

UKRAINE, SELF-DETERMINATION, AND EMERGING NORMS FOR UNILATERAL SECESSION OF STATES

INTRODUCTION

In 1991, the Soviet Union dissolved, devolving from a single political entity into 15 discrete independent republics.¹ Following the Soviet Union's collapse, several breakaway movements emerged in post-Soviet states: Chechnya and Dagestan in Russia,² South Ossetia and Abkhazia in Georgia,³ Transnistria in Moldova,⁴ Artsakh (also called Nagorno-Karabakh) between Azerbaijan and Armenia,⁵ and, most recently, Crimea, Donetsk, and Lugansk in Ukraine.⁶ Many of these conflicts have persisted for decades.⁷

1 See GLENN E. CURTIS & LIBRARY OF CONGRESS, *RUSSIA: A COUNTRY STUDY* 109-118 (1998). Although the breakup of the Soviet Union was a process characterized by several individual declarations of independence, the Union was formally disbanded by agreements between the leaders of constituent Soviet Republics at summits in Minsk and Almaty which "created the Commonwealth of Independent States ["CIS"] and annulled the 1922 union treaty that had established the Soviet Union." *Id.* at 118. The Minsk summit was attended only by representatives from Russia, Ukraine, and Belarus; the Almaty summit was attended by 11 former Soviet republics, excluding the Baltic states and Georgia. *Alma-Ata Declaration*, <http://www.cis.minsk.by/page.php?id=178> (Russian language; includes the assent of representatives from Azerbaijan, Russia, Armenia, Tajikistan, Belarus, Turkmenistan, Kazakhstan, Uzbekistan, Kyrgyzstan, Ukraine, and Moldova.)

2 See Max Fisher, *9 Questions About Chechnya and Dagestan You Were Too Embarrassed to Ask*, WASHINGTON POST, April 19, 2013, <https://www.washingtonpost.com/news/worldviews/wp/2013/04/19/9-questions-about-chechnya-and-dagestan-you-were-too-embarrassed-to-ask/> (indicating that the conflicts in Chechnya and Dagestan ignited because "when the Soviet Union dissolved and its various regions either seceded or negotiated their place in the new Russian Federation, Moscow's talks with Chechen representatives fell apart.")

3 See Bruno Coppieters, *The Roots of the Conflict*, in ACCORD: A QUESTION OF SOVEREIGNTY 18, 18 (Conciliation Resources, 1999) (providing a historical account of Georgia's rescissions of certain Soviet policies favoring "national minorities," including Ossetians and Abkhazians, as inciting incidents for those conflicts).

4 See Mihály Borsi, *Transnistria – An Unrecognized Country Within Moldova*, SEER: JOURNAL FOR LABOUR AND SOCIAL AFFAIRS IN EASTERN EUROPE, vol. 10, no. 4, 2007, at 45, 45 (characterizing tension between Transnistria and Moldova as "a 'frozen conflict'" resulting from Transnistria's "declar[ation of] independence from Moldova after the collapse of the USSR on 27 August 1991.")

5 See GLENN E. CURTIS & LIBRARY OF CONGRESS, *ARMENIA, AZERBAIJAN, AND GEORGIA: COUNTRY STUDIES* 18-25 (1995) (discussing the growing attitudes of Armenian revanchism and Armenian and Azerbaijani nationalism within the greater context of the decline and collapse of the USSR).

6 See Robert Malley, *Ukraine Is Ground Zero for the Crisis Between Russia and the West*, THE ATLANTIC (July 16, 2018) (reporting generally on the history of the Ukraine conflict, including both the Donbass and Crimea, from 2014 onward).

7 See *supra* notes 4-8. With the exception of the Ukrainian conflicts, these breakaway movements erupted in the late 1980s or early 1990s. *Id.*

Although each of these separatist movements – known as “frozen conflicts”⁸ – arose from different sets of geographic, political, and ethnic grievances,⁹ they pose a common problem: how can international law evaluate the validity of these breakaway movements? Although international law has addressed issues raised by secessionist movements in the past, unilateral secessions by non-colonized states or proto-states raise peculiar factual and legal issues.¹⁰ Frozen conflicts in the post-Soviet sphere implicate different factual, historical, and legal questions without the benefit of righting an unambiguous historical wrong.¹¹

This note focuses on the possibility of legal justification under international law for secession by two proto-states in Eastern Ukraine presently locked in frozen conflicts: the Donetsk People’s Republic (“DPR”) and Lugansk People’s Republic (“LPR”).¹² Although there are differences between them which may have material effects on their legal claims to statehood,¹³ both regions share significant linguistic, demographic, cultural, and historical traits which put their broader claims

8 See Dov Lynch, *Frozen Conflicts*, THE WORLD TODAY, vol. 57, no. 8/9, 2001, at 36 (explaining that these post-Soviet territorial conflicts are “frozen conflicts” because they are “conflicts frozen in time,” unresolved “almost a decade on” from the fall of the Soviet Union).

9 See *supra* notes 4-8. Although each conflict has grown out of the collapse of central Soviet control, they evince a varied set of *casus bellorum* and would require varying legal analyses as a result.

10 See Glen Anderson, *Unilateral Non-colonial Secession and the Criteria for Statehood in International Law*, 41 Brooklyn J. Int’l L. 1, 5 (proposing that different criteria apply to the validity of “Unilateral Non-Colonial” secessions (“UNC”) than colonial secessions.)

11 See *id.* at 17-22 (discussing the principle of *uti possidetis juris* as applicable to the secessions of postcolonial states, but not necessarily to noncolonial secessions). *Uti possidetis juris* is a legal principle which maintains the pre-existing administrative borders of a region when it gains independence so that “where there is a withdrawal of sovereignty over an administrative territory, the territorial boundaries attached thereto are protected, final, and permanent.” *Id.* Application of the principle to noncolonial secession is controversial. The Badinter Commission, an arbitral commission established by the European Community, cited the principle in its determination that “Yugoslavia’s internal federal borders became international borders following the secession of four of the federation’s republics in the early 1990s.” Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 Melbourne U. L.R. 50, 50 (2000.) However, some international legal scholars argue that *uti possidetis juris* was misapplied in that case and constitutes a general principle of international law only in the context of decolonization. See Radan, 24 Melbourne U. L.R. 50, 59-65 (discussing the development of *uti possidetis* in the context of Latin American independence movements and challenging the Badinter Commission’s application of the principle to former Yugoslav states.)

12 Some sources may refer to these entities as the “DNR” and “LNR” respectively, as the Russian word for “people’s,” “Народная” (“Narodnaya,”) begins with an N. See, e.g., *Donetskaya Narodnaya Respublika: Ofitsialniy Site*, <https://dnr-online.ru/> (Using the “DNR” romanization for the URL in the capacity of the DPR’s official website.)

13 See *infra* Part IIIA.

for sovereign legitimacy on similar footing and merit side-by-side analysis.¹⁴

Part I of this note focuses on the historical background of the Donbass¹⁵ region, the origins of the current conflict, and the current status of the secessionist states in Donetsk and Lugansk.

Part II of this note examines current and emerging international law norms concerning statehood, the right of self-determination, state rights to territorial integrity and sovereignty, and secession from non-colonial parent states. This section aims to distill from scholarly consensus and state practice an intelligible rubric to evaluate proto-state claims to a right of unilateral secession.

Part III of this note applies the standards developed in Part II to the facts of the DPR and LPR secessions. This section evaluates two principal questions: whether the DPR and/or LPR meet prevailing criteria for statehood; and whether the secessions of these regions are supported by sound legal principles (extant or emerging) for the legitimacy of secessionist states.

I. HISTORICAL BACKGROUND TO THE DONBASS CONFLICT AND ITS CURRENT STATUS

In late 2013, a major protest movement arose in Ukraine in response to a refusal by the ruling Party of Regions to sign a promised trade agreement with the European Union.¹⁶ The protests, termed “Euromaidan,” spurred the flight of then-president Viktor Yanukovich from the country,¹⁷ the election of a pro-European majority in parliament,¹⁸ and the withdrawal of

14 See generally Theodore H. Friedgut, *Professional Revolutionaries in the Donbass: The Characteristics and Limitations of the Apparatus*, 27 CANADIAN SLAVONIC PAPERS NO. 3 284 (1985).

