Humanity Bounded and Unbounded: The Problem of State Borders and the Normative Regulation of Self-Determination and Secession in International Law

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Very preliminary first draft, references incomplete; please do not cite.

1. This paper draws on the authors' prior work on the ICJ advisory case concerning the secession of Kosovo. The first part also draws extensively on Robert Howse's prior writing concerning Quebec secession in Canadian constitutional law and international law, especially Robert Howse & Alissa Malkin, *Canadians Are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession*, 76 CDN. BAR REV. 186 (1997). ; the later parts on Chapter 8 "Of Persons and Peoples" in Ruti Teitel's forthcoming book, *Humanity's Law*, OUP, 2011 and to some extent on Chapter 6 as well .

Introduction

The problem of state boundaries is central to understanding the normative constructions that international law applies when addressing self-determination and secession. This essay is intended to elucidate these normative constructions and the tensions and fault lines within them. We proceed through a critical engagement with the most important or relevant legal materials, the legal phenomena themselves, including the UN instruments that address the right to self-determination, the European Union Guidelines on Recognition in the wake of the break-up of Yugsolavia and their interpretation by the Badinter Commission, and the ruling of the Canadian Supreme Court on Quebec secession. Our method is thus interpretative and phenomenological. While it will become clear that we have normative commitments to human rights and a skeptical view of ethno-nationalism and the political theories that support or defend it, we do not attempt to assess international law against a particular political theory or comprehensive philosophical position concerning self-determination and secession.[2] Rather we think that it might be possible to make a modest contribution to sharpening or enrich philosophical debate concerning self-determination and secession, through articulating the normative constructs and tensions that have emerged as international lawyers have wrestled with the challenge of bringing the global rule of law to claims of self-determination and secession, often in response to the real world challenge of inter-group conflict, including violence.

At the same time, our engagement with the legal materials does not purport to provide anything like an exhaustive treatment of "doctrine" as a traditional international law positivist would understand such an exercise. The normative constructions we discuss derive in important ways from some of the foundational commitments and structures of international law in its most uncontroversial sense: the UN Charter system. At the same time, we have engaged with the normative material without concern for its pedigree in terms of the sources of law enunciated in the ICJ Statute for example; rather we have been more concerned for how and whether it might guide the conduct of relevant actors, what opportunities and constraints and biases it brings to deliberation and debate concerning self-determination and secession.

Further, there is a set of developments or tendencies in international law, often not specifically identified as in relation to self-determination and secession, that may reshape in various ways the

[2] An overview of such positions can be found in Allan Buchanan, "Secession," Stanford Encyclopedia of Philosophy,2007, at http://plato.stanford.edu/entries/secession/

kind of normative guidance that international law can provide in this area. We wish to focus the attention of international lawyers, as well as philosophers and international lawyers on the question how such developments might be integrated into an international law doctrine concerning self-determination and secession. The developments or tendencies we have in mind , are characterized by one of us, Teitel, as "Humanity Law". Through multiple interconnected reinterpretations of international law's basic doctrines as human rights, humanitarian law, and the law on the use of force evolve through mutual influence and interdependence, and new institutions are created to address conflict in the post-cold war era, Humanity Law is changing, in important respects, the relative weight of territorial integrity and other normative concerns (e.g. human security). It is creating a continuum of normative regulation of violence that encompasses both internal and international conflicts and recognizes the unstable boundary between internal and international conflict in the case of struggle between ethnonational movements. International responsibility is correspondingly extended beyond state responsibility; so international legal norms regulate non-state actors such as independence fighters and propagandists who incite ethnic violence or persecution. Further, through its connection to various existing offences, ethnic cleansing becomes capable of sanction under international criminal law; thus, limiting one technique for asserting the ethnonationalist model of self-determination through alignment of territorial boundaries with a community of identity.

The Problem of State Boundaries

Writing in the early 1960s, the Jewish-German philosopher Leo Strauss made the provocative suggestion that the post-war, UN-Charter based system of international law was based on a "pious fraud." By requiring respect for existing state boundaries but *also* endorsing the self-determination of peoples, Strauss intimated, the system had to commit itself to "the assumption that all present boundaries are just, i.e. in accordance with the self-determination of peoples but this assumption is a pious fraud of which the fraudulence is more evident than the piety."[3]

Strauss here reveals only part of the "fraud"; for, in addition, the post-war, UN-Charter based system did not fundamentally alter the doctrine of recognition of new states (or more precisely resolve the ambiguities in that doctrine) so that on the one hand one was called to respect existing territorial boundaries but on the other if a self-determination movement was effectively able to change the "facts on the ground" concerning the control of territory, it had a significant chance of gaining recognition of the "breakaway state." Thus while normatively consecrating existing state boundaries, international law also permitted existing states to recognize new states, based on de facto considerations such as the presence of government and territorial control. Thus, international law, although claiming stability of existing borders as a fundamental ordering principle, rewarded the unilateral disruption of those very boundaries by

3. The City and Man, p. 6.

separatist movements, where successful on the ground. Once recognized as a state, the independence movement in control of a given territory would itself be entitled to the protection of the prohibition on the use force against its "territory", as well as the right of self-defense, i.e. the right to use force against any attempt to resist its secession by the state from which it was breaking away. But, at the same time, and in obvious tension with the acceptance of recognition as *Machtpolitik*, the evolution of international human rights has given rise to the expectation that the right to self-determination would express and conform to the conception of human freedom, equality and security at the normative core of human rights.

The history of post-war international legal practice bears witness to numerous attempts to rescue the global juridical order from the "pious fraud" (partly) identified by Strauss, reconciling self-determination as a normative ideal with territorial sovereignty, the prerogative of state recognition, and more recently, human rights.

Decolonization

The UN instruments on decolonization represent the first major effort to reconcile the ideal of self-determination and the principle of stable territorial integrity. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, without defining the meaning of a "people," states that "all peoples have the right to self-determination; by virtue of that right, they freely determine their political status and pursue their economic, social and cultural development."(paragraph 1). The Declaration further states: "All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected." (paragraph 4) But at the same time: "Any attempted 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 United Nations…"(paragraph 6).

