electoral law which faithfully tracked the previously agreed-upon criteria. Most members of the Cambodian Supreme National Council (SNC) objected, arguing that the law ought explicitly to disenfranchise ethnic Vietnamese, regardless of the difficulties involved in distinguishing a group that had lived in Cambodia for generations.[140] The Khmer Rouge member of the SNC dismissed the draft law as giving "a rubber stamp to the Vietnamese occupation of our country."[141]

The pressure had some effect, as the draft law was revised to require stronger family ties to the territory. The final law, promulgated on August 12, 1992, enfranchised all eighteen year olds who were (i) born in Cambodia to at least one parent born in Cambodia; or (ii) born elsewhere with at least one Cambodian parent and grandparent.[142] This formulation altered the Paris Accords by adding one generation of linkage for those born in Cambodia and two generations for those born abroad. Still, there are a number of reasons for regarding the final law as substantially less than a full capitulation to an ethnically defined electorate. First, the group of greatest concern to the Cambodian parties — Vietnamese who moved into the country after the 1979 invasion — would not have been permitted to vote under the Paris criteria in any case, assuming such persons were born in Vietnam to Vietnamese parents. Second, UNTAC rejected a Khmer Rouge proposal to apply purely ethnic criteria by extending the franchise to the so-called Khmer Krom — ethnic Cambodians born or with a parent born in southern Vietnam.[143] The Secretary-General responded that "the extension of the franchise on purely ethnic grounds to persons who were not born in

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138. *See* Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1, 19–20 (1993).

139. *See* Settlement Agreement, *supra* note 137, art. 13 and Annex 1 § D(1).

140. Colm, *supra* note 135, at 1. The Khmer Rouge, for example, wanted the franchise restricted to Cambodian citizens over age 18 with one parent who was a Cambodian citizen prior to January 1979. Anuraj Manibhandu, *K. Rouge Give Indications They Won't Join Poll*, BANGKOK POST, Aug. 14, 1992, at 2.

141. Kevin Barrington, *Samphan Threatens Violence Over Electoral Law*, CAMBODIA TIMES, Aug. 16, 1992, at 1.

142. *Second Progress Report of the Secretary-General on the United Nations Transitional Authority in Cambodia*, U.N. Doc. S/24578, at 3–4 (1992).

143. *Third Report*, *supra* note 136, at 7–8; Ratner, *supra* note 138, at 39 & n.239.

Cambodia would not be consistent with the letter or the spirit of the Paris Agreements."[144] This decision was in keeping with UNTAC's consistent refusal to make open concessions to ethnicity in other stages of the electoral process.[145] Implicit ethnic criteria, it appears, were tolerated only to the extent necessary to keep the entire electoral process from collapsing.[146] Finally, UNTAC did not insist on formal documentary evidence in establishing whether a person met the Electoral Law's requirements: in the event of a dispute over a potential voter's family history, UNTAC decided to permit registration if two other registered voters swore to the person's qualifications.[147] In the end, the Cambodian electoral law neither disenfranchised large groups within Cambodia who had longstanding connections to the territory nor enfranchised ethnic Cambodians outside its borders with few permanent ties.

In both the Namibian and Cambodian missions, the United Nations exercised plenary authority over the criteria for voter eligibility. If for this reason they can be taken as expressing at least nascent international standards, important *affirmative* criteria are apparent for who must be included in an electorate. Both enfranchised persons born in a territory with a parent born there; and both enfranchised those born outside the territory with a grandparent born in the territory. Both add one generation to the *jus solis* and *jus sanguinis* standards, but given the nature of the two operations, such a deviation is not unreasonable. Both territories were emerging from years of bitter conflict to an uncertain future as independent states. The elections were watershed events in this transformative process. That participation in the elections should be restricted to those persons who had, by virtue of long-standing family ties, weathered the worst years of conflict, is understandable. But more importantly, it is a standard that focuses on the links between persons and territory in defining the electoral self.[148]

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144. *Third Report*, *supra* note 136, at 8.

145. In instructions to its registration workers, UNTAC stated: "The [Electoral] Law does not define a Cambodian person in terms of a person's ethnic origin, and no person can be refused registration merely because of his or her ethnic background if he or she falls within the definition of 'Cambodian person' set out in the Law." UNTAC, REGISTRATION PROCEDURES MANUAL, PART I 11 (Sept. 1992).

146. Electoral Component Director Austin explained that in responding to pressure from the parties to make ethnicity explicit, UNTAC had "discussed possible ways of defining a 'Cambodian,' the term that the Cambodian parties wanted to be used, which would meet this problem but also meet the standards that the United Nations must itself uphold." ELECTORAL NEWSLETTER, *supra* note 135, at 2.

147. UNTAC, *supra* note 145, at 16.

148. Additionally, the Security Council in recommending a settlement plan for the long-standing dispute in Cyprus has called for a solution "based on a State of Cyprus with a single sovereignty and international personality and a single citizenship." S.C. Res. 939, U.N. SCOR, 49th Sess., at 1, U.N. Doc. S/RES/939 (1994).