15 “Donbass” (Russian) or “Donbas” (Ukrainian) refers to a region in eastern Ukraine and western Russia formed by the Donets River basin (thus “Донецкий бассейн” (“Donetskiy Bassein”) forming the portmanteau “Donbass”). In the context of Ukraine, “Donbass” is often used as a metonym for the territory, culture, and people of Donetsk and Lugansk oblasts. See Andrew Wilson, *The Donbas Between Ukraine and Russia: The Use of History in Political Disputes*, J. CONTEMP. HIST. Vol. 30, No. 2, April 1995, 265, at 267.

16 See BBC, *Ukraine Suspends Preparations for EU Trade Agreement* (Nov. 21, 2013), <https://www.bbc.com/news/world-europe-25032275> (reporting on the surprise vote against the EU trade deal) and BBC, *Huge Ukraine Rally over EU Agreement Delay* (Nov. 24, 2014), <https://www.bbc.com/news/world-europe-25078952> (indicating that over 100,000 people gathered to protest in Kiev).

17 See BBC, *Ukraine Crisis: Timeline* (13 November 2014) <https://www.bbc.com/news/world-middle-east-26248275> (noting Yanukovich’s disappearance from Ukraine on February 22, 2014).

18 BBC, *Ukraine Elections: Pro-Western Parties Set for Victory* (27 October 2014), <https://www.bbc.com/news/world-europe-29782513>.

the Party of Regions from Ukrainian politics.¹⁹ Shortly after Yanukovich's flight to Russia, counter-protest movements seized control of the eastern oblasts²⁰ of Donetsk and Lugansk, a region known as the "Donbass."²¹ In May of 2014, those oblasts held questionable referenda which purported to express Donbass residents' intention to exercise control over that territory.²² Since that time, the region has remained largely under the control of the Donetsk and Lugansk Peoples' Republics.²³

Prior to the late 19th century, the Donbass was an inhospitable steppe used primarily as a battlefield in the frequent clashes between Slavic and Turkic empires.²⁴ The tumultuous history of the region and its subsequent rapid development as a mining center with a diverse imported population inculcated a frontier character of "freedom, militancy, violence, terror, [and] independence" which "transcend[s] the borders of Russia[] and Ukraine."²⁵ When the Russian Empire industrialized the Donbass, it did so by importing Russian peasant labor and foreign investment capital.²⁶ From this context emerged a unique cultural identity neither fully Ukrainian nor Russian.²⁷

19 *Id.*

20 Administrative divisions roughly equivalent to states or provinces; *see supra* note 1.

21 Simon Denyer and Anna Nemstova, *Eastern Ukrainians Vote for Self-Rule in Referendum Opposed by West*, WASHINGTON POST (May 11, 2014) https://www.washingtonpost.com/world/europe/ukraines-rebels-say-they-are-seeking-a-mandate-not-independence-in-referendum/2014/05/11/ac02688a-d8dc-11e3-aae8-c2d44bd79778_story.html.

22 *Id.*

23 *See generally* BBC, *supra* note 20 (providing a timeline for the separatist conflict in the Donbass).

24 *See* HIROAKI KUROMIYA, *FREEDOM AND TERROR IN THE DONBAS: A UKRAINIAN-RUSSIAN BORDERLAND, 1870S-1990S*, 11-13 (Cambridge University Press 1998). Kuromiya notes that the preindustrial Donbass was known as the "wild steppe," a vast sea of grass whose lack of naturally defensible terrain "made [it] a wild, dangerous area" and "a theater of continuous military operations." *Id.* at 11. [Appears the published year is 1998, not 2003]

25 *Id.* at 12.

26 *See* Friedgut, *supra* note 17, at 284 (indicating that "The Donbass began to grow in the early 1870s and was characterized by the concentration of thousands of workers in large metallurgy and mining enterprises financed and managed by non-Russian entrepreneurs.") Friedgut notes that the rapid industrialization diversified the population from small pockets of Ukrainian villagers to include "Russian workers and miners [who] had been uprooted from their familiar surroundings and institutions," Russian Jewish tradespeople seeking new opportunities within the Pale of Settlement, and "the foreign community of managers, foremen, and skilled workers" who funded and administered the industrial expansion but generally neither integrated into the community nor suffered the same deprived conditions as the workers. *Id.* at 285-86.

27 *See* Paul S. Pirie, *National Identity and Politics in Southern and Eastern Ukraine*, 48 EUROPE-ASIA STUDIES NO. 7 1079 (1996). [Month doesn't need to be included] Pirie finds that the population of the Donbass in particular evinces particularly low rates of self-identification with either entirely-Ukrainian or entirely-Russian identity, as opposed to high rates of Ukrainian-identification in

As a result of this unique identity, the Donbass has historically been concerned with administrative freedom and retention of a greater proportion of the industrial wealth generated in the region.²⁸ Additionally, residents of the Donbass favored a political order which, though subject to Ukrainian sovereignty, maintained close ties with Russia economically, socially, and politically;²⁹ Pirie notes that in the first national Ukrainian elections in 1994, “[t]he Donbass’ support for much closer ties with Russia” was confirmed by poll results in Donetsk and Lugansk on the question of joining the Commonwealth of Independent States (CIS):³⁰ “88.7% of Donetsk voters and 90.7% of Lugansk voters” voted in favor of joining.³¹

These attitudes—independence, apathy toward both Ukrainian and Russian nationalism, nostalgia for the unity and stability of the USSR, and a historical grudge against external rent-seeking on the Donbass’ industrial productivity³²—all came to a head in the wake of President Yanukovich’s flight to Russia.³³ Yanukovich is Donbass, born and bred: he grew up in Yenakievo, a Donbass city, where he reportedly “fell in with a street gang

the country’s western regions (even among mixed Ukrainian-Russian citizens) and Russian-identification in Crimea. For example, in the 1970s, approximately 30% of married households in Ukraine were mixed Ukrainian-Russian; in the Donbass, that rate was 55%. *Id.* at 1086. Pirie also notes polls from 1991-1994 which indicate that a plurality of Donbass residents, 36.5%, consider themselves mixed Russian-Ukrainian (compared to 25-26% identifying as such across the nation) and that residents of Lugansk Oblast “defined the Donbass as a special community tied to both Russia and Ukraine, as opposed to a Ukrainian region.” *Id.* at 1087.

28 For example, although “Donbass voted overwhelmingly for independence in 1991[,] [t]he region was partly voting (so people thought) for greater independence for the oblast ... They wanted real socialism – greater control over their mines, the output and their lives in general.” Irina Predborska, Katya Ivaschenko, & Ken Roberts, *Youth Transitions in East and West Ukraine*, 20 EUROPEAN SOCIOLOGICAL REVIEW NO. 5 403, 408-09 (2004). [Month doesn’t need to be included]

29 See Pirie, *supra* note 30, at 1098-1100.

30 The Commonwealth of Independent States (hereinafter “CIS”) is an international organization founded to promote political and economic cooperation among former Soviet states. See Alma-Ata Declaration, *supra* note 4. The Donbass’ enthusiasm for the CIS is particularly relevant in light of the possibility that the CIS is a vehicle for Russian hegemony in the region. See Paul Kubicek, *The Commonwealth of Independent States: An Example of Failed Regionalism?*, 35 REVIEW OF INTERNATIONAL STUDIES 237, 242-43 (2009) (Noting fears among CIS members that “Russian-led CIS ‘peacekeeping efforts’ were ... viewed suspiciously by many as a means for Russia to re-insert itself in the post-Soviet space” and that “Russian claims that the CIS was in its sphere of influence ... or that Russia had the right to intervene in CIS states to protect the rights of ethnic Russians made many uneasy about creating a security structure that would, because of power asymmetries, be dominated by Russia.”) [Month not needed]

31 Pirie, *supra* note 30, at 1098.

32 See generally *id.*

33 See *Ukraine Crisis: Protesters Declare Donetsk ‘Republic’*, BBC, April 7, 2014, <https://www.bbc.com/news/world-europe-26919928>.

and received two convictions for robbery and assault.”³⁴ After the fall of the USSR, Yanukovich entered local politics and built the Party of Regions into a powerful regional political organization.³⁵ His background as a political outsider and a Donbass native with a checkered past resonated with a Donbass that feared exploitation and forced Ukrainianization by the nationalistic, anti-Russian western part of the country.³⁶ Donbass residents saw him “as ‘their guy,’ who would make decisions in their ... best interest.”³⁷ For the separatists in Donetsk and Lugansk, the Euromaidan revolution represented a decisive opening salvo against the interests of the Donbass, and the culmination of irrevocable differences in priorities over Ukraine’s future.³⁸

II. CURRENT AND EMERGING INTERNATIONAL LAW NORMS GOVERNING STATEHOOD, SECESSION, AND THE SELF-DETERMINATION OF PEOPLES

A. Statehood

International legal consensus has largely rejected the “constitutive” theory of statehood, which posited that recognition by other states (or a

34 Stuart Williams, *Ukraine's 'Orange villain' Seeks Last Laugh*, The Telegraph, Jan. 12 2010, <https://www.telegraph.co.uk/expat/expatnews/6973451/Ukraines-Orange-villain-seeks-last-laugh.html>. [the “at” not needed].

