Chapter 1

Secession: A Word in Search of a Meaning

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Introduction

In what Allen Buchanan suggests is 'the age of secession',[1] the contemporary world is less threatened by conflicts between states than by the breakdown of order within states. States today are more concerned with internal, rather than external, threats to their security and territorial integrity.[2] These internal threats to states have in recent years, in particular, generated a plethora of studies by lawyers, political theorists, economists and historians dealing with secession. However, there is little consensus amongst them on a precise definition of secession. This lack of consensus often leads to problems with interpreting the relevant literature as scholars are not always talking about the same thing. From a legal perspective the definition of secession is important. For example, whether there exists, or should exist, a legal right of secession, cannot be adequately addressed in the absence of a generally acceptable definition of secession.

The word 'secession' is often viewed negatively. States are generally, and understandably, opposed to secession. Thus, in 1978, Lee C. Buchheit observed:

> It is understandable that a community of States and a legal system that purports only to regulate the rights and duties of States would react adversely to any threat to the present State-centered order. … The present reluctance to accommodate the claims of secessionist groups … seems to be motivated by a fear on the part of most independent States that such [accommodation] would constitute an unmanageable threat to intra-State harmony and consequently have an adverse effect upon the stability of the international system.[3]

In more recent times the negative approach to secession is exemplified by the comment in 1992 by Boutros Boutros-Ghali, the then Secretary-General of the United Nations

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1 Buchanan, A. (1997), 'Self-Determination, Secession and the Rule of Law', in McKim, R. and McMahan. J. (eds), *The Morality of Nationalism* (New York: Oxford University Press), p. 301.

2 Craig, G.A. and George, A.L. (1995), *Force and Statecraft, Diplomatic Problems of Our Time*, 3rd Edition (New York: Oxford University Press), p. 146; Hannum, H. (1998), 'The Specter of Secession, Responding to Claims for Ethnic Self-Determination', *Foreign Affairs* 77:2, 13.

3 Buchheit, L.C. (1978), *Secession, The Legitimacy of Self-Determination* (New Haven: Yale University, Press), pp. 13, 19.

(UN), that 'if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve'.[4] Thus, a positive reaction to secession raises fears of an endless number of secessions leading to anarchy.[5]

This general hostility to secession has led to definitions of secession that are beset with what, it will be argued, are irrelevant elements. The purpose of this chapter is to suggest and, through an analysis of these other definitions, justify an alternative definition.

Secession Defined

The word 'secession' has its roots in the Latin words 'se' meaning 'apart' and 'cedere' meaning 'to go'. Secession is thus associated with leaving or withdrawing from some place. Broadly speaking, secession can be viewed as withdrawing from an association or organisation. In the context of international law and municipal constitutional law, this chapter suggests that secession should be defined as follows:

> Secession is the creation of a new state upon territory previously forming part of, or being a colonial entity of, an existing state.

This definition expresses quite clearly what is at the heart of secession, namely, the creation of a new state – a state being defined as a territorial entity which has 'plenary competence to perform acts, make treaties, and so on, in the international plane'[6] – upon territory which previously was not, of itself, a state.

For ease of understanding in the discussion that follows, the term 'host state' refers to the 'existing state' referred to in the definition, and the term 'seceded state' refers to the 'new state' created as a result of secession.

Implicit in this definition is that secession is a *process*. As Marcelo G. Kohen observes:

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4 Boutros-Ghali, B. (1992), *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping* (New York: United Nations), para. 17. See also Boutros-Ghali's comments, in 1993, at a seminar on ethnic conflict, quoted in Roberts, A. (1995), 'Communal Conflict as a Challenge to International Organization: The Case of Former Yugoslavia', *Review of International Studies* 21, 394. The Secretary-General's views echoed those of Hector Gros Espiell, Special Rapporteur to a sub-commission of the Commission on Human Rights, who noted that 'the proliferation of very small States might have the effect of destroying or seriously undermining the very foundations of the existing community of nations': quoted in Duursma, J. (1996), *Fragmentation and the International Relations of Micro-States, Self-determination and Statehood* (Cambridge: Cambridge University Press), p. 40.

5 Buchheit, above n. 3, p. 14.

6 Crawford, J. (2006), *The Creation of States in International Law*, 2nd Edition (Oxford: Clarendon Press), p. 40.

> Secession is not an instant fact. It always implies a complex series of claims and decisions, negotiations and/or struggle, which may – or may not – lead to the creation of a new State.[7]

Thus, a seceded state is the *outcome* of a process. Secession cannot be said to have occurred until the process has been completed by the creation of a new state. The process can generally be said to start when representatives of a population settled on a territory (territorial community) proclaim a new state on that territory.[8] In most cases they do so by means of a declaration of independence. In some, but not all, cases in which independence is so proclaimed, other states formally recognise the independence of the proclaimed state. When a sufficient degree of recognition has been achieved the proclaimed state becomes, at that time, a state in reality. The outcome of the process has been achieved and the process of secession is complete.