B. *Negative Norms*

Reinforcing the norms emerging from U.N. practice as to who should be included in an electorate are a series of unconnected yet mutually reinforcing prohibitions against various sorts of *exclusions* from an electorate. These norms address both policies intended to disenfranchise groups or individuals and actions that have the effect of doing so. Taken together, they present a significant challenge to states' traditional discretion to define their electorates as they see fit.

1. Exclusions Based on Racial Criteria

The host of treaties, resolutions and unilateral actions directed against apartheid have been based, at core, on the unacceptable exclusion of black citizens from participating in choosing their governments. In 1992, for example, the General Assembly affirmed the legitimacy of "the struggle of the oppressed people of South Africa" to establish a society "in which all the people of South Africa as a whole, irrespective of race, colour or creed, will enjoy equal and full political and other rights and participate freely in the determination of their destiny."[149] Groups assumed to represent the majority of South African people had long been recognized as those people's "authentic representatives."[150] Also in 1992, the Assembly declared that a satisfactory solution to the South African problem would occur only upon "the establishment of a non-racial, democratic society based on majority rule, through the full and free exercise of adult suffrage."[151] The holding of all-race elections on April 27, 1994 achieved that goal and led the U.N. immediately to repeal all previously imposed sanctions and to allow South Africa to participate in the work of U.N. organs for the first time in twenty years.[152]

The international community's successful eradication of apartheid represents an important limitation on the *Nottebohm* principle: states cannot limit participation in their political processes through race-based exclusions. This is true both for persons of color who hold nominal citizenship but who are denied crucial political rights accorded to white

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149. G.A. Res. 130, U.N. GAOR 3d Comm., 47th Sess., at 1, U.N. Doc. A/RES/47/130 (1992).

150. G.A. Res. 6(I), *supra* note 41, at 12.

151. G.A. Res. 130, U.N. GAOR 3d Comm., 47th Sess., at 353, 354, U.N. Doc. A/47/678/Add. 2 (1992).

152. *South African Vote is First in Twenty Years*, N.Y. TIMES, July 30, 1994, at A6; S.C. Res. 919, *supra* note 98 (*inter alia* terminating 1977 arms embargo).

citizens and for residents of the state denied citizenship altogether. This second category derives from the international community's overwhelming refusal to recognize the South African "homelands," to which residents were deemed to have transferred their citizenship from the South African state.[153] Such persons were, in effect, deemed to hold a human right to continue as South African citizens and participate in the political life of the nation on an equal footing with white citizens.[154]

2. Inclusion and Exclusion Accomplished by Forced Movement of Peoples

A government may manipulate an electorate in two ways through large scale forced movement of peoples. First, it can prevent certain groups from participating in a vote by displacing them within their country or by expelling them altogether from the territory. "Ethnic cleansing" in Bosnia-Herzegovina — which has created an almost entirely homogenous Serbian zone in seventy percent of the state whose residents have voted to reject internationally mediated peace plans — is an example of such forced expulsions. Second, a government may force large groups *into* the territory in order to "stack" voter rolls. This has been the Moroccan tactic in the Western Sahara, beginning with the so-called "Green March" in 1975.[155]

Both such forms of coercion are directly contrary to international standards regarding freedom of movement, which concern not only the freedom to remain in the state of one's nationality but also to choose the place of one's residence within that state.[156] The International Covenant on Civil and Political Rights, for example, provides that "[e]veryone lawfully within the territory of a State shall, within that territory, have the . . . freedom to choose his residence."[157] Thus, persons "of different races, religions, or political belief cannot be required to live in designat-

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153. *E.g.*, S.C. Res. 407, U.N. SCOR, 32d Sess., U.N. Doc. S/RES/407 (1977); S.C. Res. 402, U.N. SCOR, 31st Sess., U.N. Doc. S/RES/402 (1976); G.A. Res. 6A, U.N. GAOR 31st Sess., Supp. No. 39, at 10, U.N. Doc. A/31/39 (1976); G.A. Res. 105, U.N. GAOR, 32d Sess., Supp. No. 45, at 30, U.N. Doc. A/32/45 (1977).

154. The President of the Security Council stated on behalf of its Members that the homelands policy "seeks to create a class of foreign people in their own country." U.N. SCOR, 34th Sess., 2315th mtg., at 1, U.N. Doc. S/14794 (1981); *see also* DUGARD, *supra* note 29, at 107–08.

155. In 1979 the General Assembly "deeply deplored the aggravation of the situation resulting from the continued occupation of the Western Sahara by Morocco." The Assembly also referred to the POLISARIO as "the representative of the people of the Western Sahara." G.A. Res. 37, U.N. GAOR, 34th Sess., at 3, U.N. Doc. A/RES/34/37 (1979).

156. *See generally* Ved P. Nanda, *International Law and the Refugee Challenge: Mass Expulsion and Internally Displaced People*, 28 WILLAMETTE L. REV. 791 (1992).