35 See Taras Kuzio, *The Opposition's Road to Success*, 16 Journal of Democracy No. 2 117, 124 (Apr. 2005) (reporting widespread allegations from Yanukovich’s opposition that Yanukovich “had maintained strong connections to organized crime ... serving as its lobbyist in local and national government” and that “[h]e was closely linked to the Donetsk “clan” [of organized crime] and its leader, oligarch Rinat Akhmetov.”) In addition to his alleged connections to organized crime, Yanukovich benefited from a close political alliance with Leonid Kuchma, the second post-Soviet president of Ukraine. *Id.*

36 Adam Taylor, *Ukraine's Real Problem is Viktor Yanukovich*, BUSINESS INSIDER (Jan. 31, 2014), <https://www.businessinsider.com/ukraines-real-problem-is-viktor-yanukovich-2014-1>. See also *infra* note 41.

37 *Id.*

38 See, e.g., International Republican Institute, *Public Opinion Survey: Residents of Ukraine March 14-26, 2014*, (Apr. 5, 2014), <http://www.iri.org/sites/default/files/2014%20April%205%20IRI%20Public%20Opinion%20Survey%20of%20Ukraine,%20March%2014-26,%202014.pdf>. The survey reveals significant pluralities in the East concerned about discrimination against Russian speakers and favoring of Russian intervention to protect Ukraine’s Russian population. *Id.* at 6, 8. The survey results also show a majority in the east favoring entrance to an economic customs union with Russia, Belarus, and Kazakhstan rather than the European Union. *Id.* at 12. Note that the “East” for this survey contains not only Donetsk and Lugansk, but also Kharkiv and Dnipropetrovsk. *Id.* at 133. Though these oblasts have significant Russian-speaking populations and saw pro-Yanukovich protests after Euromaidan, they did not join the breakaway oblasts and their responses may mitigate the anti-Kyiv attitudes represented by these responses in the survey.

community of other states) was necessary for statehood.³⁹ In its place, international law has recognized a “declarative” theory of statehood, which defines states by “the exercise of effective power by an authority over a territorial community, and the representation of the community in its relations with like communities.”⁴⁰ The Montevideo Convention on the Rights and Duties of States of 1933 articulated “the best-known formulation” of these “‘classical’ criteria for statehood.”⁴¹ In order to be a state, an entity must meet four criteria: “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.”⁴² Although these criteria are plainly-stated, they require nuanced case-by-case application; the specifics of their applicability to the DPR and LPR are explored in Section IIIA, below.

B. Self-Determination

International law recognizes a right to self-determination of peoples.⁴³ By 1995, the International Court of Justice found the right to possess “an *erga omnes* character,” such that each state has an obligation toward the entire international community to support the right.⁴⁴ The right is vaguely defined: the UN charter refers only to “the principle of equal rights and self-determination of peoples” as a basis for the “develop[ment] [of]

39 See James R. Crawford, *State*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW at ¶ 44, (2011) (explaining that “Recognition is not a condition for statehood in international law. Rights under international law are not contingent upon the acceptance of the right-holder by individual others. An entity is not a State because it is recognized; it is recognized because it is a State.”). [Month not needed]

40 *Id.* at ¶ 13.

41 *Id.*

42 Convention on Rights and Duties of States adopted by the Seventh International Conference of American States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter *Montevideo Convention*].

43 See Glen Anderson, *A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?*, 49 Vand. J. Transnat'l. L. 1183, 1185 (2016) (noting that “self-determination is widely regarded as a peremptory norm” among international law scholars). See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶ 114 (noting that “[t]he existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond “convention” and is considered a general principle of international law.”) [hereinafter *Quebec*] and International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171, 173 (declaring that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

44 *Case Concerning East Timor* (Port. V. Austl.), Judgment, 1995 I.C.J. 90, 102 (June 30, 1995). See also Jochen A. Frowein, *Obligations Erga Omnes*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (explaining that *erga omnes* obligations “are ‘obligations of a State towards the international community as a whole’ which are ‘the concern of all States’ and for whose protection all States have a ‘legal interest’.”).

friendly relations among nations.”⁴⁵ A more robust definition appears in the UN “Friendly Relations Declaration” which indicates that the self-determination of peoples includes “the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.”⁴⁶ The vagueness of this formulation of the right may arise from its origins as a modern-era rejection of the divine right as a fundamental principle of state legitimacy.⁴⁷

Over time, the right of self-determination has been interpreted as two discrete rights: “internal self-determination,” or “the protection of minority rights within a state,” and “external self-determination,” or “secession from a state.”⁴⁸ This distinction has a basis in the tension between the right of self-determination and “two core concepts of the euro-centric system of states: state sovereignty and territorial integrity.”⁴⁹ A strictly-construed right to self-determination, would imply a right to on-demand secession by any “people.” This would undermine the principle of territorial integrity and subject state sovereignty over its territory to the constant threat of secession.⁵⁰

45 U.N. Charter art. 1, ¶2.

46 G.A. Res. 2625 (XXV) (Oct. 24, 1970). *See also* G.A. Res. 1514 (XV) (Dec. 14, 1960) [hereinafter “Friendly Relations Declaration”] (declaring that “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

47 *See* Anderson, *supra* note 46, at 1192-1201. Anderson specifically reaches four conclusions about the right of self-determination: first, it is “is opposed to the divine right of kings”, conceiving of political authority “from the bottom-up, so to speak, rather than the top-down.” *Id.* at 1201. Second, “self-determination does not imply conservatism,” that is, political units are malleable to a certain (though undefined) extent. *Id.* Third, “self-determination is a progressive force that has challenged the political status quo throughout history.” *Id.* This progressive force, when applied to European hegemony over non-European peoples, “culminated in the movement against colonialism and ultimately, international recognition of the legality of UC secession.” *Id.* Fourth, self-determination is a durable concept in international law and “is unlikely to be expunged from the international legal landscape.” *Id.* at 1201-02. Anderson postulates that non-colonial secessionist movements, such as those in the post-Soviet sphere, will drive continued developments in the principle of self-determination. *Id.*

48 Mark A. Meyer et al., *Mission to Moldova: Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova: The Special Committee on European Affairs*, 61 *The Record* (of the Assoc. of the Bar of the City of New York) 196, 203 (2006).

49 Ilya Berlin, thesis, *Unilateral Non-Colonial Secessions: An Affirmation of the Right to Self-Determination and a Legal Exception to the Use of Force in International Law* p.30, Electronic Thesis and Dissertation Repository 4777, <https://ir.lib.uwo.ca/etd/4777>.

50 *See* JOHN DUGARD, *THE SECESSION OF STATES AND THEIR RECOGNITION IN THE WAKE OF KOSOVO* 120 (2013) (indicating that “territorial integrity equals self-determination in terms of its legal credentials.”) However, respect for the territorial integrity of States may not be an international legal requirement in the case of nonstate actors. *Id.* at 133-40.

To protect the vital state interest in territorial integrity, international law considers “that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.”⁵¹ The 1970 UN Friendly Relations Declaration provides a rough definition of internal self-determination: it states that “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”⁵² However, the Declaration also prohibits “authoriz[ation] or encourage[ment of] 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.”⁵³ In short, a state which provides any form of internal self-determination cannot legally have its territorial integrity compromised on the basis of an alleged lack of self-determination.⁵⁴

Because adequate internal self-determination is “normally attainable within the framework of an existing state,”⁵⁵ a legal claim to external self-determination depends upon an abrogation of that right.⁵⁶ Therefore, when a proto-state asserts a legal claim to secession, the inquiry is whether the right to internal self-determination has been abrogated by the parent state.⁵⁷

51 *Quebec*, *supra* note 46, at ¶ 126.