In international law the classic requirements of statehood are set out in Article 1 of the so-called Montevideo Convention of 1933,[9] which stipulates that a state should possess the following attributes: (a) a permanent population, (b) a defined territory, (c) a government, and (d) a capacity to enter into relations with other states.[10] A territorial entity that does not satisfy these requirements is not a state. In the wake of the break-up of the Socialist Federal Republic of Yugoslavia (Yugoslavia) and the Union of Soviet Socialist Republics in 1991, it has been suggested[11] that, even if a territorial entity satisfies these requirements and therefore can be said to be a state, in order to be accorded recognition as a state, it must also satisfy international standards relating to human rights and self-determination, as set out in the Guidelines for Recognition issued by the European Community (EC) in late 1991.[12]

In international law the function of recognition is a controversial issue with two major schools of thought. According to the declaratory theory, recognition plays no role in the creation of a state. A territorial entity that meets the requirements of statehood is a state, irrespective of its recognition by other states, with recognition being simply the formal acknowledgment of that fact. According to the constitutive theory, recognition of a state creates that state, thereby constituting a further requirement of statehood.[13]

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7 Kohen, M.G. (2006), 'Introduction', in Kohen, M.G. (ed.), *Secession, International Law Perspectives* (Cambridge: Cambridge University Press), p. 14. See also Coppieters, B. (2003), 'Introduction', in Coppieters, B. and Sakwa, R. (eds), *Contextualizing Secession, Normative Studies in a Comparative Perspective* (Oxford: Oxford University Press), pp. 4–5.

8 Thus, it is incorrect to refer, as many writers do, to a declaration of independence as secession. Rather, at this stage, and right through to the creation of a state, there is no more than an *attempted* secession.

9 Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States, 26 December 1933 (1936) 165 LTNS 21031.

10 These requirements are fully discussed in Crawford, above n. 6, pp. pp. 45–62.

11 Dugard, J. and Raič, D. (2006), 'The Role of Recognition in the Law and Practice of Secession', in Kohen, above n. 7, p. 96; Caplan, R. (2005), *Europe and the Recognition of New States in Yugoslavia* (Cambridge: Cambridge University Press), pp. 93–4.

12 Trifunovska, S. (ed.), *Yugoslavia Through Documents from its Creation to its Dissolution* (Dordrecht: Martinus Nijhoff Publishers), pp. 431–2.

13 Crawford, above n. 6, pp. 19–28.

Whatever the merits of these competing theories, it is widely accepted that, in the context of secession at least, recognition of the seceded state by other states has at least some part to play in its creation.[14] That this is so is effectively conceded by secessionists themselves. Historically, international recognition of statehood has been the major foreign policy goal of any secessionist movement.[15] The recognition of independence of the Spanish American States by the United States of America (US) in 1822 has been described as 'the greatest assistance rendered by any foreign power to the independence of Latin America'.[16] The recognition by India, a significant regional power, of Bangladesh in 1971 was crucial to the success of the latter's secession from Pakistan.[17] Conversely, the failure to gain international recognition has been a major contributing factor to the failure of various attempts at secession. This is confirmed by a number of examples, including, the failure of the southern Confederacy to gain, in particular, British recognition of its attempted secession from the US in the 1860s[18] and the failure of Katanga to gain the recognition of any other state of its attempted secession from Congo in the 1960s.[19] In cases where recognition is given by an insignificant number of states, notwithstanding such recognition, the attempted secession will fail. Illustrative examples here include the attempted secession of Biafra from Nigeria in the late 1960s[20] and the, still unresolved, attempt at secession of the Turkish Republic of Northern Cyprus from Cyprus in 1983.[21]

A very effective means by which recognition can achieve its constitutive function in the context of secession is by admission of the proclaimed state to membership of the UN. As membership to the UN is limited to states, admission to it is persuasive evidence of the new member being a state.[22] Alternatively, recognition by a significant collection of regional and/or other states will achieve the same result, as was evidenced by the widespread recognition of Bangladesh before its admission

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14 Dugard and Raič, above n. 11, p. 99.

15 Crawford, above n. 6, p. 376.

16 Samuel Flagg Beamis, quoted in Gleijses, P. (1992), 'The Limits of Sympathy: The United States and the Independence of Spanish America', *Journal of Latin American Studies* 24, 487.

17 Crawford, above n. 6, p. 141.

18 For Abraham Lincoln, the President of the United States, his major foreign policy goal was to prevent international recognition of the southern Confederacy. He was prepared to risk war with Great Britain over this issue. On Lincoln's foreign policy on the recognition issue see Jones, H. (1992), *Union in Peril, The Crisis Over British Intervention in the Civil War* (Lincoln: University of Nebraska Press).

19 Indeed, a Security Council resolution of 24 November 1961 reiterated the UN's support for Congo's territorial integrity and political independence and declared the Katanga secession illegal: Security Council Resolution 146 (1960), 9 August 1960, para. 4.

20 Five states recognised Biafra: Crawford, above n. 6, p. 406.

21 Only one state (Turkey) has recognised the Turkish Republic of Northern Cyprus: see *Loizidou v Turkey (Merits)* (1996) 108 ILR. 445 (European Court of Human Rights), p. 471; Jennings, R and Watts, A. (1992), *Oppenheim's International Law, volume I, Peace*, 9th Edition (London: Longman), p. 130.

