FORCED SECESSIONS

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Abstract

Many of the central challenges in international law arise from bad relationships between regions and the nations in which they are located. Some scholars and advocates argue for a right of remedial secession for regions facing oppression. Should states be able to claim an analogous right of "remedial expulsion" against malefactor regions? If it is an act of "self-determination" for the people of a region to leave a nation against the nation's wishes, is the same thing true when they wish to stay against its wishes? Since acquisition and possession of territory is no longer the national priority it once was, can nations simply let go of undesirable regions—including former colonial outposts—that are proving too expensive? We argue that the traditional rules, based on the acceptance in international law of the legitimacy of imperial conquest, should be modified with a market-type system that permits forced secession in some circumstances, but imposes a penalty on the expelling nation.

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Introduction

Millions of people live in former colonies that never became independent states[1]—nearly one in six Caribbean residents, for example, lives in a region with constitutional ties to a former imperial power.[2] Far from seeking full independence, such "overseas territories" have generally fought hard to maintain these ties. Meanwhile, in many cases, their former colonizers see them as politically and economically costly and have sought to cut them loose, leading to a situation some describe as "decolonization upside-down."[3] This raises serious legal complications, because the existing rules of international law developed to address what are essentially an inverse set of problems involving territorial acquisition, decolonization, and secession.

To take just one example, the Netherlands cannot induce its Caribbean territories to favor independence.[4] Maintaining the Antilles is costly to the Kingdom, and the current arrangement seems untenable in the long run. Does international law permit the Dutch to force their former colonies to accept independence?[5] On what terms? Would the answers be different if the colonies were committing human

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[1] ROBERT ALDRICH & JOHN CONNELL, THE LAST COLONIES 5 (1998) (noting "the UN position that 'colonies' are non-self-governing, geographically separate and ethnically and/or culturally distinct from the countries administering them").

[2] GERT OOSTINDIE & INGE KLINKERS, DECOLONISING THE CARIBBEAN: DUTCH POLICIES IN A COMPARATIVE PERSPECTIVE 220 (2004) ("Of the total population of the Caribbean, an estimated 37 million people, almost 15 per cent live in areas which still maintain constitutional ties with the mother country."),

[3] OOSTINDIE & KLINKERS, *supra* note 2, at 217 ("As far as Westminster was concerned, all of the former British colonies had to go. The fact that at present a handful of Caribbean 'Overseas Territories' still come under the sovereignty of the United Kingdom should not, therefore, be attributed to the ardent wishes of Westminster, but rather to the stubbornness with which these islands have refused to accept independence.").

[4] OOSTINDIE & KLINKERS, *supra* note 2 ("[M]ajor public support for the acceptance of independence [in Aruba and the Antilles) has never materialised. … However much the Dutch insisted, they simply refused to cooperate.").

[5] Our interest here is in the default international rules. As noted below, some national charters forbid expulsion as a matter of domestic law. OOSTINDIE & KLINKERS, *supra* note 2, at 219 (Dutch Charter rules out expulsion of Antilles); D.J. Latham Brown, *The Ethiopia-Somaliland Frontier Dispute*, 5(2) INT'L. & COMP. L.Q. 245, 255 (1956) (noting that Britain's alienation of Somaliland to Ethiopia might be read as violating a covenant "not to permit such territory to pass under the sovereignty of any other state"). But even those rules are not be as universal as some might suppose. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72. U. CHI. L. REV. 797 (2005) (arguing that the *Insular Cases* are based on a principle of "territorial deannexation" that would permit the United States to expel the unincorporated territory of Puerto Rico).

rights violations and had resisted all political and economic interventions? Does it matter that they were once colonies? What, in short, are the default rules of international law with regard to expulsion of national territory?

The prospect of expulsion is perhaps more prominent today than ever before, and it presents a unique set of challenges. International law and practice have historically been molded by the *outward* push of nations,[6] and have developed rules to cabin that pressure by, for example, limiting the modes of territorial acquisition. Contemporary reality is more complicated.[7] For a variety of political and economic reasons, some nations now want to downsize. (The same is true of some supra national organizations, though these efforts raise a distinct set of political and legal issues that we and Laurence Helfer address in a separate paper.[8]) The question is whether nations can do so without the agreement of the regions[9] they want to expel.