52 *Friendly Relations Declaration*, *supra* note 49.

53 *Id.*

54 *See, e.g., Quebec*, *supra* note 46, at ¶ 130 (asserting that a state's territorial integrity remains protected by international law so long as it “represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements”).

55 *Id.*

56 *See Anderson*, *supra* note 13, at 8 (stating that “should a people within an existing state be denied their right to internal self-determination, then a right to external self-determination, or UNC secession, will arise.”).

57 *Id.*

C. Secession

As noted above, “principles of state sovereignty and territorial integrity [which] have been regarded as relatively sacrosanct” limit the right to secession.⁵⁸ A would-be secessionist people must show that it has been “blocked from the meaningful exercise of its right to self-determination internally.”⁵⁹ But what does that mean? Does international law broadly construe a people’s “right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development[,]”⁶⁰ or are those inquiries narrowed in light of states’ strong interests in territorial integrity and sovereignty?

Textual sources of international law imply conflicting standards for violations of internal self-determination. The language of the Friendly Relations Declaration, above, is quite broad – mandating the “free[] determin[ation]” of a people’s self-determination interests “without external influence.”⁶¹ But compare the findings of the League of Nations in *The Aaland Islands Question*, where the arbitral commission held that “geographical, economic and other similar considerations” could limit the “complete recognition” of the right to self-determination.⁶² Given States’ strong interests in preserving their territorial sovereignty, a more expansive definition of “internal self-determination” has emerged in order that “secession ... be resisted whenever possible.”⁶³

The presumption against secession is rooted in the language of the Friendly Relations Declaration. The Friendly Relations Declaration finds adequate internal self-determination in a state which complies “with the principle of equal rights and self-determination of peoples” and which is “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”⁶⁴ The last clause makes clear that states whose governments represent the whole people of the territory without abrogating “meaningful access to

58 *Anderson*, *supra* note 46, at 1191.

59 *Quebec*, *supra* note 46, at ¶ 134.

60 *Friendly Relations Declaration*, *supra* note 16.

61 *Id.*

62 *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, 3 League of Nations O.J., Spec. Supp. 3, 6 (1920) [Hereinafter *Aaland Islands Question*].

63 DUGARD, *supra* note 53, at 140.

64 *Friendly Relations Declaration*, *supra* note 49.

government to pursue [peoples'] political, economic, social and cultural development," do not give rise to a valid claim to secession.⁶⁵

Critically, there appears to be little scholarly or judicial consensus on the scope and severity of infringements upon "meaningful access to government" required to justify a people's right to external self-determination.⁶⁶ Some scholars find a pattern of state practice justifying external self-determination by non-colonial peoples only in light of *in extremis* violations of human rights.⁶⁷ This restriction would eliminate the right to external self-determination in all but the most severe cases of human-rights abuses, such as genocide or war crimes targeting a particular people.⁶⁸ However, a more lenient standard might be construed to imply a legal right to secession in any case where constituent peoples of a state believe that their state's government is structurally inadequately representative and provides insufficient "access to government ... [for] the pursuit of political, economic, social, and cultural development."⁶⁹

III. DOES INTERNATIONAL LAW PROVIDE A LEGAL BASIS FOR THE SOVEREIGN STATEHOOD OF DONETSK AND LUGANSK?

Two inquiries govern the issue of DPR and LPR statehood. First, they need to meet international legal criteria for statehood. As neither entity has been recognized by another recognized nation,⁷⁰ both entities fail the

65 *Quebec*, *supra* note 46, at ¶ 138.

66 See Glen Anderson, *Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects*, 41 *Denv. J. Int'l. L. & Pol'y.* 345, 394 (2013).

67 See *id.* at 395 (finding that "state practice in terms of recognition only supports [non-colonial] secession when the people within the seceding entity have been subject to oppression in extremis") and Berlin, *supra* note 52, at 70 (observing that *opinio juris* and state practice establish that "only the qualified right to ["non-colonial"] secession coupled with human rights abuses deemed as *in extremis* has been able to find support under customary international law").

68 Berlin, *supra* note 52, at 70.

69 *Quebec*, *supra* note 46, at ¶ 138.

70 See Alec Luhn, *Ukraine's Rebel 'People's Republics' Begin Work of Building New States*, THE GUARDIAN, (Nov. 6, 2014, 9:02 AM), <https://www.theguardian.com/world/2014/nov/06/ukraine-rebel-peoples-republic-states> (indicating that "The two 'people's republics' carved out over the past seven months by pro-Russia rebels have not been recognised [sic] by any countries.") However, the DPR and LPR have been officially recognized by South Ossetia, itself a partially-recognized state. *South Ossetia Recognizes Independence of Donetsk People's Republic*, TASS (June 27, 2014, 8:37 PM), <http://tass.ru/en/world/738110>. Additionally, Russia has provisionally and "temporarily recognize[d] civil registration documents issued in separatist-held areas of eastern Ukraine," including "identity documents, diplomas, birth and marriage certificates, and vehicle registration plates issued in the eastern Ukraine regions of Donetsk and Luhansk." *Maria Kiselyova & Pavel Polityuk, Putin Orders Russia to Recognize Documents Issued in Rebel-Held East Ukraine*, Reuters (Feb. 18, 2017,

constitutive theory of statehood.⁷¹ However, under current norms of international law, the *Montevideo* criteria provide a sound basis for the evaluation of an entity's statehood.⁷² Therefore, the criteria-based inquiry for Donetsk and Lugansk will center on their satisfaction of *Montevideo* criteria.

Second, Donetsk and Lugansk will need sufficient justification to override the "sacrosanct" principles of territorial integrity which stand in opposition to a unilateral secessionist movement's legitimacy, even when that movement satisfies the *Montevideo* factors.⁷³ The right of self-determination may provide Donetsk and Lugansk with sufficient legal rationale for secession. However, that rationale only applies if Ukraine has so drastically infringed on Donbass residents' rights to *internal* self-determination that secession – *external* self-determination – becomes justifiable.

A. *Montevideo Criteria*

In order to accrue the rights of independent states, Donetsk and Lugansk need to meet basic criteria for statehood.⁷⁴ As noted in Part IIA above, international law typically considers an entity's *de facto* sovereignty, often by reference to the four criteria established in the *Montevideo* Convention: permanent population, defined territory, government, and the ability to conduct external relations with other states.⁷⁵ If Donetsk or Lugansk lack any of these four factors, then no legal argument for their statehood may be sustained.⁷⁶ However, because each criterion is vaguely defined, "...[i]nternational law does not impose rigid or arbitrary quantitative criteria when it comes to [their] requirements."⁷⁷ Therefore, "when looking at each criterion individually, it becomes evident that their classical definition is viewed more as a flexible legal rule rather than a rule of law *strictu sensu*."⁷⁸

10:34 AM), <https://www.reuters.com/article/us-ukraine-crisis-russia-documents/putin-orders-russia-to-recognize-documents-issued-in-rebel-held-east-ukraine-idUSKBN15X0KR>.

71 See Crawford, *supra* note 42 at ¶ 44 (explicitly disclaiming recognition by other states as a determinative criterion for statehood in international law.)

72 *Id.*

73 *Quebec*, *supra* note 46, at ¶ 138.

74 *Supra* Part IIA.

75 *Id.*

76 *Id.*

77 Berlin, *supra* note 51, at 44.

78 *Id.*

The first requirement under the *Montevideo* standard is a permanent population.⁷⁹ Although, given the flexible interpretive guidelines applied for *Montevideo* criteria, “a permanent population does not need to be a constant one,”⁸⁰ a flexible analysis is not necessary in this case because both Donetsk and Lugansk indisputably contain permanent populations.⁸¹ Although the ongoing war has displaced a large number of Donbass residents – the UN suggests as many as 2 million people have been displaced within Ukraine, with over 100,000 fleeing abroad⁸² – many millions more continue to live in the region.⁸³ Thus, both proto-states satisfy this criterion.⁸⁴

The second *Montevideo* requirement is a defined territory.⁸⁵ Donetsk and Lugansk are unable to satisfy a strict interpretation of this requirement, as the borders of both separatist regions have shifted repeatedly over the course of the war.⁸⁶ But the defined territory

79 *Montevideo Convention*, *supra* note 45, art. 1.