22 Crawford, above n. 6, pp. 544–5; Dugard, J. (1987), *Recognition and the United Nations* (Cambridge: Grotius Publications), p. 164.

to the UN in 1974,[23] and by the recognition of Slovenia and Croatia by the EC on 15 January 1992[24] and soon thereafter by various other states,[25] all prior to their admission to the UN on 22 May 1992.[26]

Other Definitions of Secession

Prominent scholars of secession have proffered definitions of secession that are, in one way or another, narrower in scope than the one propounded by this chapter. However, these other definitions are also outcome-based, in that at the heart of them is embedded the notion that secession is concerned with the process of the creation of a new state. The most prominent of these definitions is that of James Crawford, who, in his seminal work, *The Creation of States in International Law*, defines secession as

> … the creation of a State by the use or threat of force without the consent of the former sovereign.[27]

The differences between Crawford's narrow definition and the broad definition advanced in this chapter are that, for Crawford:

(i) secession does not include all cases of state creation resulting from the process of decolonisation;
(ii) secession requires the opposition of the host state;[28]
(iii) secession requires the use or threat of force by the secessionist movement.[29]

Each of these differences leads to a narrowing of the definition of secession from that proffered by in this chapter, thereby excluding from the definition of secession many instances of state creation that fall within the definition of secession proffered by this chapter. Thus, by asserting that the opposition of the host state and the use or threat of force by the secessionist movement are necessary elements of the definition of

23 Crawford, above n. 6, pp. 141, 393.

24 'Statement by the Presidency [of the European Community] on the Recognition of Yugoslav Republics', 15 January 1992, in Trifunovska, above n. 12, p. 501.

25 These other states included the US, Russia, China and India: Rich, R. (1993), 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', *European Journal of International Law* 4, 49.

26 General Assembly Resolution A/RES/46/236, 22 May, 1992 (Slovenia); General Assembly Resolution A/RES/46/238, 22 May 1992 (Croatia).

27 Crawford, above n. 6, p. 375.

28 Other scholars who maintain that the opposition of the host state is an element of secession include Kohen, above n. 7, p. 3; Pfirter, F.A. and Napolitano, S.G. (2006), 'Secession and International Law: Latin American Practice', in Kohen, above n. 7, p. 375; Dugard, J. (2003), 'A Legal Basis for Secession – Relevant Principles and Rules', in Dahlitz, J. (ed.), *Secession and International Law, Conflict Avoidance – Regional Appraisals* (The Hague: TMC Asser Press), p. 89.

29 Other scholars who adopt the requirement of the threat or use of force in defining secession include Pfirter and Napolitano, above n. 28, p. 375.

secession, Crawford argues that, outside the context of decolonisation, Bangladesh constitutes the only case of secession since 1945.[30]

Secession and Irredentism

Before proceeding with a discussion of whether definitions of secession such as those proposed by Crawford and others are appropriate, it is necessary to explain the differences between secession and the distinct, but related, process of irredentism.

Irredentism, which derives from the Italian word *irredenta*, meaning unredeemed, is defined by Thomas Ambrosio as 'attempts by existing states to annex territory of another state that their co-nationals inhabit'.[31] Irredentism is far less common than secession. Prominent examples of irredentism include the 'constitutional' irredentist claim by the Republic of Ireland to Northern Ireland as set out, prior to 1999, in Articles 2 and 3 of its constitution, the claims of Somalia to parts of Ethiopia, Kenya and Dijbouti, and the claims of Pakistan to the Indian state of Kashmir. Some scholars include irredentism within their definitions of secession.[32] However, there are two significant reasons that warrant distinguishing secession from irredentism.

First, although both secession and irredentism involve the withdrawal of territory from a host state, 'secession is a group-led movement', whereas 'irredentism … is state-initiated'.[33] With irredentist claims there are three parties, namely, the irredentist state claiming another state's territory, the state targeted by the irredentist state, and a territorial community within the targeted state.[34] On the other hand, secession involves only two parties, namely the host state and the territorial community aspiring to secede.

Second, irredentism does not involve the creation of a new state. As Donald L. Horowitz observes, '[i]rredentism involves subtracting from one state and adding to another state, new or already existing; secession involves subtracting alone'.[35]

On the other hand, it can be conceded that the distinction between irredentism and secession is not always clear-cut in practice. A useful illustration is the case of the attempted secession of the Republic of Serb Krajina (Krajina) from Croatia in late 1991. Although the Serbs of Croatia declared their independence from Croatia

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30 Crawford, above n. 6, p. 415.

31 Ambrosio, T. (2001), *Irredentism, Ethnic Conflict and International Politics* (Westport: Praeger Publishers), p. 2.

32 Dahlitz, J. (2003), 'Introduction', in Dahlitz, above n. 28, p. 6; Raič, D. (2002), *Statehood and the Law of Self-determination* (The Hague: Kluwer Law International), p. 308.

33 Horowitz, D.L. (1997) 'Self-Determination: Politics, Philosophy, and Law' in Shapiro, I. and Kymlicka, W. (eds), *Ethnicity and Group Rights* (New York: New York University Press), p. 423.