The solution to the reconciliation of the principles enunciated in paragraphs 1 and 4 with that enunciated in paragraph 6 is of, course, notorious: *uti posseditis*. The assertion of the right to self-determination and "complete independence" in paragraphs 1 and 4 was conditioned on the newly independent states having the same boundaries as the administrative boundaries that existed under colonialism. In this way, independence could be reconciled with stable territorial sovereignty. But of course these boundaries did not correspond, not even roughly, to the territorial patterns of organized political, social, economic and cultural life prior to colonization: thus how could the imposition of *uti possedetis*, the denial of the freedom to choose a different pattern, really be compatible with the free determination of political status and economic social and cultural development? *Uti possedetis* is most often justified as necessary to prevent the outbreak of violent conflict over territory in the process of decolonization. But as we have seen, most dramatically in Africa, the result has often been the opposite. More cynically, *uti possedetis* had the advantage to the former colonial powers of extending colonial domination beyond formal decolonization through preserving a territorial configuration whose only basis for

internal unity was often its economic, political and administrative relationship to the colonial power. Boundaries in important ways determine the challenges of governance the kind infrastructure necessary for a national political economy (transportation, utilities, education, etc.) the kind of differences (linguistic, cultural, religious) have to be managed in order to have a sustainable and just polity. Giving peoples independence from colonial rule while saddling them with whatever boundaries were created through the original (putatively unjust) colonial practices, regardless of the impact on the challenges of governance, was arguably a perpetuation rather than a solution to the "pious fraud" referred to by Leo Strauss. The defenders or apologists of *uti possedetis* would point out that no one seemed to have a viable plan for restoring the territorial patterns of political, economic, social and cultural life prior to colonization; nor would that have been, either, necessarily just given that the effects of colonization might well have rendered such patterns no longer viable in the modern world in many cases. And even if disrupting those patterns through violent colonial conquest could be understood as *un*just, this would not make the original patterns just; these patterns might in themselves be intertwined with injustices, or what we would now judge to be injustices, other than and prior to those of colonialism; therefore their simple restoration (even if viable under contemporary conditions) would not, *even in the abstract*, be a simply just remedy.

Self-Determination as Democratic Equality; The Declaration on Friendly Relations

One could produce a certain normative clarity or at least honesty, transcending "pious fraud" , through explicitly accepting 1) that any particular division of the world into territorial units defined as states will have strong elements of arbitrariness, will likely be shaped by past injustices, and there is no obvious normative principle that would inform judgment on and revision of borders, allowing a decisioni between the competing claims and historical narratives of different groups 2) that the division of the world into territorial states and the protection of territorial integrity of those states is a necessary if not foundational building block of a international legal order; 3) that to the extent possible *within* the confines of such an international order one should encourage and support the mitigation or remedy of any injustices that might result from or be exacerbated by such an arbitrary division of the world (whether inequality of resources, or vulnerability or persecution of minorities, to give but two examples).

How then to make sense of the normative intuition behind the idea of the self-determination of peoples? The answer apparently given in the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations is that self-determination really means democratic equality. A "people" is just the collection of individuals that one finds within the territory of *any given existing state*: the entitlement to self-determination of this "people". Thus according to the 1970 Declaration, the right to self-determination is apparently fulfilled where a state "is possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color." It is true that the opening paragraph of the

Declaration seems to suggest a rather different normative thrust to the right to self-determination in stating that "the *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 …"(emphasis added) *But* this is "not to be construed as encouraging or authorizing any action which would dismember or impair totally or in part the territorial integrity or political unity" of an existing state.

What the Declaration *does* leave open is the possible legality or legitimacy of modes of realizing self-determination that do entail disrupting existing territorial state boundaries in the case where that existing state *denies* democratic equality, i.e. a "government representing the whole people belonging to the territory without distinction as to race, creed, and color." "External" self-determination thus becomes a legal *remedy*: the consequences, as suggested in the Declaration are that the state denying democratic equality cannot forcibly resist the self-determination attempt even if it entails dismemberment of that state, and also that, legally, other states can come to the aid of the self-determination movement.

The acceptance of external self-determination as a remedy for the denial of democratic equality would seem to indicate a major qualification on the principle of territorial integrity of existing states, and indeed one based on an ideal of *internal* political justice. It is hard to imagine such a counter-Westphalian development except in light of the emergence of human rights as a shaping and indeed transformative force in international law. Yet in international legal practice it was already foreshadowed by the hint in the Report of the League of Nations Commission on the Aland Islands question that "oppression" might be one of the rare or only justification(s) for secession and in political theory by, for example, purely political Zionism, which had as its basis the notion that independent statehood is a solution-in a world of sovereign states perhaps the only solution--to the problem of persistent discrimination or persecution, to the denial of democratic equality, either formally or as a matter of social fact, or both.

But original political Zionism was philosophically consistent in recognizing discrimination or persecution might generate a valid claim to statehood by a persecuted group but not necessarily a claim, and certainly not one that trumped that of any counter-claims of other inhabitants, to any given territory. Thus, original political Zionism generated any number of proposals for possible territories on which a Jewish homeland might be established, including for example what is today Uganda. Herzl, the founder of political Zionism, wrote: "we are a nation: the enemy makes us a nation whether we like it or not." Statehood here is not the fulfillment of a positive destiny but the prevention of a negative one.

By accepting the principle that the denial of democratic equality by a government of all the people in a given territory gives a persecuted or discriminated *group* within that territory a legal remedy of external self determination, the 1970 UN Declaration indirectly or subtly introduces an additional or second meaning to "people"-a "nation" in Herzl's sense, as defined by the persecution or discrimination in question. Fatefully, the Declaration, while opening up the possibility of external self-determination, provides no principle for determining over what

territory such a right might be exercised. Does the remedy simply trump any rights or claims of other inhabitants of such a territory? Once the remedy for the denial of democratic remedy is no longer a remedy exercised by the entire people on the territory of the state in question, i.e. the replacement of the government of that people as a whole with a government that respects democratic equality, an ancestral homeland, for example, or part of the territory of the existing state where they constitute a majority. One aspect of the difficulty is that the remedy of external self-determination is only available to groups who are organized in such a way as to be able to stake a claim to some territory or other. Where the people who are denied democratic equality don't have some sort of claim to an identifiable, bounded territory, they must content themselves with other remedies, either changing the practices of the government of the existing state, or exit (immigration to another state where they are not denied democratic equality).[4]

By offering the possibility of external self-determination as a remedy for discrimination or persecution but leaving undetermined the principles that would establish within what territorial boundaries it might be exercised, the 1970 UN Declaration at least indirectly encourages the staking of territorial claims based on extrinsic normative principles, including ethnic or even racist ideologies or historical narratives, which connect people to territory based on "blood and belonging." Of course, as we know there are often counter-ideologies or counter-narratives of other groups, in contestations over the same or overlapping territory. Yet, there are no adequate principles intrinsic to the right of self-determination itself by which such competing claims to territory could be decided or mediated.