157. Political Covenant, *supra* note 15, art. 12(1), 999 U.N.T.S. at 176.

ed areas."[158] The Covenant goes on to protect against arbitrary expulsions: "[n]o one shall be arbitrarily deprived of the right to enter his own country."[159] The Covenant does permit restrictions on these rights which are "consistent with the other rights recognized" in the instrument.[160] An attempt to manipulate an election through forced movement of peoples, however, would hardly be consistent with a treaty that guarantees the right to vote in "genuine" elections.[161]

3. Murdering Potential Voters

The most brutal manipulation of an election would involve a regime engaged in mass killings of its political opponents. Such an act clearly violates the human right to life,[162] as well as the Genocide Convention, if the killing is undertaken with the intention of destroying a national, ethnic, racial, or religious group in whole or in part.[163]

4. Disenfranchisement Through Electoral Fraud

Elections can be manipulated in both blatant and subtle ways that may deprive a particular group of effective participation in the process of choosing national leaders. Conventional law addresses electoral fraud in broad terms,[164] while an increasing number of particular elections

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158. Stig Jagerskiold, *Freedom of Movement*, *in* THE INTERNATIONAL BILL OF RIGHTS 166, 176 (Louis Henkin ed. 1981).

159. Political Covenant, *supra* note 15, art. 12(4), 999 U.N.T.S. at 176; *see also* Universal Declaration of Human Rights, art. 13, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. for Sept. 21-Dec. 12, 1948, at 71, 74, U.N. Doc. A/810 (1948) ("1. Everyone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and to return to his country."); American Convention on Human Rights, Nov. 22, 1969, art. 22(5), O.E.A. T.S. No. 36, at 8, 9 I.L.M. 673, 682 ("No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it."); Protocol IV to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, arts 2–3, 7 I.L.M. 978, 978–79 (1968) ("Everyone lawfully within the territory of a State shall, within that territory, have the . . . freedom to choose his residence. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.").

160. Political Covenant, *supra* note 15, art. 12(3), 999 U.N.T.S. at 176.

161. *Id.* art. 25(b), at 179.

162. *Id.* art. 6, at 174; American Convention, *supra* note 159, art. 4, O.E.A. T.S. No. 36, at 2; Protocol IV, *supra* note 159, art. 2, 7 I.L.M. at 978; Universal Declaration, *supra* note 159, art. 3, at 72.

163. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277.

164. *See* Political Covenant, *supra* note 15, art. 25, 999 U.N.T.S. at 179; American Convention, *supra* note 159, art. 23(1)(b), O.E.A. T.S. No. 36, at 8; Protocol (No.1) to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 262, 264; African Charter on Human and Peoples' Rights, art. 13(1), OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 59, 61; International Convention on the Elimination of all

have been subject to scrutiny by U.N. monitoring missions.[165] Many commentators now regard this practice as supporting an emerging norm of free and fair elections.[166] Subsumed under this general heading are prohibitions on acts such as instituting a one party state, disrupting campaigns, restricting access to mass media, and outright ballot fraud.[167] Each such tactic results in the effective disenfranchisement of affected voters. The emerging consensus condemning tainted elections seeks as its goal to achieve "some consistency between the will of the voters and the result of the election."[168]

III. Recent Electoral Practice and Self-Determination

A. *Democracy and Self-Determination*

If one accepts these arguments for an emerging internal right to self-determination, Beigbeder's book provides a wealth of supporting data. His survey of monitoring by the United Nations, regional organizations, and an NGO community only recently taking an interest in electoral matters provides a detailed review of all important missions since the First World War. The conceptual bridge between this history and the notion of an internal right must be provided by the reader, however. Beigbeder is not a theorist; his dense recitations of fact are generally introduced with broad labels and do not seem to progress in anything other than chronological order. The relationship between monitoring internal elections and the broad principle of self-determination is asserted but not explored.[169] The closest Beigbeder comes to a conceptual analysis is to restate the contemporary dilemma without elaboration in unhelpfully basic terms: "[i]f self-determination is an internationally recognized principle, why does it not apply to the people of West Irian,

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Forms of Racial Discrimination, *opened for signature* Mar. 1, 1980, art. 5(c), 660 U.N.T.S. 195, 220 (entered into force Jan. 4, 1969); Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, art. 1, 193 U.N.T.S. 135, 135 (entered into force July 7, 1954).

165. *Report of the Secretary-General: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, U.N. Doc. A/47/668 (1992); *Report of the Secretary-General: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, U.N. Doc. A/46/609 (1991) [hereinafter *1991 Election Report*].

166. *See* Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 Harv. Int'l L.J. 1, 2 n.3 (1995).

167. *Id.* at 4–5; Fox, *supra* note 113, at 555–60.

168. Mexico Elections Decision, Cases 9768, 9780, 9828, Inter-Am. C.H.R. 97, 108 OEA/ser. L/V/11.77, doc. 7, rev. 1 (1990).