34 Brubaker, R. (1996), *Nationalism Reframed, Nationhood and the National Question in the New Europe* (Cambridge: Cambridge University Press), pp. 4–6.

35 Horowitz, D.L. (1991), 'Irredentas and Secessions: Adjacent Phenomena, Neglected Connections', in Chazan, N. (ed.), *Irredentism and International Politics* (Boulder: Lynne Rienner Publishers), p. 10.

and applied to the EC for the recognition of Krajina as an independent state in late 1991, it was clear that their preference was to remain part of Yugoslavia. At that time, Serbia, which refused to formally recognise Krajina, nevertheless committed itself to acting as protector of the Krajina Serbs and acted as their principal backer until 1995, when Krajina's attempt at secession was finally crushed.[36] Although there were clear irredentist sentiments in this case, Krajina is properly seen as a case of attempted secession, given its application for recognition as a state and the fact that what remained of Yugoslavia never explicitly declared any irredentist claims to the Serb populated regions of Croatia.

Reflections on Other Definitions of Secession

Decolonisation and Secession

In the definition of secession proffered by this chapter, state creation through the process of decolonisation falls within the definition. In the UN era, decolonisation has involved the creation of new states out of colonial entities formally referred to as either Non-Self-Governing Territories[37] or Trust Territories.[38] Other definitions of secession reveal two different views as to whether or not decolonisation is within the ambit of secession. First, some scholars exclude all such cases of state creation from their definitions of secession.[39] Second, other scholars, such as Crawford, only include as instances of secession, cases of statehood resulting from 'the forcible seizure of independence by the territory in question' and exclude those resulting from 'the grant of independence by the previous sovereign'.[40]

In relation to those scholars who totally exclude decolonisation from their definition of secession, this may simply be a reflection of the reality that decolonisation is no longer a significant practical reality, given that, since the independence of Palua in 1994, there are no longer any more Trust Territories,[41] and only 16 Non-Self-Governing Territories left.[42] However, the question remains as to whether all cases of decolonisation in the past are properly excluded from the definition of secession.

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36 Radan, P. (2002), *The Break-up of Yugoslavia and International Law* (London: Routledge), pp. 177–82.

37 United Nations Charter, Chapter XI.

38 United Nations Charter, Chapters XII and XIII.

39 Kohen, above n. 7, p. 3; Nolte, G. (2006), 'Secession and External Intervention', in Kohen, above n. 7, p. 65; Bartkus, V.O. (1999), *The Dynamic of Secession* (Cambridge: Cambridge University Press), p. 3; Bishai, L.S. (2004), *Forgetting Ourselves, Secession and the (Im)possibility of Territorial Identity* (Lanham: Lexington Books), p. 33; Dahlitz, above n. 34, p. 6; Higgins, R. (2003), 'Self-Determination and Secession', in Dahlitz, above n. 28, p. 35.

40 Crawford, above n. 6, p. 330.

41 *Ibid*., p. 601.

42 American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Guam, Monserrat, New Caledonia, Pitcairn, St Helena, Tokelau, Turks and Caicos Islands, United States Virgin Islands, Western Sahara: *Ibid*., p. 634.

It is certainly the case that in the UN era there has been a divergence in attitude by the international community of states towards, on the one hand, cases of new states emerging as the result of decolonisation, and, on the other hand, cases where the territory of the seceded state was formerly part of the host state. With the former, new state creation was generally promoted, whereas in the latter, there was general hostility towards the idea of new state creation.

This difference in approach reflected a changed attitude towards imperialism following the two world wars of the first half of the twentieth century. International opinion became increasingly hostile to the continuation of colonialism. This was demonstrated by the recognition of the principle of self-determination in the UN Charter that came into effect in 1945.[43] The Charter's adoption of the principle of self-determination, together with its explicit provisions dealing with Non-Self Governing and Trust Territories, gave principled legitimacy to the decolonisation that subsequently took place, especially in the wake of two UN General Assembly resolutions adopted in 1960. The first – General Assembly Resolution 1514(XV) – called for 'immediate steps' to be taken towards colonial entities attaining 'complete independence and freedom'.[44] The second – General Assembly Resolution 1541(XV) – was more restrained in tone and spoke in terms of 'evolution and progress' towards reaching a full measure of self-government by one of three means, namely, '(a) [e]mergence as a sovereign independent State; (b) [f]ree association with an independent State; or (c) [i]ntegration with an independent State'.[45] In practice, the UN consistently viewed independence as the preferred option,[46] and only reluctantly accepted decisions of the populations of relevant territories that chose to retain their existing dependant status or some form of association with an independent state.[47]

The question that has to be asked is: Why should the independence of a colonial entity not be viewed as an instance of secession, whereas the independence of a territorial community that formed part of an independent state should be viewed as an instance of secession?