Many people have a strong, even visceral, intuitive response: That in the absence of an explicit agreement to the contrary, *nothing* can justify the expulsion of region from a nation. Some believe that international law supports this bright line rule against expulsion. Such arguments have been most prominent in the context of expelling member states from supra national organizations, rather than regions

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[6] Andrew Burghardt, *The Bases of Territorial Claims*, 63(2) GEOGRAPHICAL REV. 225, 225 (1973) ("Virtually all states and empires have treated territory as being of itself good"); *see also id.* (quoting Niccolo Machiavelli: "[T]he wish to acquire more [territory] is admittedly a very natural and common thing; and when men succeed in this they are always praised rather than condemned."); Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830, 830 (2006) ("The history of international law since the Peace of Westphalia is in significant measure an account of the territorial temptation.").

[7] Although we believe that traditional notions of sovereignty have changed to a significant degree, we do not agree with those who suggest that we are in a "post-sovereignty" world. MICHAEL KEATING , STATELESS NATIONS: PLURINATIONAL DEMOCRACY IN A POST-SOVEREIGNTY ERA (2004); Neil Walker, "The Cosmopolitan Local: Neil MacCormick's Post-Sovereign World" (Nov. 7, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1704409 Quite to the contrary, nations are the central players in our framework—our contention is that the rules governing their boundaries must account for their contraction.

[8] *See* Joseph Blocher, Mitu Gulati, & Laurence A. Helfer, "Can Greece be Expelled from the Eurozone? Toward a Default Rule on Expulsion From International Organizations" in GAPS IN GOVERNANCE (Elena Carletti et al., eds. 2016, forthcoming). In addition to that chapter, the three of us are pursuing the question in a larger project.

[9] In keeping with international law's focus on sovereign territory, we use the term "region" to refer to physical places occupied by people. Expelling a people from a territory is, as described in more detail below, *supra* Section II.B, subject to a wide range of restrictions.

from nations, but the analogies initially seem convincing. If it is true that a member state cannot be expelled from an organization—even for invading another member state[10]—or that expulsion (perhaps like secession or withdrawal) is simply not a problem susceptible to legal analysis,[11] then surely the same must be true for the expulsion of regions from nations.

Ironically, the traditional view of international law suggests precisely the opposite: That a sovereign, because it is sovereign, can expel its regions (give them "independence" or cede them to another sovereign) almost at will, while an international organization—to the degree that it has the power to expel—must be able to identify some serious material breach. We believe that the first proposition is outdated and inconsistent with both logic and the basic tenets of modern international law, especially the principle of self determination. (We address the second proposition in a separate paper.[12])

Our analytical starting point is that the international system should not force regions or sovereigns to stay together in perpetuity,[13] but that expulsion—like its conceptual sibling, secession—should be (and maybe is, under existing international law) subject to restrictions. There should be exit options for nations that are undermined by their regions, just as remedial secession would provide a failsafe for

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[10] *See, e.g.*, PHOEBUS ATHANASSIOU, WITHDRAWAL AND EXPULSION FROM THE EU AND EMU: SOME REFLECTIONS, European Central Bank Working Paper Series No. 10 (Dec. 2009); Annie Lowrey, *Could Greece Get Kicked Out of the European Union? No*, FOREIGN POLICY, March 23, 2010, http://foreignpolicy.com/2010/03/23/could-greece-get-kicked-out-of-the-european-union/.

[11] J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2412 (1991) ("The juridical conclusion is that unilateral withdrawal [from the European Community] is illegal. Exit is foreclosed. But this is precisely the type of legal analysis that gives lawyers a bad name in other disciplines. . . . If Total Ext is foreclosed, it is because of the high enmeshment of the Member States and the potential, real or perceived, for political and economic losses to the withdrawing state.").

[12] In brief, we think that international law *does* permit expulsion from supra national organizations under certain circumstances, but that the rules are different than they are for nations. Blocher, Gulati, & Helfer, "Can Greece Be Expelled," *supra* note 8.

[13] A number of scholars, primarily from economics and political science, have also questioned the conventional notions that fixed national boundaries and constraining governance to members of the local population are optimal from the perspective of social welfare. *E.g.,* Alessandara Casella & Barry Weingast, *Elements of a Theory of Jurisdictional Change*, in POLITICS AND INSTITUTIONS IN AN INTEGRATED EUROPE (Barry Eichengreen et al., eds. 1995); Bruno Frey & Reiner Eichenberger, THE NEW DEMOCRATIC FEDERALISM FOR EUROPE: FUNCTIONAL, OVERLAPPING, AND COMPETING JURISDICTIONS (1999); Michael Hiscox & David Lake, *Democracy and the Size of States*, Working Paper, 2002, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002686; Jonathan Rodden & Susan-Rose Ackerman, *Does Federalism Preserve Markets?*, 83 VA. L. REV. 1521 (1997); Barry Weingast, *The Economic Role of Political Institutions*, 7 J. L. ECON. ORG. 1 (1995).

regions that are oppressed by nations.[14] One can think of this as a right of "remedial expulsion," justified by roughly the same set of considerations that underlie the principle of remedial secession.