169. Beigbeder, *supra* note 7, at 18.

East Timor, Tibet, Kashmir and other territories, as it has been applied to trust and other colonial territories?"[170]

Beigbeder's writing style does not help matters. Some passages are collections of one sentence paragraphs, often extending for several pages.[171] Others are expressed in an odd, sometimes ungrammatical phraseology.[172] Political theories on the nature of democracy are presented as lists of factors and are not related to the discussion of practice that follows.[173] When Beigbeder does venture a theory of democratic transitions it comes across as a quasi-Hegelian notion of Ideas marching through history: "[t]he democratic ideology and practices have taken centuries to develop in the Western countries: the evolution had to weaken and then defeat despots, absolute monarchs and emperors, military rulers, religious imperialism."[174]

The most obvious bridge between self-determination and internal democracy is majoritarianism. Beigbeder states but does not explore this connection.[175] He repeats the Security Council's description of the Cambodian national elections as an act of self-determination,[176] but several pages later contrasts missions to observe acts of self-determination with "pro-democracy operations."[177] One obvious problem with the common bond of majoritarianism is that in polarized, multi-ethnic, or multi-racial states the goals of autonomy and self-government fostered by colonial-era self-determination may only be partly realized through democratic elections. Minorities, by definition, may not benefit. This problem is avoided by a more comprehensive definition of democracy, which includes not only majoritarian decisionmaking but anti-majoritarian protections for those for whom the normal political process may offer no assistance. However, Beigbeder fluctuates radically throughout the book between a narrowly majoritarian and a more robust, rights-based conception of democracy. Early in the book he follows

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170. *Id.* at 145.

171. *See, e.g., id.* at 52, 206.

172. For example, a General Assembly resolution "did not express relief nor satisfaction." *Id.* at 198. Or the following: "[t]he withdrawals from the League of Japan and Germany in 1933, from Italy in 1937 and from Spain in 1939, were not due principally . . . ." *Id.* at 77. Or several passages in which ellipses appear at the end of sentences that are not quotations. *Id.* at 191, 199. Or his description of political upheaval in Mongolia as "manifestations." *Id.* at 6.

173. *E.g., id.* at 54 (listing another author's "seven basic elements of the fascist outlook").

174. *Id.* at 43.

175. *See id.* at 18.

176. *Id.* at 212; *see* S.C. Res. 745, *supra* note 96.

177. BEIGBEDER, *supra* note 7, at 218.

Joseph Schumpeter[178] (although attributing the view to Samuel Huntington)[179] in a procedural conception of democracy, describing its "main tenet" as the proposition "that government shall rest on the consent of the governed, that consent, or dissent, being expressed at free and periodical elections."[180] Through much of the rest of the book, however, Beigbeder measures the "democratic" nature of regimes by their overall respect for human rights, especially those of minority or dissident groups.[181]

As the previous discussion has suggested, a Schumpeterian procedural view of democracy provides only a weak link to internal self-determination. Pure majoritarianism was clearly appropriate in cases of external self-determination, such as decolonization, where consideration of minority views might have easily lead to an infinite regression of smaller and smaller units detaching themselves from parent states. But an internal doctrine concerns not the control of one territory by another but the constitutional makeup of a single territorial "self." In a single polity, pure majoritarianism will by definition exclude some citizens from the decisionmaking process, thus making the consultation at the core of self-determination incomplete. One need not go as far as adopting a purely deontological, rights-based conception of democracy to close this gap. John Ely's notion of minority rights as enhancing participation in the majoritarian process embraces an inclusive view of the entire "self" without wholly abandoning elections as the central means of participation.[182] The point, which Beigbeder's unfocused definition of democracy obscures, is that only a theory of democracy that takes into account the concerns of all individual components of state-based "self" is convincing as a species of self-determination.[183]

B. *Emerging Electoral Norms*

This critique of Beigbeder is in one sense unfair: he has not, after all, written a book addressing all the human rights norms conceivably

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178. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (2d ed. 1947).

179. In a book written after the essay cited by Beigbeder, Huntingon explicitly adopts Schempeter's conception of democracy as essentially procedural. SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 6–7 (1991).

180. BEIGBEDER, *supra* note 7, at 20.

181. *E.g.*, *id.* at 22–23, 62, 99.

182. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

183. Thus, when a state precludes effective participation, it denies its people their right to self-determination. Acts such as mass electoral fraud, anti-democratic coups, or persecution of minority groups constitute violations of a people's collective right to determine by whom it is ruled.

fitting under the umbrella of "democratic" government. On the other hand, Beigbeder himself consistently defines democracy as the respect for a broad panoply of civil and political rights. Despite this ongoing terminological confusion, the book is nonetheless rich in information on the growing international practice of monitoring elections, which in most theoretical conceptions functions as the foundation of democratic governance.

Beigbeder aptly chronicles the slow ascendence of election monitoring from occupying a marginal corner of international conflict resolution to its role as high-profile guarantor of an emerging human right to participation in national political affairs. Election monitoring began as a sporadic practice in the nineteenth century, most notably in connection with Italian unification.[184] The first multinational efforts of any consequence took place after the First World War pursuant to the Treaties of Versailles and Saint-Germain. Wilson's enthusiasm for the concept of self-determination was clearly the inspiration for the relevant treaty provisions, but his rhetoric far outstripped eventual practice. Before the Versailles Conference, Wilson proclaimed that the settlement of every territorial question would be founded "on the basis of the free acceptance of that settlement by the people immediately concerned."[185] At virtually the same time, however, he had entrusted a team of historians, ethnologists, and cartographers (headed by the young Walter Lippman) with the task of redrawing the map of Europe to redistribute the ethnic groups newly emancipated from the Austro-Hungarian and Ottoman Empires.[186] The final territorial settlements were based largely on Allied views of appropriate ethnic arrangements, with substantial weight given to concerns that the newly created states remain sufficiently small and dispersed to pose no strategic threat.[187] Only five plebiscites were eventually held in small, relatively marginal areas.