It could be argued that the two situations could be distinguished on the basis of reasoning stemming from the guarantee of the territorial integrity of states enshrined in Article 2(4) of the UN Charter which precludes 'the threat or use of force [by member States of the UN] against the territorial integrity or political independence of a State'. This principle clearly only includes the territory of a state and does not extend to any colonial entity that such a state administers. Article 2(4), in conjunction with the two UN General Assembly resolutions of 1960 aimed at facilitating the end of colonialism, clearly implies that a state's sovereignty over any colonial entity

43 United Nations Charter, Articles 1(2), 55.

44 General Assembly Resolution 1514(XV), 14 December 1960, para. 5.

45 General Assembly Resolution 1541 (XV), 15 December 1960, Annex, Principles I and VI.

46 Of approximately 100 Non-Self-Governing Territories that determined their final status between 1945 and 2003, 70 did so by means of joint or separate independence: Crawford, above n. 6, p. 623.

47 Emerson, R. (1971), 'Self-Determination', *American Journal of International Law* 65, 470, where the author notes that the decision in 1965 of the Cook Islands to continue ties with New Zealand was accepted by the Committee 'with surprised dismay'.

that it administers is illegitimate.[48] The reason that colonialism is illegitimate is that the population of a colonial entity has second-class citizen status as compared to the population of the imperial state. Thus, in seeking to justify the exclusion of decolonisation from the definition of secession, Linda S. Bishai writes:

> Colonies contain populations which lack the benefits of full membership in the parent state to begin with; they are territories without a history of statehood in the modern international sense, and therefore a colonial independence movement is closer to the creation of a state de novo than it is to the unilateral 'withdrawal' of territory and population from a bounded proper state.[49]

Bishai's reasoning is flawed. The illegitimacy of colonialism is relevant to providing a principled basis for *justifying* the recognition of colonial entities as new states on the basis that the continuation of their colonial status entails the denial of the right of colonial peoples to self-determination. However, the illegitimacy of colonialism is of no relevance to the process of state creation through decolonisation. The justification for, and the process of, decolonisation are separate issues. Conflating them leads Bishai to the conclusion that the withdrawal of a territorial community from within the territorial confines of a state is *not* really the creation of a state de novo. Such a suggestion leads to the fanciful conclusion that, simply because it was previously part of Pakistan, the withdrawal of the territorial community that today is known as Bangladesh was not the creation of a state de novo in the same sense as was the creation of Pakistan as a result of its decolonisation from the United Kingdom. For Bishai, the creation ('de novo') of Pakistan is not a case of secession, whereas Bangladesh's creation (by 'withdrawal') is one of secession. However, legally, politically, and as a matter of common sense, the emergence of Pakistan and Bangladesh were in the fullest sense, creations of new states. That Pakistan withdrew from an empire and Bangladesh withdrew from a state is of no consequence. Both withdrawals involved a rejection of what Crawford's definition refers to as 'the former sovereign'. In both cases the result was the same, namely, the creation of a new state on territory that was not, of itself, previously a state. In both cases the result should be given the same label, that is, secession.

In relation to Crawford's definition of secession, only those colonial entities that obtained independence without the consent of the host state and involved the threat or use of force can be said to be cases of secession. For Crawford, these elements apply equally to cases of state creation involving a territorial community within an existing state. The analysis of these two elements that follows, therefore, applies equally to cases of decolonisation and non-colonial secession.

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48 It is this illegitimacy which explains the sense of urgency in the wording of Resolution 1541(XV) as well as the consistent preference of the UN for independent statehood as the means by which colonial entities reached their full measure of self-government.

49 Bishai, above n. 39, p. 33.

Secession Requiring Opposition from Host State

The issue of opposition of the host state as a necessary element of the definition of secession is most extensively canvassed by Crawford.[50] His analysis is in the context of state creation outside the colonial context and is based upon relevant state practice since 1945. This analysis leads him to the conclusion that the only case of secession outside the colonial context since that date is that of Bangladesh because it was the only case in which statehood was achieved without the consent of the host state (Pakistan).[51] The other cases of new state creation that he discusses are not seen by him as instances of secession.

Each of Crawford's case studies of state practice since 1945 in which a new state emerged from within an existing state can be classified into one of the following four categories:

(a) Cases where the host state opposed the creation of the new state up to the point of its creation and the host state continued its existence as a state. Bangladesh's emergence from Pakistan is an example of this category;
(b) Cases where the host state opposed the creation of a new state when a process of secession was commenced, but not at the time that the new state was created, and the host state continued its existence. An example here is the emergence of Eritrea from Ethiopia;
(c) Cases where the creation of a new state arose at a time when the host state had dissolved by agreement leading to the creation of at least two new states. In such cases, the agreed nature of the dissolution implied the consent of the host state to the creation of new states. An example is the creation of the Czech Republic and the Slovak Republic from the state of Czechoslovakia; and
(d) Cases of new state creation where a host state was dissolving or had dissolved as the result of events and circumstances, rather than by agreement. In these cases the factual dissolution of the host state meant that there was was no host state to give consent to the creation of new states. The new states that emereged as a result of the break-up of Yugoslavia in the 1990s are illustrative examples.