Analyzing expulsion in legal terms is difficult, because the standard rules of international law were designed to address precisely the opposite set of issues: the rules for legitimately acquiring sovereign territory,[15] or for regions to leave it in scenarios of extreme hardship.[16] Responding to the needs of the time in which they were designed, the basic building blocks of international law—territorial integrity, equal sovereignty, and the like—do not provide clear or satisfactory answers to the question of expulsion.[17]

Accordingly, we propose a new analytic framework with which to evaluate expulsion of regions from nations. We draw largely on existing rules of international law, but we also propose changes—for example with respect to remedial secession—that we think better track the trajectory and principles underlying those rules. Based on the available legal materials, and synthesizing the conceptual and normative considerations sketched above, we propose a basic framework with which to evaluate expulsion.[18] We do not make the claim that our framework is a mandatory rule, akin to *jus cogens*, that would override all agreements to the contrary. If a national constitution provides rules for or against expulsion, and the

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[14] Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, DUKE L. J. (forthcoming 2017) [hereinafter Blocher & Gulati, *A Market for Sovereign Control*].

[15] *See, e.g.*, R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW (1963); 1 OPPENHEIM'S INTERNATIONAL LAW 434-35, 455-57 (H. Lauterpacht ed., 5th ed. 1937); Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1 (2000).

[16] For a description of the evolution of the self determination concept, see Patrick Macklem, *Self Determination in Three Movements*, in THE THEORY OF SELF DETERMINATION (Fernando R. Teson ed., forthcoming 2016). On the related concept of secession, see ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 335 (2004); LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF DETERMINATION 220-223 (1978); Thomas Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW (C. Brölmann et al. ed, 1993). *But see* Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST ANTONY'S INT'L REV. 37 (2010).

[17] As a matter of legal and historical development, the situation is not unlike that once faced by property law, whose content was long shaped by acquisition, not de-acquisition, destruction, or even basic questions like legal liability for injuries suffered on abandoned property. *See, e.g.*, Lior Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

[18] *See infra* Part III.

people (or region) being expelled can in some sense be seen as having assented to those rules, then they should generally be followed.[19] In the absence of such explicit agreement, however, we see three possible default rules, each of which is dependant on the actions and governance of the region, just as the rules of secession are pegged to the behavior of the state.[20]

First, we support a strong default presumption against expulsion in the absence of malfeasance by the region of member state. Regions that respect their basic obligations cannot be involuntarily expelled, just as well-governed nations cannot be forced to accept secessions.[21] If the union is malfunctioning, then a break must be negotiated with the approval of both the state and the region, as was recently attempted in Scotland. In standard cases, this requirement of mutual assent is, we think, the best way to accommodate the tension between the traditional rule of territorial sovereignty (including the power of cession) and the contemporary principle of self-determination.

Second, on the opposite end of the spectrum, regions or member states that are misbehaving in the extreme—for example by declaring war on or otherwise oppressing the rest of the nation of which they are a part—can be expelled at the option of the nation as a whole (that is, including the political voice of the region itself).[22] The analogy here is to the principle of remedial secession, which would permit regions to leave an oppressive country. The same logic supports a rule of "remedial expulsion" in scenarios where the malfeasance is committed against the nation, rather than by it.

There is, however, a middle category: one in which regions are not actively oppressing the rest of the nation, but are nonetheless falling significantly short of their obligations. In those scenarios, we suggest—very tentatively—that the region

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[19] The qualifier is necessary here, because some rules of international law might be mandatory—a nation could no more forbid remedial expulsion than it could forbid remedial secession. Other rules might fall into desuetude, or lose their legitimacy over time.

[20] We have argued that an analogous set of considerations, tied to the quality and representativeness of governance, should govern remedial and "purchased" secessions. Blocher & Gulati, *Market for Sovereign Control*, *supra* note 14.

[21] *See infra* Section III.A.