The possibility of international law being co-opted by ethno-nationalism[5] is further increased by indeterminacy in the content of the idea of democratic equality or more precisely "a government representing the whole people belonging to a territory without distinction as to race, creed or color." Philosophers such as Will Kymlicka have suggested that group identity or cultural context are themselves vital goods, on which meaningful individual freedom or autonomy depends, and that this may be the basis for some entitlement to the exercise by a group of self-government or a measure of political autonomy over a given territory. In this regard, Kymlicka quotes approvingly a proposal for a European minority rights convention that

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[4] Will Kymlicka's *Multicultural Citizenship* is an attempt, in part, to suggest that one can give a principled basis for according rights of self-government to some groups who have a plausible territorial basis for its exercise while giving others, mere "ethnic groups", much lesser entitlements to self-determination. His various contorted justifications include the characterization of "ethnic groups" as voluntary immigrants or as people who have their own territorial homeland elsewhere. But of course much of the movement of people that has produced territorially dispersed minorities could hardly be described as truly voluntary. And the argument that they have a homeland elsewhere is of course one of the justifications for various means of ethnic cleansing of minorities; it presumes the viability and legitimacy of organizing identity around ethnic "nations" or peoples into which the world is territorially divided.For a powerful philosophical critique of Kymlicka's general position, see Jeremy Waldron, "Two Conceptions of Self-Determination" in The Philosophy of International Law (2009).

5We use ethno-nationalism in a broad sense here to denote in Miller's sense the idea of a "people" as having a "distinct, common character of its own," a shared identity makes it a "nation", and the notion that "every nation must have a homeland", taken together. The "distinct common character" could be based on religious, ethnic, linguistic, racial or historical notions as long as they play an exclusionist, particularist identity-forming function. See David Miller, *On Nationality* (1995), p. 25.

would provide that "persons belong to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching this specific historical and territorial situation…."[6] At first glance, this would seem to go beyond the entitlement to a government that represents the entire people without distinction as to race, creed, or color." But does a government "represent the *entire* people" if it provides for instance public funding for education only in the majority language, or provides publicly-funded schools where the majority religion is taught but not minority religions-or where, because of majoritarianism or through application of the formal equality principle of "one person, one vote" only members of the majority ethnic group are elected to public office, i.e. because of the individual or private preferences of those belonging to the majority group to be governed by "their own" not do to governmental discrimination as such? If majoritarianism itself tends to preclude representing the entire people in the normatively meaningful sense, then democratic equality itself could be interpreted as implying a right of minorities to some kind of political autonomy or "special status" within a certain territory, the denial of which could then, in turn, be considered to provide a basis for external self-determination. The problem here is not solved but rather arguably only exacerbated by the broad terms in which minority rights are defined in Article 27 of the UN Covenant on Civil and Political Rights.

Badinter and the Balkans: *uti possedetis* revisited in an era of human rights

The break-up of Yugoslavia gave rise to new efforts to recast the structure of international legal normativity as it applies to self-determination and secession. By setting up a framework for recognition of statehood that contained a significant number of human rights conditionalities, the European Union appeared to be boldly challenging the gap between the aspiration of international law to regulate normatively self-determination and secession and the reality of the consecration of *rapports de force* through the doctrine of recognition. The European Union's guidelines were based on the premise-radical and progressive-that this gap must be closed. In the Guidelines, the EU affirmed its "attachment to the principle of self-determination." This principle governed the recognition of new states provided these states respected "the rule of law, democracy and human rights" and provided "guarantees for the rights of ethnic and national groups and minorities." But, in addition, the EU also required as a condition for recognition "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement. Further, "The Community and its member States will not recognize entities which are the result of aggression."

In effect, the EC was opening itself up to something like a right to secession in international law. It was saying that that the recognition of statehood resulting from unilateral secession was consistent with or perhaps even implicit in the normativity of self-determination in international law. The secessionist movement might even have been driven by ethnic

6 "Minority Rights in Political Philosophy and International Law", The Philosophy of International Law, p. 383.

nationalism, it might have engaged in violent struggle against other groups, but it would still have the possibility of recognition provided that the resulting *state* committed itself to democracy, human rights and some version of multiculturalism (a further instrument, the Declaration on Yugoslavia, envisaged as a condition for recognition adhesion to a new legal instrument on minority rights, which never in the event came into existence). One of course must be careful to underline that the EC Guidelines did not suggest that under the international law of self-determination there was a requirement that existing states confer recognition: recognition remained within the discretion of existing states. But such discretion could be exercised legitimately and in conformity with international law principles, where the independence movement representing the future state made the required human rights commitments.

How could this be reconciled with "respect for inviolability of all frontiers"? After all, almost by definition secession destroys the inviolability of the frontiers of the state as it existed prior to secession occurring in respect to part of its territory. Were the guidelines then little more than a continuation of the "pious fraud" noted by Strauss, namely that one could honor the normative force of self-determination while maintaining the integrity of existing boundaries as a bedrock principle of international order? Here the reference to "aggression" provides a clue. It suggests that once the seceding state has been recognized any effort by the state from which it has seceded to use force will now be criminal under international law. And implicitly, the secessionist movement now being a state, *its* further use of violence is legitimate self-defense. What the guidelines seem to suggest, is that through recognition it is legitimate to consecrate the challenge to inviolability of frontiers constituted by secession itself, as long as no *further* change to boundaries is permitted. This would seem to reward the secessionist movement for taking a much territory as possible and holding it; the movement would, further, be able to shut the door on further or consequent claims by a minority within that territory either to secession or to re-joining the state from which the movement seceded; since from now on, the moment of independence, state boundaries would be frozen as inviolable.

The consequence of the Guidelines could then be described as follows: "victors keepers." The groups in conflict have every incentive to engage in the most brutal and intense struggle over territory prior to recognition, since once recognition occurs the door is shut to any further territorial adjustment or any other territorial claims. The way one secessionist movement territorializes self-determination for its group, forever limits the possibilities of other groups to achieve self-determination through statehood. The consolation prize of minority rights is what is left to these other groups.