Crawford's definition of secession only includes category (a) cases, because that is the only category in which the new state is created against the opposition of the host state. However, the argument that consent of the host state is a requisite element of secession is undermined by two concessions made by Crawford himself. First, he concedes, that the distinguishing feature of the presence or absence of consent is 'in some circumstances … formal and may even be arbitrary'.[52] Second, he concedes that, at least in their initial stages, cases coming within categories (b)–(d) can be triggered by attempts at secession,[53] and that in many cases such attempts are initially

50 Crawford, above n. 6, pp. 390–418.

51 *Ibid*., p. 415. The recognition of Kosovo's secession from Serbia in early 2008 would be the second such case.

52 *Ibid*., p. 330.

53 *Ibid*., p. 390.

opposed by the host state.[54] Thus, according to Crawford, something that starts as an attempt at secession and ends with the creation of a state is not secession.

More importantly, the fact that, at the end stage of the process of state creation, the host state, (i) does not oppose the creation of a new state (category (b)), or (ii) has dissolved or is dissolving (categories (c) and (d)), does not affect the final outcome of the process – the creation of a new state or states. The same outcome arises in a case in which the host state, at the end stage of the process of state creation, *does* oppose the creation of a new state (category (a)). Whether or not the host state opposes the creation of a new state is irrelevant to the final outcome of the process – the creation of a new state upon territory that was formerly part of the host state. There is no compelling reason why these situations should be differentiated. This can be demonstrated by analogy. The termination of a marriage is not defined differently depending upon whether one of the parties to the marriage is, or is not, opposed to the other applying to terminate the relationship. In either case the termination is defined as a divorce. Accordingly, there is no principled basis for excluding from the definition of secession cases coming within categories (b)–(d) of Crawford's analysis of state practice since 1945.

Crawford's argument that opposition of a host state is an element of the definiton of secession, stems from what he correctly identifies as a difference in approach that the international community has, since 1945, taken to secession within and outside the colonial contexts. As he fairly points out, 'the degree of effectiveness required as a precondition to recognition will be much less extensive [in the colonial context] than in the case of secession within a metropolitian State'.[55] This flows from the fact that the right to self-determination underpins and encourages the former, whereas the principle of territorial integrity largely discourages the latter, leading to his conclusion that '[t]he result of these contrasting developments is that there is no longer *one single test* for secessionary independence' (emphasis added).[56]

However, contrary to Crawford's assertion, there is 'one single test for secessionary independence', namely the principle of self-determination. The application of that principle, as Crawford points out, positively facilitates secession in the colonial context. It is also the principle that justifies secession in the non-colonial context.

Crawford concedes that the principle of territorial integrity does not provide a state with a 'guarantee'.[57] The principle of territorial integrity is conditional, as is made clear by the 'safeguard clause' in UN General Assembly Resolution 2625(XXV), which stipulates that:

> Nothing in the foregoing paragraphs [dealing with the principle of equal rights and self-determination of peoples] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and

54 For example, Senegal's withdrawal from the Mali Federation was initially opposed by the latter's other constituent member: *Ibid*., p. 392.

55 *Ibid*., pp. 383–4.

56 *Ibid*., p. 384.

57 *Ibid*.

> thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[58]

The safeguard clause places a condition upon the guarantee of a state's territorial integrity, namely that the guarantee applies for only as long as the state does not treat a particular group, or groups, of its citizens as second-class citizens, or, in other words, does not exclude such groups from exercising their right to self-determination. If such a condition is not fulfilled by the state in relation to a territorial community within it, its territorial integrity is no longer guaranteed, with the consequences that the state's sovereignty over that territorial community becomes illegitimate. If that territorial community attempts to secede from the state, the illegitimacy of the state's continued sovereignty over that territory gives a principled basis justifying the recognition of statehood in relation to it. This has been appropriately referred to as 'remedial' secession.[59]

Accordingly, the safeguard clause in UN General Assembly Resolution 2625(XXV) justifies cases of secession that come within category (a) of Crawford's analysis of post-1945 examples of state creation. However, the principle of self-determination is also the justification behind the creation of states in categories (b)–(d) of Crawford's analysis. The demands of territorial communities in these cases are invariably based upon the right to self-determination,[60] and they are satisfied by the creation of new states, which, according to UN General Assembly Resolution 2625(XXV), is, just as in the context of decolonisation, one of the means by which claims to self-determination are satisfied.[61]

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58 General Assembly Resolution 2625 (XXV), 24 October 1970, Principle 5. At the second World Conference on Human Rights in 1993 organised by the United Nations, the more than 180 states adopted by consensus a declaration which, in Article 2, paragraph 3, restated the essence of Principle, but also broadened its scope by replacing the words 'without distinction as to race, creed or colour', in Principle 5 with the words 'without distinction of any kind': The Vienna Declaration and Programme of Action, United Nations Department of Public Information, Doc. DPI/1395-39399, August, 1993; reprinted in (1993) 32 ILM pp. 1661–87. The terms of Article 2, paragraph 3 of this declaration were adopted by a General Assembly resolution passed on the occasion of the 50th Anniversary of the United Nations in 1995: General Assembly Resolution 50/6, 24 October, 1995, Article 1.