[22] *See infra* Section III.B.

or nation can be expelled, but that it is owed compensation as a result. That compensation must include an option to retain citizenship in the expelling nation.[23]

This tripartite framework invites many serious questions and challenges. What does it mean for a region to respect its basic obligations to the nation? Who is, or should be, empowered to answer that question—an existing, or perhaps new, international organization? Should claims of compensation be retroactive, such that residents of former colonies should still be able to claim citizenship in the former imperial power? Does giving regions the right to resist expulsion rely on self-determination, or can it be independently justified? We welcome these questions, and have tried to answer some of them throughout the paper, because we think that they are mostly about the *implementation* of the framework, not its soundness.

Our basic goals in this initial foray are to show that traditional statements of international law seem to permit nearly unlimited powers of expulsion, and then to argue that this power—while legally and normatively defensible as a general matter—is and should be subject to restriction. This is likely to bother some readers, including those who support strong state sovereignty, those who believe in regional self-determination, and those who reject the notion that expulsion is ever permissible. As difficult as it is to navigate those competing concerns, the inquiry is increasingly difficult to avoid.

I. The Politics and Economics of Expulsion

At a broad level, our goal is to investigate how international law and practice can respond to dysfunctional or otherwise undesirable region-state relationships. Although the particular question of expulsion from nations has not received much scholarly attention, the general institutional inquiry is familiar. In *Exit, Voice, and Loyalty*, A.O. Hirschman showed that there are two main ways in which a member of an organization can respond to unsatisfactory performance by that organization—either abandon it (exit), or express dissatisfaction in an effort to improve the

[23] *See infra* Section III.C.

situation (voice).[24] In Hirschman's words, "Exit and Voice, that is, market and non-market forces, that is, economic and political mechanisms, have been introduced as two principal actors of strictly equal rank and importance."[25] He applied this political-economic analysis to firms as well as to states.

We ask the mirror image of Hirschman's question: How can the *organization* (here, the state), respond to unsatisfactory performance by a *member* (the region)? Voicing dissatisfaction is obviously possible. But what about the equivalent of exit: expulsion?

Some will reject the very notion of thinking about countries in these terms. For many people, national identities—including national borders—are an immutable or at least inalienable characteristic, a primordial quality that cannot or should not be changed, and certainly not for monetary reasons. On this view, it is simply a mistake to think about borders or nations being "tradable." Our model, described in more detail in Part III, tries to respect that view—it does not force changes on nations and regions that are well-governed and wish to maintain their allegiances. But a great many people *do* think of national identity as mutable, and the constantly-changing lines on the global map are evidence of ongoing efforts to reorganize national borders. Whether and how nations, and not just regions, do or should have control over those changes is the question at the heart of our project. The surprising and ongoing story of decolonization provides an illustration.

A. The Pull and Push of Decolonization

> In no more than two decades between the 1950s and 1970s, vast colonial empires that had taken centuries to assemble almost totally disappeared. All the colonial powers witnessed, and *sometimes expedited and encouraged*, the disintegration of their global realms.[26]

In the standard story, the 20th century was an era of belated but welcome decolonization. European empires on which the sun never set began retreating to

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[24] ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[25] *Id.* at 19. Like Hirschman, we "hope to demonstrate to political scientists the usefulness of economic concepts *and to economists the usefulness of political concepts* …." *Id.*

[26] ALDRICH & CONNELL, *supra* note 1, at 113.

the shadows, responding to demands for self-governance and independence. Of course, even with support from the international community, and often from their former colonizers, the road was not easy for former colonies. Yet, the story of decolonization is generally regarded as a transition from oppression to dependence to freedom, all in response to demands from the colonies themselves.

Consider, however, a different reading of the history and the resulting state of affairs:

> Although it has been argued that, especially in the British case, precipitous decolonization was a result of 'every remaining dependency . . . impatiently demanding equal independence and receiving it in very short order', in fact, the converse was often true, and not only in the smallest colonies. The Australian desire to grant independence to Papua New Guinea was much greater than local demand; the Solomon Islands, Vanuatu and Mauritius went to independence as much with trepidation as jubilation. These island states were not isolated exceptions, but were representative of the end of one era and the dawn of another.[27]

This is a story of *push*, not of pull, and it raises uncomfortable questions for the legality and desirability of expulsion, especially for the millions of people still living in "territories," "departments," and other designations for former colonies.

In the background of this alternative story lies a radical shift in incentives both for the former colonial powers and for the territories they control. Put simply: by the time the wave of decolonization crested after the Second World War,[28] colonies were no longer good investments.[29] European nations, having extracted what value they could from their far-flung colonies, now saw resources flowing in the opposite direction, as nations paid to support the comparatively poor residents of their overseas territories. Increased attention paid to human rights and equality in the Post World War II era made it much harder to treat some subjects of the

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[27] *Id.* at 246

[28] *Id.* at 1 ("The age of decolonization is usually regarded as having peaked during the 1960s ….").