That the Allies' post-war reconfiguration of Europe took little account of the views of peoples affected is hardly surprising: the peace treaties neither embodied a coherent view of self-determination nor established an international mechanism to supervise disposition of the territories concerned. The emergence of a successful monitoring regime in the era of decolonization may in large part be attributed to the pres-

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184. *See* SARAH WAMBAUGH, A MONOGRAPH ON PLEBISCITES WITH A COLLECTION OF DOCUMENTS 58–169 (1920).

185. BEIGBEDER, *supra* note 7, at 80 (quoting WAMBAUGH, *supra* note 184, at 11).

186. RONALD STEEL, WALTER LIPPMAN AND THE AMERICAN CENTURY 128–40 (1980).

187. HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION 27–29 (1990).

ence of these two factors in the United Nations system. Spurred by seminal General Assembly resolutions, the U.N. (and in particular the Trusteeship Council) observed thirty elections, referenda, and plebiscites in non-self-governing and trust territories between 1956 and 1990.[188] Not all former colonies held votes on independence or had international monitors present at their first post-independence elections. But the ubiquity of supervision lent an important orderliness to many such transitions, particularly those in territories with potentially explosive ethnic tensions such as British and French Togolands[189] (later Togo, Ghana and Benin) and Ruanda-Urundi[190] (later Rwanda and Burundi). Perhaps most importantly in normative terms, the colonial-era missions established a repertoire of electoral practices which gave content to the then inchoate notion of a "free and fair" election.[191]

The United Nations did not begin monitoring elections in independent states until after the process of decolonization was largely completed. Early in its history the U.N. had attempted monitoring in Korea and Germany, with Cold War tensions leading to predictably unsatisfactory results.[192] The watershed came with the highly successful mission to Namibia (UNTAG), which capped over thirty years of international efforts to oust South Africa from the territory. The Namibian operation was ground-breaking in several respects. First, it was the Security Council that established the legal framework for Namibian independence by declaring it "imperative that free elections under the supervision and control of the United Nations be held for the whole of Namibia as one political entity."[193] Second, to many observers South Africa's continued administrative control over the territory during the campaign and election, as well as outbreaks of fighting between South African and SWAPO forces, raised severe doubts as to whether the final results would be accepted by both sides.[194] Yet voting occurred with virtually no violence and a peaceful transition of power took place several

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188. *1991 Election Report*, *supra* note 165, at 27–28. The list of missions is reprinted in BEIGBEDER, *supra* note 7, at 98.

189. *See Report of the United Nations Commission for the Supervision of the Elections in Togoland under French Administration*, U.N. GAOR, 13th Sess., Annex 1, Addendum to Agenda Item 40, at 1, U.N. Doc. A/3957 (1958); *The Future of Togoland Under British Administration: Report of the United Nations Plebiscite Commissioner*, U.N. TCOR, 18th Sess., 733rd mtg. at 279, U.N. Doc. T/1258 (1956).

190. *Report of the United Nations Commissioner for Ruanda-Urundi*, U.N. GAOR, 16th Sess., Annex 2, Agenda Item 49, at 1, U.N. Doc. A/4994 (1961).

191. *See* Fox, *supra* note 113, at 587–96.

192. BEIGBEDER, *supra* note 7, at 120–26.

193. S.C. Res. 385, U.N. SCOR, 31st Sess., U.N. Doc. S/RES/385 (1976).

194. *See* COMMISSION ON INDEPENDENCE FOR NAMIBIA, REPORT OF THE FIRST OBSERVER MISSION OF THE COMMISSION ON INDEPENDENCE FOR NAMIBIA (1989).

months later.[195] Third, the devisive ethnic politics practiced by South Africa during its years of occupation required, in the words of one UNTAG official, "that the holding of elections in Namibia which would be more than only superficially free and fair would require massive intervention by UNTAG to change the political climate in the country."[196] Substantial social engineering, in other words, as opposed to mere passive observation, was required to ensure a successful transition.

To overcome these and other obstacles UNTAG deployed over 8,000 persons in the territory — an enormous U.N. undertaking by the standards of 1989 — and insisted that it be involved in every step of implementing the new framework of electoral laws, which it had also painstakingly negotiated with the South African Administrator-General.[197] UNTAG also organized a massive public relations campaign designed to convince Namibians both that the elections would be conducted fairly and that the results would be respected.[198] Soon after the elections the newly elected Namibian Constituent Assembly drafted a remarkably progressive constitution,[199] which it adopted with much ceremony less than one week prior to formal independence.[200]

The Namibian operation produced an enormous sense of optimism in the U.N. Coinciding as it did with the end of the Cold War, the operation's success not only represented for many an emerging consensus on the value of democratic governance (previously, even the word "democracy" rarely appeared in official U.N. documents) but also presented important evidence of the organization's capacity to establish democratic processes in states torn by conflict and mistrust. Namibia thus served as an important catalyst for further large scale, transformative U.N. operations in which democratization played an increasingly central role. In the next several years, such operations followed one on the heels of another.