59 Crawford states that remedial secession only arises 'in extreme cases of oppression': Crawford, above n. 6, 119. In *Katangese Peoples' Congress v Zaire*, Communication No 75/92, para. 6, the African Commission on Human and Peoples' Rights indicated that 'in the absence of evidence of violations of human rights' by Zaire in relation to the population of its Katanga Province, the Katangese were 'obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire'. For more detailed discussion see Raič, above n. 32, pp. 308–97; Radan, above n. 36, pp. 24–68. For a philosophical argument for this remedial right to secession see Buchanan, A. (2004), *Justice, Legitimacy and Self-Determination, Moral Foundations for International Law* (Oxford: Oxford University Press), pp. 331–400.

60 See for example 'Declaration on the Establishment of the Sovereign and Independent Republic of Croatia', 25 June 1991, in Trifunovska, above n. 12, pp. 301–304.

61 General Assembly Resolution 2625 (XXV), 25 October, 1970, Principle 5.

Thus, in both the colonial and non-colonial contexts, it is the principle of self-determination that underpins the 'one single test for secessionary independence'. Given that in both instances the claim of the host state to the relevant territory lacks legitimacy, there can be no basis for distinguishing between them. The outcome in both is the same, namely, the creation of a new state upon territory which previously was not, of itself, a state. In this respect the following observation by Buchheit is appropriate:

> One searches in vain ... for any principled justification of why a colonial people wishing to cast off the domination of its governors has every moral and legal right to do so, but a manifestly distinguishable minority which happens to find itself, pursuant to a paragraph in some medieval territorial settlement or through a fiat of cartographers, annexed to an independent State must forever remain without the scope of the principle of self-determination.[62]

That the principle of self-determination may be more easily satisfied in some cases than others does not alter this conclusion. Principles are often differently applied in different contexts. For example, in the common law jurisidictions, restraints of trade are void, unless reasonable.[63] The reasonableness of such restraints is measured against a variety of criteria. However, it is clear that the reasonableness of the restraint is easier to establish in some contexts than in others. Thus, it is easier to uphold a restraint in the case of a sale of business than in a contract of employment.[64] Similarly, the fact that the principle of self-determination readily justifies the exercise of the right to self-determination by colonial peoples, whereas the exercise of that right is more difficult to establish in the case of peoples within the territorial confines of an existing state, does not detract from the fact that it is the principle of self-determination that is the justificatory principle for either form of what Crawford refers to as 'secessionary independence'.

The conclusions reached above in relation to the relevance of host state opposition in any definiton of secession were reached in the context of non-colonial secession. They are, however, equally pertinent in the colonial context. Accordingly, there is no justification for any definition of secession including the element of host state opposition to the creation of the new state.

Secession Requiring Use or Threat of Force

In relation to claims that the use or threat of force is also an element of the definition of secession, two comments can be made, each of them suggesting that such an element should not form part of the definition, irrespective of whether the new state that is created emerges in a colonial or non-colonial context.

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62 Buchheit, above n. 3, p. 17. See also Anon. (1980), 'The Logic of Secession', *Yale Law Review* 89, 808.

63 *Nordenfeldt v Maxim Nordenfeldt Guns and Ammunition Co Ltd* [1894] AC 535, 565.

64 *Geraghty v Minter* (1979) 142 CLR 117, 185.

First, if one argues that the the opposition of the host state is an element of secession's definition, adding the further element of the threat or use of force is superfluous. If the opposition of the host state is an element, it is hard to see how, other than by the use or threat of force, a secessionist movement could ever succeed in achieving its goal of independent statehood. In achieving that goal, secessionist movements invariably contemplate that the use of or threat of force is always a *possibility*. As Michael Schoiswohl observes, 'an element of force is already inherent in the lack of approval by the previous sovereign'.[65] When the process is commenced by a declaration of independence, the secessionist movement is asserting a claim to statehood. Whether or not the use of force is necessary to satisfy that claim, there must, at the very least, be an implied threat of the use of force if the claim is opposed by the host state, especially given that the host state would be entitled to use force as a means of supressing the attempted secession. Thus, in these circumstances, the element of the use or threat of force adds nothing to any definition of secession that includes opposition of the host state as an element.

Second, if, as has been argued above, the opposition of the host state is not an element of the definition of secession, there is no reason why the threat or use of force should be one of its elements. This is because the use or threat of force to achieve independent statehood, relates only to the *means* by which that result is achieved. Whether the process of secession is achieved peacefully or violently is irrelevant to the outcome of that process. This is so because the end result of the process is the same, namely, the creation of a new state over territory which was not, of itself, previously a state. The meaning of secession is a separate matter to the means by which it is achieved. This point can be illustrated by analogy to childbirth. The birth of a child may be either by vaginal delivery or by caesarian section. This difference in means of delivery does not change the fact that in each case birth has occurred and a new child has joined the community of human beings.

Accordingly, there appears to be no justification for the use or threat of force constituting an element of the definition of secession.