[29] *Id.* at 60 ("Much evidence suggests that contemporary overseas territories have tended to be an economic cost to the colonial powers, most obviously in recent times."); OOSTINDIE & KLINKERS, *supra* note 2, at 216 ("Once cherished as the 'darlings of empire', the colonial possessions had turned into economic millstones.").

empire as second or third class citizens vis-a-vis their former masters.[30] As a matter of domestic politics, it was once quite cheap to promise some form of citizenship (or at least national membership) to far-flung residents. But the value—and corresponding cost—of that citizenship soon increased in direct proportion to the access it gave to the homeland itself. Once upon a time, European nations might well have benefited by maintaining Caribbean outposts that their residents could easily access. Eventually, however, the planes back to Europe were carrying more than sunburned tourists.[31]

And then there is also the fact that the influence, wealth and power of nations inevitably evolves over time. When Britain was an imperial power, holding on to overseas territories was not terribly onerous, even in the face of hostility from other nations regarding those occupations. That was particularly so when those other nations were relatively weak in terms of their ability to impose costs on Britain (e.g., China, in the case of Hong Kong in the 1800s). However, things change. China is now a great power both economically and militarily, which probably helps explain why, when China demanded Hong Kong back in the 1980s, Britain agreed to give it back. And it did so even though surveys suggest that the people of Hong Kong overwhelmingly would have preferred to stay British subjects (or, at least, would have preferred to stay independent of the mainland China government).[32]

The incentives of colonies vis-à-vis independence have also changed, albeit in precisely inverse fashion. The remaining colonial territories overwhelmingly oppose independence,[33] and they have pushed towards the center more than they have

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[30] *E.g.,* NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF US INTERVENTION TO PROTECT PROPERTY OVERSEAS, 1893-2010, 236-242 (2013) (describing the Philippines and the US desire to avoid giving rights to outsiders).

[31] OOSTINDIE & KLINKERS, *supra* note 2, at 223-24 ("[T]here is the factor of perspectives. Freedom of migration, for example, may be deemed crucial to the individual Caribbean migrant who will therefore be satisifed with a metropolitan passport and the right of abode, whereas in the metropolis this may be experienced by locals as an aggravating factor in social issues."). This is of course an oversimplification. As Aldrich and Connell note, "[b]y the 1980s the most rapid phase of emigration from the territories had ended: the economies of metropolitan states faced recession, governments actively discouraged immigration and a conservative backlash threatened migrants." ALDRICH & CONNELL, *supra* note 1, at 104.

[32] For a discussion, see Blocher & Gulati, *Market for Sovereign Control*, *supra* note 14..

[33] ALDRICH & CONNELL, *supra* note 1, at 117 ("Support for independence [of Puerto Rico], in various forms, has remained strikingly consistent in the post-war years, but has always been tiny."); *id* at 121

tried to pull away from it.[34] Those that remain are those that have successfully resisted efforts to make them independent.[35] In fact, "[i]n no territory has a majority of the electorate cast its vote for parties or politicians who unequivocally demand independence."[36] This is especially true in smaller, more isolated territories, where opposition to independence is "almost unanimous and has rarely even been considered," despite support from the UN Special Committee on Decolonisation[37]:

> Indeed, when Britain withdrew from its Pacific colonies in the 1970s Pitcairn resisted every effort of the United Kingdom to 'get off the hook', ensuring that it remained a 'captive patron'. The inhabitants of Anguilla and Mayotte actively resisted any move towards independence.[38]

Such sentiment is not limited to the smallest territories.[39] As Robert Aldrich and John Connell note: "In every contemporary territory, powerful reasons exist for choosing continued political ties with metropolitan powers; they range from concerns over security (from local civil or political unrest rather than external aggression), to dependence on transfer payments (in various forms) and access to migration opportunities."[40]

The economic incentives are straightforward enough. With a few exceptions like Bermuda, the majority of former colonies are poorer than their colonizers

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(noting that a majority opposed independence in French Polynesia even after French resumption of nuclear testing led to riots; "[t]hose who opposed independence expressed concern over the decline of French economic support"); *id.* at 124 (noting lack of support for independence in Martinique and Guadeloupe); *id*. at 139 (noting Cocos (Keeling) Islanders' and Christmas Islanders' overwhelming rejection of independence from Australia); *id.* at 140 ("Mayotte, having voted against independence in 1976, with 99.4 per cent of the electorate choosing France, seems destined to remain a French outpost for the foreseeable future ….").