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195. BEIGBEDER, *supra* note 7, at 161–63.

196. Cederic Thornberry, The Secretary-General and Namibia 7 (1991) (paper presented to Ralph Bunche Institute conference on "The Impact of the Changing International Climate on the Role of the United Nations' Secretary-General" held on Sept. 11–13, 1991)(on file with author).

197. Szasz, *supra* note 128, at 143.

198. *1991 Election Report*, *supra* note 165, at 9.

199. For example, the constitution provides that its extensive protections of civil and political rights cannot be altered or removed by amendment. NAMIB. CONST. arts. 131, 132(5)(a). In addition, unless otherwise specified "the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." *Id.* art. 144. On the latter issue, see Gerald Erasmus, *The Namibian Constitution and the Application of International Law*, 15 S. AFR. Y.B. INT'L L. 81 (1989/90).

200. Szasz, *supra* note 128, at 250.

The next mission was the ONUVEN operation in Nicaragua, which the Secretary-General authorized even before the Namibian elections had taken place. The elections culminated a regional effort to resolve the *contra* war that had engulfed Nicaragua and its neighbors since the early 1980s. ONUVEN had none of the leverage with the Nicaraguan government that UNTAG was able to muster when negotiating with the South African electoral authorities. Yet, remarkably, it was able to persuade the Sandinista government both to alter laws and cease practices that it found inconsistent with the mission mandate.[201] That mandate might have been interpreted to cast ONUVEN as mere passive observer, but Elliot Richardson, the Secretary-General's Special Representative in Nicaragua, argued that ONUVEN's unique ability to legitimize the elections "demanded more than merely recording the process, more than monitoring, and could not stop short of actively seeking to get corrected whatever substantial defects and been discovered."[202] That the incumbent government *lost* the election and proceded to leave office (although not without substantial controversy) further reinforced the perceived value of a U.N. presence.

Still more ground was broken in the Haiti operation, authorized by the General Assembly only seven months after the elections in Nicaragua. Both the Namibian and Nicaraguan elections were part of solutions to conflicts long of concern to the international community; both, for example, had been the subject of opinions by the ICJ.[203] In September 1990, the Secretary-General attempted to codify this practice by announcing that henceforth, large scale U.N. election monitoring would be restricted to situations in which a "clear international dimension" was present.[204] One month later, however, the General Assembly approved the mission to Haiti. The only "international dimension" to Haiti's ongoing political crisis was a steady outflow of refugees, a factor present in virtually all *purely internal* crises.[205] After Haiti, the requirement

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201. *First Report of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua to the Secretary-General*, U.N. Doc. A/44/642 (1989), at 6.

202. *Fifth Report of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua to the Secretary-General*, U.N. Doc. A/44/927 (1990), at 3.

203. International Status of South-West Africa, 1950 I.C.J. 128 (July 11); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 6 (Jan. 26); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

204. *Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/45/1 (1990), at 15 [hereinafter *1990 Report*].

205. In a subsequent report the Secretary-General remarked with typically oblique understatement that "the case of Haiti differed from that of Nicaragua in that the international dimension of the case was less evident." *1990 Report*, *supra* note 204, at 15.

of an international nexus has faded from official commentary on U.N. electoral activities.[206]

This universalization of monitoring as appropriate to virtually all national elections has led to the establishment of an elaborate infrastructure — both at the U.N. level and elsewhere — designed to promote democratic transitions.[207] Ironically, the very failure to limit U.N. operations to situations with a "clear international dimension" has reinforced the centrality of monitored elections to crises which are undoubtedly of interest to the international community — in particular efforts to resolve protracted civil wars. For if societies at peace are now expected to include their citizens in choosing leaders and devising national policy, then such processes are surely necessary in states in which divisiveness and exclusion are ongoing problems still to be remedied.[208]

Thus, less than one month after the value of the Haiti operation seemed to disappear when the Haitian military overthrew President Aristide, nineteen states initiated by treaty the largest U.N. electoral mission to date. The Paris Accords on Cambodia went far beyond Namibia in the degree of control over the process ceded to the U.N. All Cambodian "administrative agencies, bodies and offices which could directly influence the outcome of the election" were placed under direct UNTAC supervision.[209] The U.N. was thereby granted effective control over Cambodia's "foreign affairs, national defence, finance, public

206. Even in what has become an annual General Assembly resolution serving as a counterpoint to resolutions praising monitoring activities, the Assembly did not single out this factor as dispositive in decisions to provide electoral assistance. Rather, according to this resolution, the "special circumstances" meriting assistance include "cases of decolonization, in the context of regional or international peace prcesses or at the request of specific sovereign States, [or] by virtue of resolutions adopted by the Security Council or the General Assembly." *Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in Their Electoral Processes*, G.A. Res. 180, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/180 (1994). Moreover, in the Forty-Ninth Session, fifty-seven Member States voted against this resolution, whereas only *one* member state (Iran) voted against a parallel pro-election resolution. *See Strengthening the Role of the United Nations in Enhancing the Effectiveness of Periodic and Genuine Elections and the Promotion of Democratization*, G.A. Res. 190, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/190 (1994).