80 Anderson, *supra* note 13, at 14.

81 See *Population (by Estimate) as of December 1, 2018. Average Annual Populations January-November 2018*, State Statistics Service of Ukraine, last updated Jan. 23, 2019, http://www.ukrstat.gov.ua/operativ/operativ2018/ds/kn/kn_e/kn1118_e.html. The estimated population of Donetsk Oblast on December 1, 2018 was approximately 4.16 million people. *Id.* The estimated population of Lugansk Oblast at that time was 2.15 million people. *Id.* Although the DPR and LPR do not control their entire namesake oblasts, major population centers (such as Donetsk, Lugansk, and Gorlovka) remain in separatist control. See Live Universal Awareness Map, *Ukraine*, (live updates, retrieved Nov. 4, 2018), <https://liveuamap.com/> (providing up-to-date maps of borders between Ukrainian and separatist territory).

82 UNHCR, *Ukraine Refugee Crisis*, <https://www.unrefugees.org/emergencies/ukraine>. See also Cynthia Buckley, Ralph Clem, Jarod Fox, and Erik Herron, *The War in Ukraine is more Devastating than you Know*, *Washington Post* (April 9, 2018) <https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/09/the-war-in-ukraine-is-more-devastating-than-you-know> (reporting that “[n]early two million people have been internally displaced or put at risk if they remain in their homes.”).

83 See Ministry of Foreign Affairs of Ukraine, *Donetsk Region*, <https://mfa.gov.ua/en/about-ukraine/info/regions/25-doneck> (indicating a prewar population of 5 million people in Donetsk) and Ministry of Foreign Affairs of Ukraine, *Luhansk Region*, <https://mfa.gov.ua/en/about-ukraine/info/regions/26-lugansk> (indicating a prewar population of approximately 2.5 million people in Lugansk).

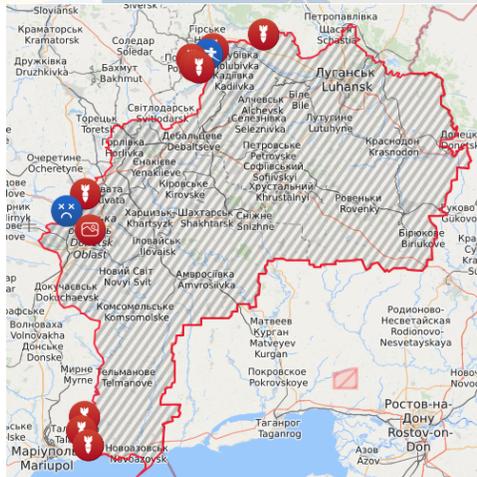
84 See *Montevideo Convention*, *supra* note 45, art. 1.

85 *Montevideo Convention*, *supra* note 45, art. 1.

86 See BBC, *Ukraine Crisis in Maps* (Feb. 18, 2015), <https://www.bbc.com/news/world-europe-27308526> (providing maps which show the fluctuating borders of the separatist movements from May 2014 to February 2015) and Live Universal Awareness Map, *supra* note 79 (providing up-to-date renderings of the border between territory held by DPR and LPR separatists and the Ukrainian government.) For comparison, see the maps below; the first from early 2015, see BBC, *Ukraine Crisis*

requirement “does not mean ... that there must be an absence of disputed frontiers.”⁸⁷ There is no requirement that the territory be any particular size,⁸⁸ nor that it be contiguous.⁸⁹ Instead, “The only requirement is that the State must consist of a certain coherent territory effectively governed.”⁹⁰ If the new state’s borders are in a state of flux, it must “make

in Maps, and the second current as of the time of writing this note see Live Universal Awareness Map,



supra note 84.
 87 Anderson, *supra* note 13, at 15.
 88 Crawford, *supra* note 42, at ¶ 15. Crawford notes that, for example, “Vatican City and Monaco occupy less than two square kilometres of territory. *Id.*”
 89 *Id.* at ¶ 16.
 90 *Id.* at ¶ 20.

clear to the international community which territory it has claimed and maintain fidelity to the claim's specific nature."⁹¹

The DPR and LPR borders have remained largely intact, particularly since the signing of the First Minsk Protocol in September 2014.⁹² The names of the breakaway republics also give notice of the states' territorial ambitions: the Donetsk Peoples' Republic claims a portion of Donetsk Oblast, and the Lugansk People's Republic claims a portion of Luhansk Oblast.⁹³ Because both breakaway regions have maintained fairly well-defined borders with Ukraine (and firmly fixed borders with Russia, their only other neighbor), they likely satisfy the second *Montevideo* criterion.⁹⁴

To satisfy the third *Montevideo* criterion, the purported state must have a government.⁹⁵ This is a two-part inquiry: first, whether there is "a political, executive, and legal structure for the purpose of regulating the

91 Anderson, *supra* note 13, at 16.

92 Compare BBC, *supra* note 89, and Live Universal Awareness Map, *supra* note 84 (showing that the map of the Minsk I ceasefire and the modern map share the same general shape, with the border beginning on the Azov shore between Mariupol and Novoazovsk, continuing north to the west of Donetsk and Gorlovka, before curving eastward, north of Lugansk, and then southeast to the Russian border; the largest notable difference is that Debaltsevo, held by Ukraine under the Minsk I plan, is currently under the control of the Donetsk People's Republic.)

93 In May 2014, the separatist groups attempted a confederation of their respective proto-states under the name "Novorossiia." See *Donetsk, Lugansk People's Republics Unite in Novorossiia*, THE VOICE OF RUSSIA (May 24, 2014, 7:58 PM), archived at https://web.archive.org/web/20140607011548/http://voiceofrussia.com/news/2014_05_24/Donetsk-Lugansk-Peoples-Republics-unite-in-Novorossiia-1012/ (reporting that "the two republics have signed their merger in one state, Novorossiia."). This might raise a question as to whether the borders of the states as separate entities are sufficiently fixed to pass *Montevideo* standards. However, the Novorossiia project collapsed just shy of a year later. See Andrei Kolesnikov, *Why the Kremlin is Shutting Down the Novorossiia Project*, Carnegie Endowment for International Peace (May 29, 2015), <https://carnegieendowment.org/2015/05/29/why-kremlin-is-shutting-down-novorossiia-project/i96u> (reporting that "On May 20, the leaders of the Lugansk and Donetsk People's Republics (LNR and DNR) announced the abandonment of the Novorossiia project, a hypothetical confederation of states in southeastern Ukraine stretching from Kharkiv to Odessa."). It is unclear whether any *de jure* structures were established under the imprimatur of the Novorossiian state, and apparent that there was no *de facto* unified governance of the DPR and LPR territories; Alexander Borodai, former prime minister of the DPR, referred to Novorossiia as "a false start ... an idea, a dream." *Ex-Prime Minister of Unrecognized Donetsk Republic: There's No 'Novorossiia', but a False Start*, BELSAT (January 2, 2015), <https://belsat.eu/en/news/ex-prime-minister-unrecognised-donetsk-republic-theres-no-novorossiia-its-false-start/>. Thus the theorized Novorossiia, though announced as an intentional project, never disrupted the *de jure* or *de facto* control of the DPR or LPR over their respective territories.

94 Compare BBC, *supra* note 89, and Live Universal Awareness Map, *supra* note 84, see also included maps, *supra* note 89. (showing that the DPR and LPR have unchanged borders with Russia, and that their borders with Ukraine and with one another have shifted very little since their secessions.)