Charged with applying the Guidelines and the Declaration on Yugoslavia to demands for recognition of the secession movements in the various Yugoslav republics, the Badinter Commission did its best to blunt, sidestep or hide some of the consequences just discussed. First of all, the Commission interpreted the course of events in Yugoslavia in such a way that it could present the trigger for recognition as something *other* than unilateral secession. Thus, the Commission interpreted the various events *engendered* by the secessionist movements, such as plebiscites in favor of independence in the republics, the breakdown in the functioning of the

institutions of federal of governance in Yugoslavia, and the state of war itself, as the "process of dissolution" of Yugoslavia as a federal state. Thus, in applying the criteria for recognition in the Guidelines and the Declaration, the Badinter Commission could make it appear as though it was simply responding to the challenge of an orderly state *su*ccession, in the circumstances of the failure or collapse of Yugoslavia. It could avoid the implication of legitimizing secession and consecrating its territorial consequences. While claiming to make a purely factual determination of the failure or dissolution of the Yugoslav federal state, the Badinter Commission shuttled between facts and norms in order to hide its true game Thus, while claiming to make a purely factual determination about the "process of dissolution" the Commission introduced indirectly normative considerations that would affect a judgment on the legitimacy of secession: i.e.criteria that would be relevant to judging the the legitimacy of secession -evidence of popular support for independence and whether federal institutions still allowed for adequate representativeness and participation.

The Commission was faced with the difficulty the guidelines posed with respect to the demand for territorial stability. Did recognition imply accepting whatever territory the independence movement controlled at the moment at which recognition was determined? Avoiding the implications of such a consecration of rapports de force, the Commissioned pulled out of a hat *uti possedetis*. In a novel doctrinal move (*uti possedetis* had only clearly been recognized as valid law with respect to former colonial boundaries in the context of decolonization), the Commission stated that *uti possedetis* would apply in such a way that recognition would be based on each of the independence movements being entitled to the territory of the federal sub-unit in which that movement was based. No more, no less, regardless of any normative or practical considerations. The internal federal boundaries of Yugoslavia would be the boundaries of the newly recognized states. (Opinions 2 and 3) Serbs and Croats in Bosnia-Herzegovina (and Croats in Serbia) would be entitled to minority rights but nothing more. To legitimize the choice of *uti possedetis* here the Commission pointed not only to the need for territorial stability and the avoidance of violent struggle over borders, but in a subtle and almost under the surface way to the confederal (and ethno-nationalist) notion that Yugoslavia was composed by republican "entities"; a federal state is "made up of a number of separate entities" (Opinion No. 8). \

The idea here is that the natural or original political community is a entity based upon a single people or an ethnic or national majority; the federation is a composite or derivative political community. Thus, it is no surprise that where these "entities" no longer wish to operate together a federal state, the federation would dissolve into separate states created out of these entities. But of course this is hardly the only theory of a federal polity. We point out only that an important judgment of normative political theory is embedded in what the Commission presents as a statement of obvious facts.[7] If the republics were seen as mere administrative

[7] For a critique of the pact theory, see R. Howse and K. Knop, "Federalism, Secession, and the Limits of Ethnic Accomodation", 1 New Eur. L. Rev. 269 1992-1993

districts in an authoritarian state held together by a single political party and its various sociological emanations, then one would have to question the legitimacy of basing statehood on those boundaries; indeed one might be inclined to the conclusion that the secessionist movements in the republics that were engineered by the various political elites were depriving the *Yugoslav* people of self-determination-the ability to decide together a post-communist-and perhaps even post-ethnonationalist future. There were at least three respects in which the Badinter Opinions, and the Guidelines and Declaration they were interpreting, could be said to encouraged "ethnic cleansing". First of all, the requirement of *uti possedetis* having eliminated the possibility of adjusting borders to the ethnonational ideologies of the various political groups, the obvious alternative was to "adjust" the population within the borders of each of the entities to the demands of these ideologies.

Second, in requiring very extensive protection of minority rights, and respect for non-discrimination, the criteria applied by the Badinter Commision would make it difficult for the dominant political group within each entity to operate the state as an expression of ethnonationalist ideology, as long as significant minority populations remained within their territory.

Third, the Commission opined that the members of minority groups in the newly recognized states had a right to choose their "nationality." The Commission drew out the implications of this only obscurely, one of them being that it might, for example be possible for Bosnian Serbs to choose to be nationals of Serbia (assuming Serbia agreed). They had a national homeland in Serbia to which they could choose to belong. Why then should not the majority in Bosnia "encourage" them to make this choice?

However, as we shall describe in the final part of this paper, the response to events in the Balkans included a concerted effort to create criminal responsibility for "ethnic cleansing" at least when undertaken by forced deportation or intimidation through acts of violence or the threat of violence. This was a necessary antidote to the incentive structure favoring ethnic cleansing put in place by the Badinter Commision, along with the legal instruments it was interpreting. Once ethnic cleansing was not acceptable, one was stuck with strong minority rights and the task of enforcing respect for them; in practice, this was not possible without creating within Bosnia structures for several different self-governing ethnic communities; and as we shall see, again in the final part of this paper, the kind of collective political rights granted to particular groups in this structure would eventually run afoul of a more universalist concept of non-discrimination with respect to political participation. Thus would history soon reveal the normative fault lines and tensions that the Badinter Commission sought to conceal in its rather obscure and elliptical opinions. The difficulties in question came from the Badinter Commission's acceptance *both* of the ethno-national construction of self-determination (and of federalism itself) *and* its insistence on *uti possedetis*.

Finally, in determining on the one hand that minorities within the territory of each of the former republics- the newly recognized states-would be entitled to a wide range of minority rights, and on the other that no changes in boundaries could be contemplated, the Badinter

Commission was silent on the remedies available if the newly recognized states refused to respect the human and minority rights of the minorities: in that one case, would secession be still available as a remedy, or would the principle of inviolability of post-independence frontiers preclude even remedial secession?

The Case of Quebec

In a reference opinion, the Supreme Court of Canada considered whether, under the Canadian constitution and under international law, the province of Quebec had a right of unilateral secession from Canada.[8] The Court's articulation of its understanding of democracy and peoplehood within a federal state encompassing different linguistic and ethnic groups is relevant to the meaning of self-determination and secession in international law, even though it occurs in the part of the ruling dealing with Canadian constitutional law.