207. Beigbeder briefly describes the creation of the first U.N. body dedicated to electoral matters — the Electoral Assistance Unit — in 1992. BEIGBEDER, *supra* note 7, at 115–16. Upon its creation, the Unit was in such demand that it was soon upgraded to a "Division" of the Department of Peacekeeping Operations. Beigbeder has a much more extensive review of electoral activities by regional organizations and nongovernmental organizations, two groups often neglected in the literature on democratic transitions.

208. Secretary-General Boutros-Ghali has repeatedly sounded this theme in speaking of "post-conflict peace-building." *Report of the Secretary-General: An Agenda for Peace*, U.N. Doc. A/47/277 & S/24111 (1992), at 16–17; Boutros Boutros-Ghali, *An Agenda for Peace: One Year Later*, ORBIS, Summer 1993, at 323, 328–30.

209. BEIGBEDER, *supra* note 7, at 200.

security and information."[210] All aspects of the elections themselves were under UNTAC's direct control. The recalcitrance of the Khmer Rouge and the apprehension that greeted election day in Cambodia are well documented. Perhaps because of such pessimism the success of the voting itself — with an over ninety percent turn-out rate, even in areas in which Khmer Rouge attacks were expected with virtual certainty — lent further credibility to the Namibian model of monitored elections as a vital component of large-scale multilateral efforts to assist in rebuilding civil societies.

The Namibian model has proliferated. The U.N. has monitored or plans to monitor elections as part of large-scale social engineering projects in Angola, Mozambique, El Salvador, South Africa, Afghanistan, and Georgia. These operations consume substantial resources, not the least of which is the international community's willingness join risky nation-building operations. The anti-U.N. backlash in the United States in the wake of the Somalia operation's collapse demonstrates all too graphically the toll such unsuccessful missions may take on U.N. legitimacy. But it is precisely in the scope and ambitiousness of these projects that one finds the most important implications for the nature of self-determination. Democratic processes are attempts to hold territorial states together, to create common bonds to legal and political institutions, and to replace (or sublimate) loyalties to race, ethnicity, or religious groupings.[211] Particularly when election monitoring is coupled with nation-building activities such as demobilizing militias and creating truth commissions,[212] the evident goal of those planning such operations is to create in existing territorial states a self-sustaining political community.[213] The goal of fostering political democracy, in other words, is antithetical to any conception of self-determination in which the self is less than national in character.

Beigbeder points out two important ways in which U.N. electoral practice may be linked to this process of normative evolution. First, the standards adopted by U.N. monitors are explicitly drawn from human

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210. *Id.*

211. *See* Boutros Boutros-Ghali, *Democracy: A Newly Recognized Imperative*, GLOBAL GOV. 3, 8 (1995).

212. *See* Priscilla B. Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994).

213. Despite an unprecedented degree of multilateral involvement in such traditional local activities, the evident goal of the international community in remaking national political institutions is to *strengthen* and not erode the functional sovereignty of the states involved. For an elaboration of this view, see Gregory H. Fox, *New Approaches to International Human Rights: the Sovereign State Revisited, in* CONTESTING SOVEREIGNTY (Sohail Hashmi ed., forthcoming 1995).

rights instruments, though in practice they have become considerably more detailed than the treaty provisions.[214] As a result, the U.N. has addressed a number of controversial issues in electoral law that treaty regimes had either avoided or confronted much later. For example, the legitimacy of one party states was only addressed by the Human Rights Committee in 1993,[215] yet the U.N. had for years insisted that all major groups be permitted to participate in the elections and referenda it monitored.[216] Doctrinally, the notion of internal self-determination involves a canvass of international legal instruments that leads one to view the right as an interpretive principle that in content does not exceed the sum of other political rights contained in those instruments. The jurisprudence of self-determination so conceived is substantially enriched if U.N. electoral practice is taken into account as integral to the relevant body of legal precedent.

Second, in a related fashion, the institutionalization of monitoring at the U.N. and elsewhere has created a *de facto* enforcement mechanism of participatory norms. At the end of each mission, international observers are called upon to pronounce whether elections are "free and fair."[217] In most cases this conclusion is by no means absolute; instances of incompetence, intimidation, or outright fraud must be balanced against more positive aspects of the process. As a result, mission reports effectively become adjudications of compliance with a broad panoply of norms. Moreover, because monitors are understandably eager to minimize the precariousness of these conclusions, they engage in an ongoing dialogue with electoral authorities concerning problems evident in the run-up to election day. This may, as in the cases of Namibia and Nicaragua, lead to substantial changes in the legal framework for the elections. Finally, a more indirect means of enforcement is evident in monitors' consciousness of the systemic effects of their conclusions. Beigbeder documents how monitors often seek to encourage democratization both by emphasizing positive aspects of elections and by issuing

214. The Secretary-General declared in 1992 that "the basic legal framework for the [monitored] electoral process must be in conformity with the relevant principles enunciated in fundamental international human rights agreements." *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, Report of the Secretary General*, U.N. Doc. A/47/668/Add.1 (1992), at 1, *cited in* BEIGBEDER, *supra* note 5, at 111.