95 *Montevideo Convention*, *supra* note 45, art. 1.

population,” and second, whether that structure is “effective, which means that it must be able to project authority throughout the population.”⁹⁶

This principle is exemplified in the 1923 *Tinoco Arbitration* between Great Britain and Costa Rica.⁹⁷ In that case, Costa Rica objected to the legal claims of some British nationals to a concession for an oil claim within the country, granted by Costa Rica’s prior government regime.⁹⁸ In 1917, the Costa Rican secretary of war, Frederico Tinoco,⁹⁹ overthrew the government of President Alfredo Gonzalez,¹⁰⁰ and ruled until August of 1919,¹⁰¹ when Tinoco fled to exile.¹⁰² Costa Rica asserted that the Tinoco regime was “not a *de facto* or *de jure* government according to the rules of international law,” and that it was not required to honor any commitments made by that regime.¹⁰³ Chief Justice Taft, the arbitrator in the case, considered it “well settled international law” with “universal acquiescence” that a change to a state’s internal political order, even by a military coup, does not render the new regime legally incapable of exercising the nation’s rights and fulfilling its responsibilities under international law.¹⁰⁴ He found as a general principle of international law that:

Changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired.¹⁰⁵

The relevant consideration is whether the government effectively exerted its power in fact.¹⁰⁶ Taft notes that “[n]o other government of any kind asserted power in the country. The courts sat, Congress legislated, and the government was duly administered. Its power was fully

⁹⁶ Anderson, *supra* note 13, at 22.

⁹⁷ *Aguilar Armory and Royal Bank of Canada Claims (Great Britain v. Costa Rica)*, 1 U.N. Rep. Int’l Arb. Awards 369 (1923).

⁹⁸ *Id.* at 371.

⁹⁹ *Id.* at 376.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 377.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, quoting Dr. John Basset Moore, 1 Digest of Int’l Law 249.

¹⁰⁶ See *Great Britain v. Costa Rica*, 1 U.N. Rep. Int’l Arb. Awards 369, 379 (1923).

established and peaceably exercised.”¹⁰⁷ If a purported government exercises its authority with the acquiescence of the people – if it comprises a “link in the continuity of the government” of that nation – it must be considered a legitimate government under international law.¹⁰⁸

Some scholars propose that the government requirement is relaxed when internal self-determination has been violated,¹⁰⁹ such an analysis is unnecessary in this case.¹¹⁰ Both Donetsk¹¹¹ and Lugansk¹¹² exhibit *de jure* structures of government, including written constitutions¹¹³ and elected legislatures.¹¹⁴ As for *de facto* governance over their territory, the Donetsk People’s Republic issues passports¹¹⁵ and license plates,¹¹⁶ changed the local currency,¹¹⁷ and changed “the school curriculum ... from Ukrainian to Russian”.¹¹⁸ The situation in Lugansk is more difficult to ascertain from outside the region, as “[v]ery few outsiders and journalists have been allowed access since autumn 2015.”¹¹⁹ However, control over the borders

107 *Id.*

108 *Id.* at 380.

109 See Anderson, *supra* note 13 at 22-44 (discussing the exceptions to the effective government criterion in light of violations of a people’s right to self-determination), *but see* Berlin, *supra* note 52, at 46 (indicating that “this interpretation has not been universally accepted by contemporary legal scholarship” and that some international law scholars regard effective governance over territory as essential for the factual existence of a state.)

110 Although it is unnecessary in this case to analyze whether violations of self-determination obviate the need to satisfy the effective governance *Montevideo* criterion, a determination of whether Ukraine has violated the self-determination right of Donbass residents is relevant to the overall argument for the legal validity of the Donetsk and Lugansk secessions; see Part IIIB *infra*.

111 See generally PEOPLE’S COUNCIL OF THE DONETSK PEOPLE’S REPUBLIC, <https://dnrsovet.su/en/#> (providing information and citizen services for the Donetsk People’s Republic) (last visited Month-Date-Year).

112 See generally OFFICIAL SITE OF THE COUNCIL OF MINISTERS OF THE LUGANSK PEOPLE’S REPUBLIC, <https://sovminlr.ru/> (providing legislative and regulatory information about the LPR).

113 See DONETSK PEOPLE’S REPUBLIC, CONSTITUTION OF THE DONETSK PEOPLE’S REPUBLIC (May 14, 2014, amended Dec. 29, 2017), <https://dnrsovet.su/konstitutsiya>, and *Self-Proclaimed Lugansk People’s Republic Elects Head, Passes Constitution*, RT (May 19, 2014, 3:56 AM), <https://www.rt.com/news/159840-lugansk-elects-head-constitution>.

114 Donetsk, for example, has a 100-member People’s Council currently split between two political parties. PEOPLE’S COUNCIL OF THE DONETSK PEOPLE’S REPUBLIC, HISTORY OF THE DPR PEOPLE’S COUNCIL, <https://dnrsovet.su/history-of-dpr-people-s-council>.

115 ‘Donetsk People’s Republic’ Seeks Sense of Nationhood, AL JAZEERA NEWS (Feb. 17 2017), <https://www.aljazeera.com/news/2017/02/donetsk-people-republic-seeks-sense-nationhood-170217043602195.html>.

116 *Id.*

117 *Id.*

118 *Id.*

119 Christopher Miller, *What in The World Is Going On in the Russia-Backed Separatist Luhansk ‘Republic’?* RADIO FREE EUROPE / RADIO LIBERTY (Nov. 22, 2017, 4:39 PM), <https://www.rferl.org/a/ukraine-luhansk-armed-masked-men-what-is-going-on-kornet-plotnitsky/28870308.html>.

– and the apparent exercise of police authority within Lugansk – imply effective territorial control by the secessionists.¹²⁰ In the event that Ukraine were to reclaim the Donbass, it may be in a similar position as the Costa Rican government following the Tinoco regime: the international community, following international law, would not indemnify it for any external debts or liabilities incurred under the rule of the separatist regimes.¹²¹ Thus, the DPR and LPR possess sufficient governments *de jure* and *de facto* to suffice for *Montevideo* statehood analysis.

Finally, the fourth *Montevideo* criterion is the ability to enter relations with other states, or “capacity.”¹²² Some scholars hold that “this criterion is actually a combination of both the effective government criterion and a ‘fifth’ criterion of independence.”¹²³ Others reject the capacity criterion altogether, characterizing it as “a consequence, rather than a condition of statehood.”¹²⁴ International law scholars emphasize the relative importance of the “independence” factor over the “capacity” factor, given that capacity may follow from statehood rather than comprising a prerequisite for it – that is, an entity without any one or more of the necessary qualities of statehood, such as a defined territory or a people, would be unable to conduct external affairs as a consequence of that deficiency.¹²⁵

The scholarly consensus indicates that “the independence criterion possesses two aspects: formal and actual independence.”¹²⁶ Formal independence means that the state’s “powers of government are derived from domestic law” and represented by a material indicator “such as the adoption of a constitution, formation of a provisional government, declaration of independence, or establishment of a sovereign

120 *Id.*

121 See *Great Britain v. Costa Rica*, 1 U.N. Rep. Int’l Arb. Awards 369 (1923). However, the *Tinoco* case and a postulated reunited Ukraine post-pacification of the Donbass can be factually distinguished from one another. In Ukraine, only part of the entire sovereign nation is held by *de facto* authorities; in *Tinoco*, the entire country was willfully subject to the purportedly-illegitimate government. *Id.* at 379. Thus, Ukraine could plausibly advance two arguments to counter claims by creditors to the DPR and LPR: first, of course, that the DPR and LPR were illegitimate governments who could not properly accrue obligations to external entities; and second, that even if they were legitimate governments, that they were legitimate governments for *other sovereign countries*, and thus the debts would devolve to future successor states (or to nobody) rather than to Ukraine.

122 *Montevideo Convention*, *supra* note 45, art. 1.

123 Berlin, *supra* note 52, at 47.

124 Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 Colum. J. Transnat’l L. 403, 434 (1999) (quoting Ingrid Detter, *The International Legal Order* 43 (1994)).

125 Berlin, *supra* note 52, at 47-48.

126 Anderson, *supra* note 13, at 45.

legislature.”¹²⁷ Both Donetsk and Lugansk have promulgated constitutions, established governments, and convened legislatures.¹²⁸ Because of these representations, they satisfy the formal independence requirement.