The Court summarized its approach under the Constitution as follows:

The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework. (p. 5)

The Court further opined:

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legaleffect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted: the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they

[8] ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217

no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.

The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

It will be noticed here that the Supreme Court of Canada gives some normative significance (as does the Badinter Commission albeit under the guise, as we argued, of making a purely factual determination) to an expression of popular will among the population of the federal subunit where the independence movement is making a bid for secession. But the Canadian court also suggests that there is an important issue about the democratic character of any such expression by plebiscite or referendum: thus it requires "a clear majority" and a "clear question." Also, as the Canadian court indicates, democracy is much more than a mere crude expression of popular will. The conditions under which any such expression of will takes place would be of significance therefore in considering, including respect for freedom of speech and association, political pluralism, and the meaningful participation of minorities in the voting process.

The Badinter Commission merely assumed that the various plebiscites and resolutions in the republics were valid democratic acts ; Radan makes a powerful argument as to why that was not, in many instances, the case.[9]

Second, contrary to the Badinter Commission, the Canadian Court chooses to view the expression of popular will in favor of independence not as a stage in the dissolution of the federal state but rather as triggering a negotiation with the people of the country as a whole as represented by the federal level of government. The Court does not view Canada as a union of peoples or provincial "entities": thus it speaks of a Canadian as well as a Quebec "political majority." One can of course explain the differences in terms of the different factual

[9] Peter Radan, *The Break Up of Yugoslavia and International Law* (2002), ch. 7.

circumstances. Given that the Yugoslav federal state was controlled by an authoritarian one-party government, could one speak of a political majority of the Yugoslav people as a whole, other than in connection with the hope of a democratic post-Communist transition for Yugoslavia as a whole. Also, The Canadian court did not address a situation where most of the Canadian provinces had expressed a majoritarian will for succession, but only one province.

This being said, bad facts make bad law, and unfortunately the Badinter Commission presented its view of the significance of events connected with unilateral secession movements in terms of the nature of a federal state as such, not the peculiar facts related to Yugoslavia. Further, in its constitutional analysis, the Canadian Supreme Court did not exclude "boundary issues" from the many and complex questions that would need to be resolved by negotiations within the framework of the rule of law. Thus, it by no means endorsed the validity of the existing provincial boundaries as a basis for secession or dismemberment of the country in accordance with the principles of democracy, constitutionalism and the rule of law, federalism ad protection of minorities. Finally, the Court viewed the conformity of the negotiations over secession with the constitutional principles as non-justiciable; here one needed to rely on the political actors to protect constitutional values. But, the Court observed, "the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process." The court thus assumed that 1) that, *at the international level*, recognition could depend on the legitimacy of the process of secession; that this legitimacy would in part be evaluated as against the standards of the Canadian constitutional order itself. By contrast the Badinter Commission's conception of recognition as flowing from "dissolution" of a federal state, suggests that secessionist movements have every incentive to break down the rule the law, using methods that render the institutions of the federation and indeed the federal level of governance itself as non-functional, so as to be able to provoke a verdict of "dissolution" that allows recognition of the seceding state within the boundaries established by the constitution of the federal union.

This brings us to the international legal analysis proper of the Canadian Supreme Court. The Court opined:

International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. (p. 112)

Despite the Court's remarks about the implications of legality and legitimacy for recognition at the end of its discussion of the Canadian constitution, when discussing international law the Court contemplates the possibility that a valid act of recognition under international law need not

be based on the legality and legitimacy of secession: international law permits the recognition of statehood even where the process of secession itself is not legal under international law. The Court notes a trend towards linking recognition to legitimacy, referring to the EU Guidelines, and refers a back to its earlier remarks, but in the last analysis, its view of the law is that there is no requirement to deny recognition to a state that is the product of an illegal secession process. (p. 143) But the corollary of this-which the Court was equally if not more concerned with-is that the fact of recognition by any given state or group of states cannot be used to establish a *right* to statehood in international law.

One of the most interesting elements in the Canadian Court's opinion on international law is its discussion of peoplehood. The court, ostensibly from judicial economy, refuses to decide whether the Francophone majority of Quebec constitutes a "people"; this is because, as will be discuss presently, the Court finds that even if it were a "people" in would not have a right to secession since the only such right, other than in the case of decolonization, is a remedial right in the case of oppression.

The Court remarks: "much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people", *as do other groups within Quebec* and/or Canada,…"(p. 152) (emphasis). This statement must be understood together with the Court's failure to exclude "border issues" from the matters that would need to be negotiated as part of a lawful secession under the Canadian constitution. The claim of the francophone majority or its political representatives to secession based on the existing boundaries of the province of Quebec would have to be weighed against the claims of other groups within Quebec who also, and equally, qualify as "peoples" for purposes of self-determination.

Even while suggesting that it was not deciding the legal meaning of "people" for purposes of the right to self-determination in international law, the Court was implicitly rejecting a meaning to the right to self determination that would give the majority "group" on the territory of a federal sub-unit some kind of privileged claim to realize independence within those boundaries, while relegating other groups to a lesser status, for example, that of an "ethnic group" in the Kymlicka typology. A right to external self determination exists according to the Canadian Court either in circumstances of colonialism or foreign occupation or where "where a *definable group* is denied meaningful access to government to pursue their political, economic, social and cultural development." Thus, all but explicitly, the Canadian Court rejects an ethnonationalist conception of the normative force of the right to self-determination: any definable group could be a "people" of its members are denied "meaningful access to government to pursue their political, economic, social and cultural development" on account of group membership. This justifies the jurisprudential choice of the Canadian Court to begin by

asking whether there was such a denial rather than whether the francophone majority in Quebec as represented by the Quebec government was a "people."

The Canadian Court interpreted the meaning of "access to government to pursue…political, economic, social and cultural development" not in terms of the adequacy of the political arrangements to the survival or flourishing of the defined group as a collectivity, but rather the openness without discrimination of the federal polity's political, economic, and social institutions to individual members of the defined group. The Canadian court rejected the argument of the Quebec independence movement that the failure of constitutional amendments enhancing the competences or autonomy of the Quebec government to represent the collective interests of the Francophone majority in "their political, economic, social and culture development" as a "group", All of the considerations alluded to by the Court go to the extent to which participation in the life of the country of Canada as a whole, including its political life, is afforded under the existing arrangements.

The Court opined (quoting extensively from an Amicus brief):

> The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction".