215. Bwalya v. Zambia, U.N. Hum. Rts. Comm. Commun. No. 314/1988, *reprinted in* 14 HUM. RTS. L.J. 408 (1993).

216. See the discussion in Fox, *supra* note 113, at 572–90.

217. It is quite important to note that this and other aspects of monitoring have long ceased to be solely United Nations functions. Regional organizations and nongovernmental organizations have in some cases been more aggressive and innovative in their monitoring activities. Beigbeder documents the activities of these two groups in chapters 8 and 9 respectively. BEIGBEDER, *supra* note 7, at 222–96.

reports that speak only to discrete aspects of an electoral process, rather than making an overall asessment of fairness.[218] The assumption is that positive reinforcement from the international community is more likely to compel adherence to democratic norms than a categorically critical judgment.

Not surprisingly, this normative and institutional mainstreaming of election monitoring into the work of international organizations has virtually eclipsed claims that such actions are contrary to traditional notions of state sovereignty. The primary problems raised by the recent missions canvassed by Beigbeder involve not claims of jurisdictional overreaching by the U.N. but logistical problems of managing large scale operations in situations where civil conflicts have not yet subsided (Angola),[219] a crucial party to an agreement to hold elections pulls out (Cambodia),[220] or a mission begins its work with crucial aspects of the electoral process still to be negotiated (the Western Sahara).[221] Claims of infringed sovereignty have been nominally raised each year in a General Assembly resolution cumbersomely entitled *Respect for the Principles of National Sovereignty and Non-Intervention in the Internal Affairs of States in the Electoral Process.*[222] Even there, the objection that electoral affairs are solely a domestic matter was substantially undercut in the last version of the resolution adopted during South African apartheid by an insistence on majority rule elections in South Africa.[223]

The waning of sovereignty objections to election monitoring carries important implications for the self-determination principle. Among the states traditionally claiming sovereignty over electoral matters have been many battered by the centrifugal forces of nationalism and secession. The actions of these "front line" states are necessarily central to any attempted explication of the "self" through an examination of international practice. That many of these states now support the multinational democratic infrastructure described by Beigbeder suggests they may be seeking inclusive and nonviolent solutions to their centrifugal crises. The greater the inclusionary rights granted to their citizens, the more their

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218. *E.g.*, *id.* at 246–47, 252–54, 266.

219. BEIGBEDER, *supra* note 7, at 180–84.

220. *Id.* at 198–212.

221. *Id.* at 191–97.

222. *E.g.* G.A. Res. 180, U.N. GAOR, 49th Sess., U.N. Doc. A/49/180 (1994).

223. The Assembly declared that:

> only the total eradication of apartheid and the establishment of a non-racial, democratic society based on majority rule, through the full and free exercise of adult suffrage by all the people in a united an non-fragmented South Africa, can lead to a just and lasting solution to the situation in South Africa.

G.A. Res. 130, U.N. GAOR, 47th Sess., U.N. Doc. A/47/678/Add.2 (1992).

practice approximates the "omnibus" conception of an internal right to self-determination described above. As a result, the traditional conflict over sovereign rights is largely inverted. Electoral assistance from the international community *enhances* these states' capacity to function as robust sovereign communities. Their sovereignty is perforated and diminished when inclusionary politics is *not* practiced and rebellions against central authority take their toll.

CONCLUSION

Reading Yves Beigbeder's book is an alternately rewarding and frustrating experience. On the one hand, he has compiled an impressive history of international electoral monitoring. On the other hand, for the most part, the book does not venture organizing hypotheses or conclusions beyond those evident on the surface of the practice under review. Granted some of these self-evident issues are quite important, such as the logistical questions raised by ambitious attempts to create an ordered, centralized government in states notable for their disorder and diffusion of authority. But the problem with Beigbeder's focus is that international lawyers make no unique contribution to the debate over such questions. There is, for example, much new insight within the U.N. itself on how these logistical hurdles may be surmounted. The legal authority for conducting such ambitious missions, while controversial initially, no longer requires extended justification.

A legal analysis, however, is central to the interpretive question of how the international community's newfound concern for democratic government accords with the shifting tiers of authority that increasingly marks the post-Cold War world. Much has been written about the diffusions of state power both upward to transnational entities and downward to ethnic or "tribal" groupings. Whether election monitoring contributes to an internal conception of the "self" is an aspect of this broader process of shifting authority. The task for international lawyers here is not an easy one. The very breadth of actors whose electoral activities Beigbeder examines demonstrates the complexity of drawing uniform normative conclusions. Moreover, because self-determination is such a controversial topic, the actors themselves rarely venture opinions on the nature of the right in their resolutions, reports, or diplomatic exchanges on the subject.

Even so, international lawyers must persevere undeterred. This is the essence of one's ultimate reaction to Beigbeder's study: he should not have taken the easy route of presenting interesting data without venturing conclusions that would no doubt be controversial but that would not be less interesting for being so. His hesitancy is unfortunate. The litera-

ture on self-determination (mostly nonlegal) is also not short on theories arguing for "appropriate" forms of group autonomy. All too often, however, such accounts lack a grounding in international practice, which is the surest guide to their relevance to policymakers. A study that blended the best aspects of both approaches would certainly be welcome.