The second prong of the independence requirement is actual independence, “meaning that its decisions and actions must be its own.”¹²⁹ Because this criterion is determinative of the nascent state’s ability to conduct external affairs, scholars generally treat it as a prerequisite for the capacity criterion of the *Montevideo* test.¹³⁰ This factor poses an obstacle to DPR and LPR statehood. A state occupied by a foreign power is not independent; and “a state . . . designed to conceal the sovereign control of another state, will not satisfy the test of actual independence.”¹³¹ The separatist movements in the Donbass are supported by the Russian Federation,¹³² several early leaders of the secession movement are former Russian soldiers,¹³³ and Russian troops may participate in the fighting.¹³⁴ Both regions have received frequent and large aid shipments from Russia since August 2014.¹³⁵

The extent of Russian control over the DPR and LPR is unclear. A Ukraine-based hacker collective released a cache of emails, allegedly from Putin ally Vladislav Surkov, that includes previously non-public intelligence regarding the prosecution of the conflict in the Donbass,

127 *Id.*

128 See Part IIIA, *supra*, at 12 n. 116.

129 Anderson, *supra* note 13, at 45.

130 Berlin, *supra* note 52 at 48.

131 Anderson, *supra* note 13, at 46.

132 See Luke Harding, *Ukraine Ceasefire Leave Frontline Counting Cost of War in Uneasy Calm*, THE GUARDIAN (Dec. 17, 2014), <https://www.theguardian.com/world/2014/dec/17/ukraine-ceasefire-frontline-counting-cost-war-uneasy-calm> (asserting that Russia “gave political and military support to the east’s anti-Kiev rebellion”); Catherine A. Fitzpatrick, *Novorossiya Theory Meets Novorossiya Reality in Donetsk*, THE INTERPRETER (July 8, 2014), (detailing a press conference with a Russian politician and Donbass separatists, including a dispute over the number and quality of arms provided to the Donbass militants by Russia.)

133 Igor Strelkov, for example, is a Russian former intelligence operative who led early efforts to carve out a separatist foothold in the eastern city of Slovyansk. Paul Sonne and Philip Shishkin, *Pro-Russian Commander in Eastern Ukraine Sheds Light on Origin of Militants*, WALL STREET JOURNAL (April 26, 2014), <https://www.wsj.com/articles/pro-russian-commander-in-eastern-ukraine-sheds-light-on-origin-of-militants-1398553364>.

134 For example, one ongoing controversy surrounds the origin and crew of a *Buk* surface-to-air missile launcher which shot down the civilian passenger flight MH17 in 2014. Russia maintains that “no Russian weapons were taken to Ukraine,” but a Dutch criminal investigation determined that the missile launcher was brought into separatist territory from Russia and returned the day after the attack. BBC News, *MH17 Missile ‘Came From Russia’, Dutch-Led Investigators Say* (Sep. 28, 2016), <https://www.bbc.com/news/world-europe-37495067>.

135 See TASS, *Aid Convoy from Russian Emergencies Ministry Arrives in Donbass* (May 8, 2018), <http://tass.com/politics/1003258>. TASS reports that the May delivery is the 76th Russian aid convoy to the Donbass in the 48 months since August 2014. *Id.*

including the record of a Russian paratrooper casualty in the conflict and a list of DPR political appointees sent to Surkov prior to the public announcement of those appointments.¹³⁶ The Russian government claims that the emails are fake.¹³⁷ Other evidence of Russian influence in the DPR and LPR is extensive, but circumstantial as regards direct control of governmental functions.¹³⁸ Given the principle that the *Montevideo* factors should be applied flexibly, such sparse circumstantial evidence may not undermine the argument for DPR and LPR statehood.

B. Punitive Measures as Constructive Recognition of a Right to External Self-Determination

Although the Donetsk and Lugansk Peoples' Republics plausibly meet the *Montevideo* criteria for statehood,¹³⁹ the legal legitimacy of their secessions cannot rest on that basis alone.¹⁴⁰ The territorial integrity of states is an unquestioned norm of international law¹⁴¹; in some contexts, as in the use of force for the purpose of conquest, protection of states' territorial integrity is a *jus cogens* norm, the concern of all states and

¹³⁶ Andrew E. Kramer, *Ukrainian Hackers Release Emails Tying Top Russian Official to Uprising*, N.Y. Times (Oct. 27, 2016), <https://www.nytimes.com/2016/10/28/world/europe/ukraine-russia-emails.html>.

¹³⁷ *Id.*

¹³⁸ The report "Putin. War," compiled from materials collected by Boris Nemtsov, alleges that "the DPR and LPR are under the external management of official Moscow, and key decisions about them depend on Russian bureaucrats and political consultants." BORIS NEMTSOV ET. AL., PUTIN. WAR 51 (2015). Boris Nemtsov was a politician and journalist in Russia well known for opposing Vladimir Putin's policies in general and Russian involvement in Ukraine in particular; he was murdered under mysterious circumstances in Moscow on February 27, 2015. See Howard Amos & David Millward, *Leading Putin Critic Gunned Down in Moscow*, THE TELEGRAPH (Feb. 28, 2015), <https://www.telegraph.co.uk/news/worldnews/europe/russia/11441466/Veteran-Russian-opposition-politician-shot-dead-in-Moscow.html>. The report names several figures in official leadership positions in the DPR and LPR who are Russian citizens, often with ties to Russian military or intelligence organs, and quotes one-time DPR Prime Minister (and alleged former Russian security service officer) Alexandor Borodai as saying "Surkov is [the DPR's] man in the Kremlin." PUTIN. WAR 51 -52.

¹³⁹ See *supra* Part IIIA.

¹⁴⁰ See Anderson, *supra* note 13, at 5 (noting that statehood alone is insufficient for determining the legality of unilateral non-colonial secession on the basis of alleged deprivations of the self-determination of peoples.).

¹⁴¹ See DUGARD, *supra* note 53, at 121-22 (providing a sample of the international legal instruments which explicitly recognize territorial sovereignty as a fundamental principle of international law and a necessary component of state sovereignty.).

binding upon them.¹⁴² Overcoming Ukraine's legal right to territorial integrity would require the assertion of a coequal right in opposition.¹⁴³

The right to self-determination may provide the basis for that assertion.¹⁴⁴ As noted above, the right of peoples to self-determination is a recognized general principle of international law.¹⁴⁵ The right to self-determination is typically construed as two separate rights – “internal” self-determination, or the protection of the rights of national minorities, and “external” self-determination, or secession.¹⁴⁶ Internal self-determination refers to “the protection of minority rights within a state.”¹⁴⁷ This right is so fundamental in international law that it possesses an “*erga omnes* character” – it is binding between each and every state, and its violation by one state provides valid legal basis for any other state to require remedy.¹⁴⁸ Self-determination of peoples is “one of the essential principles of contemporary international law.”¹⁴⁹ However, despite the broad implications of a “right to self-determination of peoples,” the right does not give rise to a unilateral at-will justification for secession of any group defined as a “people;”¹⁵⁰ such an interpretation would completely eradicate the territorial integrity of states, another bedrock principle of international law.¹⁵¹ Thus, the right of self-determination permits unilateral secession only in specific circumstances.¹⁵² The prevailing formulation of those circumstances was promulgated by the Supreme Court of Canada in its advisory opinion regarding the legality of the secession of Quebec; the Court held that:

[A] right to secession only arises under the principle of self-determination of people at international law where “a people” is governed as part of a colonial empire; where “a people” is subject to alien subjugation; and possibly where “a people” is

142 *Id.* at 123. Dugard notes that exceptions to the *jus cogens* character of the territorial integrity norm arise not from situations where it is less important, but in cases of consensual cession of territory by one state to another, which do not implicate the interests of other states. *Id.*

143 *Id.*

144 *See generally supra* Part IIB.

145 *Id.*

146 *Id.*

147 Meyer, *supra* note 51, at 203.

148 *See* Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, 102 (June 30) (holding that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character.”).

149 *Id.*

150 *See* Anderson, *supra* note 13, at 8-10.

151 *See* Anderson, *supra* Part III B.