As can be seen, there is no discussion at all of the extent to which the existence of a democratic government within a territorial sub-unit of Canada where the majority is francophone contributes to the realization of the right to self-determination. This is understandable once one grasps the implication of Court's obiter that other groups within Quebec might equally be "peoples" with a right to self-determination. A Quebec government that privileged the collectivity represented by Francophone Quebeckers, even if a numerical majority, at the expense of other groups within the province, might itself engage state responsibility for a violation of the right to self determination of those other peoples within the territory of Quebec. It should be noted that some years earlier the Canadian Court had held unconstitutional the exercise of competences of the Quebec government to limit the use of English in public signs in the province, in order to create a "visage linguistique" that expressed the collective identity of

the Francophone majority, finding that such a policy was a violation of freedom of expression, and not justified as a limit on rights compatible with a "free and democratic society."

Copping out or Caution on Kosovo?

The Canadian Court decision and the Badinter Commission represent the most significant efforts of jurists to define the basic legal normativity applicable to self-determination and secession (even if the Badinter Commission held to the fiction that it wasn't dealing with secession at all). As we have attempted to show, many of the (even if implicit) normative constructions of the Badinter Commission are more favorable to ethnonationalist versions of the right to self-determination and the claim to statehood, while at the same time creating (i.e.*uti possedetis*) great challenges for the assertion or realization of that claim in a manner consistent with the rights and claims of other groups The Canadian Court's approach emphasizes the importance of subjecting to valid legal norms the process by which the claim to statehood has been asserted, while the EU approach reflected in the Badinter interpretation of the Guidelines, seems largely limited to criteria concerning how the state will conduct itself once recognized.

Despite supporting the logic of linking recognition to legitimacy and lthe rule of law, both the Canadian Court and the Badinter Commission are unwilling to embrace the ultimate implication that under international law it should not be permissible for existing states to grant recognition of statehood to an independence movement acting in a manner that contravenes international legal oorms.

At the risk of repetition, we think it useful to recall how being recognized as a state reverses under international law the normative positions of the groups in conflict with respect to the legality of the use of force in the assertion of those claims: prior to statehood, and of course subject to norms of human rights, the group represented by the existing state from which the independence movement is trying to secede can use the legitimate police power of the state to protect its territorial integrity; the violence of the independence movement is criminality. But once the independence movement is given state recognition, then the use of force by the other group becomes illegal "aggression" and the violent resistance of the independence movement legitimate "self-defense" of the territorial integrity of the new state.

Thus, in terms of the normative regulation of intergroup conflict, much turns on recognition, and whether recognition is tightly linked or not to the legality of secession under international law. The view that secession is neither clearly permitted nor prohibited under international law is one that is only apparently agnostic or non-regulative, because in fact the functioning of the doctrine of recognition in tandem with the rules on the use of force and the principle of territorial integrity create a particular kind of default rule: an existing state has a legal right, including through coercive force, to suppress a secessionist movement, but if the movement is successful enough in altering the *rapports de force*, it may well attain statehood through recognition, thus as noted reversing the normative position concerning the use of force.

The Canadian Court and the Badinter Commission of course are struggling with whether a thicker, more principled and less power oriented legal normativity can be applied to self-determination and secession, *within* the conventional conceptions of territorial sovereignty and integrity in international law. Both efforts suggest the limits and pitfalls of such an enterprise. The Canadian Court is on the whole more transparent or explicit and indeed we would say self-aware about the challenges of a principled approach but more committed to it at the same time. (Thus, for example, the Court's refusal to suggest "border issues" could simply be avoided by accepting *uti possedetis*).

In its Advisory Opinion on Kosovo,[10] the International Court of Justice sought to avoid these challenges altogether, through a very narrow interpretation of the question posed to it by the United Nations General Assembly. In a Separate Declaration, one of the judges, Bruno Simma, strongly criticized his colleagues for this restraint (or abdication, in Simma's view). The Court held that since it was only being asked to determine the status under international law of the Kosovar *declaration* of independence, it need not address any of the international legal issues surrounding the eventual act of secession itself. According to Simma, what the Court was really being challenged to do was to determine not simply whether such a declaration was prohibited or not under international law but rather the relevant international legal norms that should guide the conduct of the various actors in the wake of such a declaration. Simma's approach is broadly consonant with the spirit of the Canadian Court's decision: the concern that the process flowing from an expression of the will to secede by a particular group be guided by legal normativity.[11] Instead, the Court considered that the sole measure that it was required to address was the declaratory act itself.

One could argue that there are cases where mere words may constitute or contribute to an internationally wrongful act-incitement to genocide, for instance, or a threat of the use of force. Thus, a declaration of independence that was understood as an incitement to genocide or where such conduct could be foreseen as a direct consequence of such a declaration, could be considered an internationally wrongful act. Perhaps, then, the Court moved a little too fast in suggesting (at paragraph 50) that a question about the legality of a declaration of independence need not entail any consideration whatever of the legality of its consequences. Indeed, later in its opinion the Court noted that the Security Council had condemned certain declarations of independence because "they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)."

While the Court's opinion purportedly says nothing about the question of the legality of secession in international law as such, the Court *indirectly* suggests doubt or skepticism as to the existence of a right to secession in international law. The ICJ notes: "Whether, outside the

[10] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion 22 July 2010, <http://www.icj-cij.org/docket/files/141/15993.pdf>

[11] See Howse and Teitel, "Delphic Dictum: How has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?" , German Law Journal, 11/8 (2010).

context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State, is , …, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question.

Similar differences existed regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances." (paragraph 82). By acknowledging the range and intensity of disagreement among States on a right to secede, the Court strongly intimates that the necessary consent of the world community does not exist to establish firmly any such a right as a matter of international law at this time. It is striking that the Court explicitly questions the degree of consensus with regard even to the existence of a right of remedial secession, since as discussed earlier in this paper, a plain reading of the Declaration on Friendly Relations would suggest considerable support among states for the existence of such a right; and the Canadian Court was prepared to assume, at least arguendo, its existence. But we have indicated the fundamental difficulty with the articulation of such a right: namely, that the right itself offers no principle for determining exactly over what territory, or within what boundaries it may be exercised, and its relation to the (possibly legitimate) territorial claims of other groups that may be entitled to self-determination-to which the Canadian Court, it will be recalled, explicitly alluded, in referring to the possibility that more than one group might qualify as a people with a right to self determination within the existing boundaries of the province of Quebec. In the case of Kosovo, there would be intractable difficulties of using *uti possedetis* as a device to avoid this quandary. Just as the Badinter Commission's consecration of the boundaries of the republics under the Yugoslav federal constitution was highly advantageous to the ethno-national claims of some groups it was very prejudicial to those of others. In opinion No. 10, the Badinter Commission recommended the recognition of the Federal Republic of Yugoslavia as a new state within the boundaries of Serbia and Montenegro under the Yugoslav federal constitution, based on the EU Guidelines and Declaration on Yugoslavia; in other words, recognition would be based on the future inviolability of these boundaries as the boundaries of the FRY, closing the door to statehood for Kosovo, which would necessarily entail an alteration of the boundaries of the FRY. It is indeed a difficult question as to how those European states who have already recognized Kosovo independence can reconcile this position with adhesion to the Guidelines and the Declaration.