Concluding Remarks

The definition of secession put forth in this chapter is broad in that it covers a variety of contexts in which a territory forming part of, or being a colonial entity of, a state becomes a new state. These contexts include:

(a) cases where a colonial entity becomes a new state, which can be labelled *colonial secession*;
(b) cases where, notwithstanding the continued opposition of the host state, part of that state becomes a new state and the host state continues its existence,

65 Schoiswohl, M. (2005), *Status and (Human Rights) Obligations of Non-Recognized De Fact Regimes in International Law: The Case of 'Somaliland', The Resurrection of Somaliland Against All International 'Odds': State Collapse, Secession, Non-Recognition and Human Rights* (Leiden: Martinus Nijhoff Publishers), p. 48.

which can be labelled *unilateral secession*;[66]

(c) cases where, irrespective of whether or not it initially opposed the creation of a new state, the host state consented to the creation of a new state at the time of the latter's creation and the host state continues its existence, which can be labelled *devolutionary secession*;

(d) cases where, the demand for the creation of a new state leads to the host state being dissolved by consent, leading to the creation of a new state or states, which can be labelled *consensual secession*; and

(e) cases where, the demand for the creation of a new state leads to the factual dissolution of the host state, leading to the creation of a new state or states, which can be labelled *dissolving secession*.[67]

Although *devolutionary* and *consensual* secession both involve consent, the fact that, in the former the host state continues its existence, whereas, in the latter it does not, is the distinguishing feature. Indeed, in cases of *consensual* secession, if that part of the host state that was not the subject of the demand for the creation of a new state, was, in principle, opposed to the demand, but neverthess less accepted it and went on to become a new state itself, the creation of that state would not be the product of secession. Here the creation of the Czech Republic serves as an example.

On the other hand, although *consensual* and *dissolving* secession both involve the dissolution of the host state, the distinguishing feature between them is the absence of consent from the host state in the context of *dissolving* secession. Furthermore, in cases of *dissolving* secession, if that part of the host state that was not the subject of the demand for the creation of a new state, opposed such a demand and became a new state in the wake of the host state's dissolution, the creation of that new state would not be the product of secession. An example here would be the creation of the Federal Republic of Yugoslavia in the wake of the dissolution of Yugoslavia.

This chapter's definition of secession flows from arguments which reject the relevance, in either the colonial or non-colonial contexts, of issues relating to the consent of the host state and the use or threat of force by secessionist movements. In other words, the host state's attitude towards the attempted secession and the means by which a seceded state is created, are irrelevant to the definition of secession.

This is not to deny that issues relating to consent and the use or threat of force do not have important consequences for the seceded state, once created. Their importance lies in relation to issues such as, (i) determining the critical date of commencement of statehood; (ii) resolving outstanding territorial questions, such as land and maritime boundaries; and (iii) settling issues of succession, such as rights to property formerly belonging to the host state, host state debts, and treaty

66 Dugard and Raič, above n. 11, p. 102. Indeed, Crawford in his analysis often writes in terms connecting the opposition of the host state to the expression 'unilateral secession': Crawford, above n. 6, pp. 388, 403, 416, 417, 418.

67 Thus, Schoiswohl labels cases such as the break-up Yugoslavia as 'dissolving secession[s]': Schoiswohl, above n. 65, pp. 50–51. Dugard writes that '[t]he dissolution of Yugoslavia in 1991 may be categorized as a case of secession on the part of Slovenia, Croatia, Bosnia–Herzegovina and Macedonia from Yugoslavia': Dugard, above n. 28, p. 94.

obligations.[68] However, the importance of these matters does not warrant excluding from the scope of the definition of secession, cases of new state creation that do not involve host state opposition and the threat or use of force. Again, the point can be illustrated by analogy. In common law jurisdictions, agreements for the sale of land can be entered into either orally or evidenced in writing.[69] Significantly different legal consequences attach to these two forms of agreement. Oral agreements, even if breached, can only be enforced in limited circumstances relating to the equitable doctrine of part performance[70] and where the absence of writing is due to the fraud of the defendant.[71] However, agreements evidenced in writing can be enforced simply upon proof of a breach. However, these two types of agreement are both legal contracts, notwithstanding the different consequences that attach as a result of the form in which they were entered into.

The fact that this chapter's definition of secession involves a categorisation of secession into different types, does not undermine the argument that all these types of state creation are instances of secession. As was stressed above, secession is a process of state creation in particular contexts, that is, where the new state was formerly part of, or a colonial entity belonging to, a host state. All the categories of state creation referred to above are examples of that process, and thus are properly within the definition of secession. Furthermore, as has been demonstrated, the justificatory principle for all such secessions is the same, namely, the right of peoples to self-determination.

68 The author is indebted to Professor James Crawford for making this observation on an earlier draft of this chapter: email correspondence from James Crawford to the author, 21 September 2006, copy in author's possession.

69 The importance of writing in relation to such contract stems from the Statute of Frauds adopted by the English Parliament in 1677, and is found in successor provisions in all common law jurisdictions.

70 *Maddison v Alderson* (1883) 8 App. Cas. 467, 475–6; *Regent v Millett* (1976) 133 CLR 679.

71 *McCormick v Grogan* (1869) LR 4 HL 82, 97; *Wakeham v MacKenzie* [1968] 2 All ER 783.