152 *See* Anderson, *supra* note 13, at 10 (asserting that “any right to UNC secession must be qualified in nature”).

denied any meaningful access to its right of self-determination within the state of which it forms a part.¹⁵³

Unless any of those conditions are satisfied, “peoples are expected to achieve self-determination within the framework of their existing state.”¹⁵⁴

Donetsk and Lugansk under Ukrainian rule cannot be said to be subject to a colonial empire, despite the separatists’ objections to the legitimacy of the current Kyiv government; they were peaceably subject to Ukrainian sovereignty for over twenty years after the fall of the Soviet Union,¹⁵⁵ and were administratively part of the Ukrainian SSR prior to that time.¹⁵⁶ Nor are the Donbass oblasts subject to alien subjugation; although the Donbass identity is discrete from both pure Ukrainian and pure Russian ethnic identity, it integrates both of them, and many residents of Donbass identify as either Ukrainian or both Ukrainian and Russian.¹⁵⁷ If the Donetsk and Lugansk secessions have any legal legitimacy on the basis of self-determination, it must be due to deprivation of “meaningful access to government to pursue their political, economic, cultural, and social development.”¹⁵⁸

It would be difficult to make a case for this deprivation in early 2014, when the DPR and LPR seceded.¹⁵⁹ The inciting incident for the secessions was the flight of President Yanukovich from the country and the fall of the Donbass-based Party of Regions from power.¹⁶⁰ However, post-Euromaidan measures in Kyiv may undermine the self-determination of Donbass Russophones. For example, in 2017, the Ukrainian government passed a bill requiring that Ukrainian be the sole language of instruction (except for foreign language classes) from the fifth grade on; previously, schools could teach in minority languages such as Russian or Hungarian in minority communities.¹⁶¹ Ukraine has also banned the import

153 *Quebec*, *supra* note 46, at 222.

154 *Id.*

155 See BBC, *Ukraine Crisis: Timeline*, *supra* note 20.

156 See Friedgut, *supra* note 17.

157 See Pirie, *supra* note 30 at 1087, and *supra* Part I.

158 *Quebec*, *supra* note 46 at 222.

159 See Peter Leonard, *Kiev Government to Deploy Troops in Ukraine’s East*, Associated Press (Apr. 13, 2014), <https://news.yahoo.com/kyiv-government-deploy-troops-ukraines-east-232441379.html> (reporting on the Donbass secessions in early 2014).

160 See BBC, *Ukraine Crisis: Timeline*, *supra* note 20.

161 See Tony Wesolowsky, *Ukrainian Language Bill Facing Barrage Of Criticism From Minorities, Foreign Capitals* (Sept. 24, 2017), <https://www.rferl.org/a/ukraine-language-legislation-minority-languages-russia-hungary-romania/28753925.html> and RFE/RL,

of books from Russia, as well “restricted access to “anti-Ukrainian content” from Russia.”¹⁶² In 2018, the Ukrainian Supreme Court overturned a 2012 law which permitted national minorities in their home regions to transact official business with the government, including education and interactions with the legal system, in their native language.¹⁶³ These appear to comprise a campaign of hostility to Ukrainian Russophones; one spokesperson for a political figure from a Hungarian-minority region of Ukraine noted that “We understand that this law is primarily directed against the Russian language, because it dominates the capital, the eastern regions ... This law is aimed at protecting the Ukrainian language, but mostly against Russian.”¹⁶⁴

There is no international consensus on the degree of deprivation of internal self-determination which would justify secession.¹⁶⁵ The ICJ avoided the question in the *Kosovo* case by ruling on the legality of *declaring* independence rather than *exercising* it.¹⁶⁶ The *Quebec* case flatly states that the Quebecois do not meet the standard.¹⁶⁷

Ukrainian President Signs Controversial Language Bill Into Law (Sept. 26, 2017), <https://www.rferl.org/a/ukrainian-poroshenko-signs-controversial-language-bill-into-law/28757195.html>.

¹⁶² Danuta Kean, *Ukraine publishers speak out against ban on Russian books*, THE GUARDIAN (Feb. 14, 2017), <https://www.theguardian.com/books/2017/feb/14/ukraine-publishers-speak-out-against-ban-on-russian-books>.

¹⁶³ *Constitutional Court Declares Unconstitutional Language Law of Kivalov-Kolesnichenko*, UkrInform (Feb. 28, 2018, 3:30 PM), <https://www.ukrinform.net/rubric-politics/2412584-constitutional-court-declares-unconstitutional-language-law-of-kivalovkolesnichenko.html>.

¹⁶⁴ Wesolowsky, *supra* note 164.

¹⁶⁵ Anderson, *supra* note 13, asserts that “[Unilateral non-colonial] secession is only available in response to human rights abuses *in extremis* (ethnic cleansing, mass killings, and genocide) as opposed to *in moderato* (political, cultural, and racial discrimination).” However, he bases this assertion on an inductive set of case studies of instances of unilateral non-colonial secession in order to demonstrate existing state practice. *Id.* at 12. At present, no widely-adopted international instrument appears to set out clear criteria for evaluating the degree of deprivation to the right to internal self-determination is necessary to give rise to the right of external self-determination.

¹⁶⁶ *Accordance with International Law of the Unilateral Declaration of Independence of Kosovo*, Advisory Opinion, 2010 I.C.J. 141, at 43. (July 22). In the *Kosovo* opinion, the ICJ addressed a question posed to it by the UN General Assembly: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” *Id.* at 8. The Court itself noted that some observers expected them to address fundamentally the same question as the Supreme Court of Canada in the *Quebec* case, namely, “whether there was a right to ‘effect secession.’” *Id.* at 21. The court demurred, instead ruling only on “whether the declaration of independence was “in accordance with” international law.” *Id.* The Court held that “it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it.” *Id.* Thus, Kosovo’s *declaration* of independence was upheld as not in contravention of international law without addressing the question of whether its *practice* of secession was lawful. *Id.* at 43.

¹⁶⁷ *Quebec*, *supra* note 49 at 222.

Donbass separatists will encounter two problems in invoking self-determination: first, the deprivation simply may not be severe enough to create a right of secession.¹⁶⁸ Second, rights to secession may be determined *ex ante* (then, as noted above, they were not deprived of self-determination,)¹⁶⁹ *ex post* (in which case the developing political situation will be determinative,) or as a developing threshold (in which case the legal question will revert to the severity analysis of the first issue as each new punitive measure against the Donbass is enacted.)¹⁷⁰

CONCLUSION

The Donbass conflict poses two outstanding legal questions: first, do *Montevideo*-complete states which illegally secede accrue the rights of statehood? Second, what type and extent of deprivations of internal self-determination justify secession of a “people?”

The Donbass conflict may not provide answers. Because customary international law requires both agreement to a rule by states (or “*opinio juris*”) and practice of the rule due to its legally-binding nature (or “state practice,”) they cannot be created or imposed without the consent of states;¹⁷¹ as a result, “the mere textual articulation of a qualified right to UNC [“unilateral non-colonial”] secession in declaratory General Assembly resolutions, without other concomitant state practice, such as grants of recognition in response to UNC secessionist disputes, will not constitute a binding rule of customary international law.”¹⁷² However, in

168 See Anderson, *supra* note 13, at 12 (arguing that “state practice indicates that the right to UNC secession is only available in response to human rights abuses *in extremis* (ethnic cleansing, mass killings, and genocide) as opposed to *in moderato* (political, cultural, and racial discrimination)”).

169 See Anderson, *supra* Part IIIB.

170 The Canadian Supreme Court alludes to this open question in the *Quebec* case, *supra* note 49, at 296. Although the Court had already rejected a unilateral right to the secession of Quebec, it noted that “the possibility of an unconstitutional declaration of secession leading to a *de facto* secession is not ruled out.” *Id.* Interestingly, the Court treats this as a separate legal question, and invokes both *realpolitik* and an echo of the Constitutive Theory of Statehood in declaring that “The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.” *Id.* Nonetheless, even if that postulated secession were successful, “such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.” *Id.*

171 See Anderson, *supra* note 13, at 10 (asserting that a UN General Assembly resolution is insufficient to demonstrate the requisite *opinio juris* for the recognition of a norm of customary international law).

172 *Id.*

the event that the conflicts are not quietly settled in the political arena, adjudication of the DPR and LPR secessions may provide a basis for formalization of those rules on an international scale.¹⁷³

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173 See Anderson, *Supra* note 13, at 49 (indicating that Crimea may have provided a valuable case study for unilateral non-colonial secession, but concluding that the overt intervention of Russian military forces in the period between the secession of Crimea from Ukraine and its annexation by Russia “suggests that Crimea was not a case of UNC secession followed by integration with Russia, but rather a case of belligerent occupation and annexation.”) Because the scope of direct Russian military involvement is much more unclear in the Donbass, the legal questions may be more important in determining the status of those territories. See Anderson, *supra* Part IIIA (discussing the degree of “actual independence” of the DPR and LPR, and the alleged extent of Russian involvement and control in the secessions).

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