The New Humanity Law: How the partial de-coupling of international law's normativity from territoriality and statehood affects the normative framework governing self-determination and secession

Starting from its specific normative sources and inspirations, international law as it has evolved in the UN-centered post World War II world has failed to achieve a coherent, principled regulation of self-determination and secession: it has on numerous occasions been called upon to

react to the rhetorical and political power of ethnonationalist claims, and the responses have included elements of appeasement, acceptance, resistance, co-optation and denial. The beginning point is the antinomy represented by the cabining of such claims in the name of the unshakable principle of territorial integrity and stability, on the one hand, and the doctrine of recognition on the other, which allows the consecration of successful secession movements other, regardless of the means by which they obtained territorial control and despite the relative normative force of competing claims of other groups.

We have explored the contours, tensions and limits of efforts to move beyond this antinomy and achieve a thicker more principle-driven normativity, without explicitly imagining a structural transformation of international law itself, i.e. without rethinking its foundational organizing principles. However, as Teitel has articulated in extenso, such a structural transformation is in fact occurring, not as the product of a single theory, but through multiple interconnected reinterpretations of international law's basic doctrines as human rights, humanitarian law, and the law on the use of force evolve through mutual influence and interdependence, and new institutions are created to address conflict in the post-cold war era.

The Humanity Law revolution is changing, in important respects, the relative weight of territorial integrity and other normative concerns (e.g. human security). It is creating a continuum of normative regulation of violence that encompasses both internal and international conflicts and recognizes the unstable boundary between internal and international conflict in the case of struggle between ethno-national movements. International responsibility is correspondingly extended beyond state responsibility; so international legal norms regulate non-state actors such as independence fighters and propagandists who incite ethnic violence or persecution. Further, through its connection to various existing offences, ethnic cleansing becomes capable of sanction under international criminal law; thus, limiting one technique for asserting the ethnonationalist model of self-determination through alignment of territorial boundaries with a community of identity

Further in the Humanity Law revolution, humanity is conceived in terms both of personhood and peoplehood at the same time, such that the claims of peoplehood cannot logically defeat or compromise those of personhood. *Humanity*-based claims of peoplehood, reflected above all in the law of genocide, are claims *against* persecution, against the denial or negation of a people's humanity. They are not, fundamentally, claims to the expression of collective identity through the exercise of political power. While a humanity-based claim of peoplehood could imply, at the limit a remedial right to external self-determination but such a remedial right would itself be subject to the humanity-based claims of other peoples, including claims to *human* security (not to security in the sense of the survival of a particular culture or shared identity but to live in circumstances of physical, ecological and economic security), as well as the humanity-based claims of *persons* to non-discrimination, freedom of expression, etc.

Humanity Law does not provide a "solution" to the tensions or antimonies in international law as it addresses explicitly self-determination. But it provides new normative contours for struggles for self-determination and statehood, and reshapes in important ways the

meaning and consequences of such struggles. Rather than replacing the tension-ridden, unstable international legal "doctrine" concerning self-determination and secession, Humanity Law as it were superimposes on it layers of a thicker or more principled, humanity-based normativity. An early example of such superimposition, and of the possibility of an uneasy result, are the EC Guidelines as interpreted by the Badinter Commission: human rights and minority rights criteria were superimposed on a continuing commitment to the centrality of territorial stability and integrity.

More promising was the Canadian Court's choice to understand peoplehood itself in terms of the *right* to self-determination, a human right, rather than to understand the right to self-determination based on an identity-driven or essentialist idea of a "people."

Thus consider the following holdings of the Appeals Chamber of the ICTY in the Tadic case: Article 3, as supplemented by other general principles and rules on the protection of victims of customary international law imposes criminal liability for serious violations of common internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife. (Appeal on Jurisdiction, paragraph 134)

And:

crimes against humanity can be committed for purely personal reasons, provided it is understood that the two aforementioned conditions - that the crimes must be committed in the context of widespread or systematic crimes directed against a population and that the accused must have *known* that his acts, in the words of the Trial Chamber, "fitted into such a pattern". (Appeal on the Merits, paragraph 255).

These findings of *Tadic* need to be interpreted in light of the fact that (as we have intimated earlier in this paper and as was addressed by the ICTY itself in the *Krstic* case) crimes against humanity include not only genocide but "persecution." This includes forms of ethnic cleansing common to the execution of the strategy of independence movements-the movement of people by intimidation or brute force, which is designed to make the boundaries of a prospective new state correspond as closely as possible to an ethnonational identity. But the possibility that the conduct of an independence movement and/or its members will engage state responsibility suggests a dimension to the normative regulation of self-determination and secession under international law that goes significantly beyond those situations where the conduct in question could amount to persecution under international criminal law. Tomuschat observes, that beyond the case of crimes against humanity "private persons are not bound by human rights norms such as they exist in contemporary international law."[12] The logic of the Humanity Law revolution may however be such as to evolve such responsibility in the future (consider for example the underlying logic of the Alien Tort Claims Act, as currently interpreted by the US Supreme Court). At the same time, in the case of independence movements it is also important to recall that their conduct may be attributable to the new state that results from a successful secession.

[12] C.Tomuschat, "The Responsibility of Other Entities: Private Individuals" in Crawford, et al., eds., The Law of International Responsibility (2009, p. 322.

Thus, consider Article 10.2 9 of the ILC Articles on State Responsibility: "The conduct of a movement, insurrectional or other, which succeeds in establishing a new State as part of the territoryof a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law." To this extent a secessionist movement may be said to be bound by the full range of international human rights norms to the extent that they are relevant to its conduct, just as the state from which the movement is seeking to secede is, obviously, bound, at least where the norms are customary law or ius cogens.

In *Isayeva v. Russia*, The European Court of Human Rights applied human rights norms in the Convention to the use of violence in the struggle between Russia and the Checen separatists, holding that Russia had violated Article 2 of the European Convention on the right to life. because force was not employed "with the requisite care for the lives of the civilian population." The Court explained its ruling as follows: "In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration all the surrounding circumstances. In particular, it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimized.

Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective." "Article 2 covers not only intentional killing but also the situations in which it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. … Any use of force must be no more than "absolutely necessary" This term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims."

These various developments support a shift in the focus of normative regulation of secession under international law from the question of whether the act of secession itself is a "right" as such or whether it is "legal" to the emphasis on whether the relevant actors *conduct themselves in accordance with the relevant legal norms throughout the process and the resolution* of a complex set of issues, including borders and minority rights. (A later more extended version of this paper will try to identify the relevant norms and suggest how they ought to shape the conduct of the various actors) .

In *Sejdic and Finci v. Bosnia and Herzegovina*[13] the European Court of Human Rights struggled with the consequences of postwar ethno-partition in the region, and the discriminatory ramifications of the adoption of a constitutional structure that sought to define government along ethnic lines indefinitely. According to the Constitution of Bosnia (originating in the Dayton Accord), the applicants before the ECHR, who were of Roma and Jewish origin, were ineligible to stand for election to the House of Peoples of Bosnia (the second chamber of the State parliament) and to the Presidency (the collective Head of State). Eligibility for either office required affiliation with a "constituent people" of Bosnia (Serb, Croat or Muslim).

Finding a violation of the equality provisions of the European Convention on Human Rights, the Court held: "Racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance…. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment , ..."[14] The Court found that the need for power-sharing as part of the political settlement in Bosnia was not "an objective and reasonable justification" for the discriminatory policy because power-sharing could be achieved without the "total exclusion of representatives of the other communities."[15]

Likewise, in another case, *Orsus v. Croatia* -- involving the Roma in the European Court of Human Rights, and concerning Croatian schools with Roma-only classes --- the Court struck down the segregation plan. The court explained that "the Roma have become a…. disadvantaged and vulnerable minority . . . ."[16] And, "notwithstanding that [the policy at issue] is not specifically aimed at that group," the court held that "discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations . . . . [A] general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance in the present case, are identifiable only on the basis of an ethnic criterion, may be considered discriminatory."[17]

To us the analysis in these cases raises the issue of whether there is not an *inherent* tension between international human rights and the ethnonationalist aspiration of many secessionist movements (and indeed movements that seek internal self-determination for identity-based groups) to apportion political power and organize public institutions along identity-based lines. The EU guidelines, which, as we saw, referred to minority rights and the Declaration on Yugsolavia, which contemplated adhesion to convention that would probably contain many collective rights based on group affiliation, do not seem to have been preceded by

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[13] *Case of Sejdic and Finci v. Bosnia and Herzegovina*, European Court of Human Rights Applications nos. 27996/06 and 34836/06, Judgment (22 December 2009).

[14] Ibid. at paras. 43–44.

[15] Ibid. at para. 45.

[16] *Case of Orsus and Others v. Croatia,* App. No. 15766/03 (European Court Human Rights 2008): para. 147.

[17] Ibid. at paras. 149–150.

serious deliberation about how equality is conceptualized under international human rights law and related regimes (including the European Convention on Human Rights). Secessionist movements often claim that statehood will give the identity-based group they represent more opportunity to express or protect that identity using the instruments of sovereign political power. The Quebec independence movement for example claimed that the existing constitutional arrangements did not afford Quebec within Canada with enough political autonomy to protect the French language. Yet Quebec's laws limiting public signs in languages other than French ran afoul not only of Canadian law but also the International Covenant on Civil and Political Rights, as interpreted by the UN Human Rights Committee.

Finally, although we would not claim that human security has become hard international law, it is a normative construct that is proving increasingly salient to the interpretation of the rights of persons and peoples, especially in the context of weak and failed states, where the territorial organization of power within state boundaries has not yielded viable protection of fundamental human needs and interests.[18]

Former UN Secretary-General Kofi Annan articulated the concept of human security in the following terms:

> Human security, in its broadest sense, embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfill his or her potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear, and the freedom of future generations to inherit a healthy natural environment -- these are the interrelated building blocks of human – and therefore national – security.[19]

At its most adventurous the claim to human security has been suggested to ground a right of intervention, to assist people who are faced with the incapacity of state power as current organized territorially to meet their urgent and basic needs. Again, whether or not such a right of intervention is emerging as hard law (the evidence is to say the least ambiguous) the implied

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[18] Ruti Teitel, Humanity's Law, forthcoming, ch.6.

[19] Kofi Annan. "Secretary-General Salutes International Workshop on Human Security in Mongolia." Two-Day Session in Ulaanbaatar, May 8-10, 2000. Press Release SG/SM/7382. *See also* Kofi Annan, *'We the Peoples': the Role of the United Nations in the 21st Century*, Report of the Secretary-General, U.N. Doc. A/54/2000, 27 March 2000, paras. 66-188; *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, U.N. Doc. A/59/2005, 21 March 2005, paras. 25-73 (proposing strategies for "making the right to development a reality for everyone and to freeing the entire human race from want", para. 27); Kofi Annan, "In Larger Freedom: Decision Time at the UN," FOREIGN AFFAIRS, May/June 2005 ("When the UN Charter speaks of 'larger freedom,' it includes the basic political freedoms to which all human beings are entitled. But it also goes beyond them, encompassing what President Franklin Roosevelt called 'freedom from want' and 'freedom from fear.' Both our security and our principles have long demanded that we push forward all these frontiers of freedom, conscious that progress on one depends on and reinforces progress on the others.").

relativization of the normative significance of state borders in light of arguably supervening human interests and needs may have important implications for international law in relation to self-determination and secession. The bias for avoiding the negotiation of boundaries, even at the expense of adopting historical territorial divisions unrelated to the viability of a state within such frontiers (*uti possedetis* as applied by Badinter), or the implications of the human rights of those proximate to or within the boundaries, becomes even more doubtful.

Conclusion

To be added in next draft taking account of discussion at conference