[34] ALDRICH & CONNELL, *supra* note 1, at 165 ("Rather than move towards independence, territories have welcomed, even demanded, the greater involvement of metropolitan states.").

[35] OOSTINDIE & KLINKERS, *supra* note 2, at 217 ("As far as Westminster was concerned, all of the former British colonies had to go. The fact that at present a handful of Caribbean 'Overseas Territories' still come under the sovereignty of the United Kingdom should not, therefore, be attributed to the ardent wishes of Westminster, but rather to the stubbornness with which these islands have refused to accept independence.").

[36] ALDRICH & CONNELL, *supra* note 1, at 247.

[37] *Id.* at 139.

[38] *Id.* at 137 (internal citation omitted).

[39] *Id.* at 144 ("Whilst the smallest territories were often wholly opposed to any movement towards independence, opposition was also exceptionally powerful in such large territories as the French Caribbean *departments* … and in islands like Guam, where inhabitants sought stronger ties with the metropolitan power.").

[40] ALDRICH & CONNELL, *supra* note 1, at 164, 244.

(albeit richer than their neighbors,[41] which is also a significant fact), and many are dependent on external aid and subsidies.[42] Some residents support independence no matter the "cost," on the basis of dignity or other interests.[43] But for many others, dignity and self-governance are predicated on some degree of economic stability. As a member of Montserrat's Legislative Council said to the UN Special Committee on Decolonisation:

> Poverty is indeed a barrier to self-respect. Sovereignty based on poverty is a sham. Decolonisation that is a licence for mendicancy is a misnomer. So let the UN join us in a meaningful attempt to improve the economies of our small islands. Only then can we start to initiate meaningful discussion on the decolonisation process that will bring respect, dignity, and happiness to the people of Montserrat.[44]

In addition to obvious transfer payments, "compensation" comes in the form of nationality or citizenship in the metropolitan power. Indeed, for some residents of these former colonies, the single most valuable asset they might receive is a passport (or, perhaps better yet, a right to work),[45] although this entitlement was not initially given to all subjects of the former colonies,[46] nor are they necessarily treated equally with regard to other political rights.

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[41] ALDRICH & CONNELL, *supra* note 1, at 99; *see also* OOSTINDIE & KLINKERS, *supra* note 2, at 220 ("These non-self-governing territories may in many respects be less developed compared with their mother countries, but within their own region they make up the leading group of most privileged states.").

[42] ALDRICH & CONNELL, *supra* note 1, *Id.* at 111 ("Finance and tourism have enabled some well-placed territories to avoid the drift toward the dominance of the government sector, but most are highly dependent on the metropole, which has given them an economic security that would otherwise be impossible.").

[43] "The aspiration for independence is not simply reducible to economic categories or a history of development. Colonisation and decolonization remain fundamentally a question of dignity." Paul Neaoutyine, President of the FLNKS, January 1993 (quoted in ALDRICH & CONNELL, *supra* note 1, at 113).

[44] ALDRICH & CONNELL, *supra* note 1, at 126; *id.* (quoting island's chief minister: "We are not going into independence unless we are going to get more jobs, more bread and butter on the table. We will not be pushed into independence.").

[45] *Id.* at 108-09 ("[M]ost territories would prefer the kind of metropolitan access that is available to residents of French and other territories. . . . In some cases, as in the Cook Islands, this is a key factor discouraging demands for independence."); OOSTINDIE & KLINKERS, *supra* note 2, at 220.

[46] OOSTINDIE & KLINKERS, *supra* note 2, at 117 (noting that the French territories in the Caribbean "are French citizens in every respect" and that the "Dutch and American governments also have pursued a policy a free immigration from the Caribbean territories," albeit without voting rights; since 1999, "British citizenship (and so the right of abode) has been offered to those people of the Overseas Territories who did not already enjoy it."); *see also* Aldrich & Connell, *supra* note 1, at 138 (noting that residents of St. Helena had argued that they should be entitled to full British citizenship; in the

What if a nation wanted to wipe these costs off the books by expelling its former colonies, perhaps with the pretext of of granting them independence? The question is anything but abstract. To a surprising degree, the globe is *still* covered with colonies, in which millions of people live[47]:

> Portugal did not withdraw from its oldest colony, Macao, nor from its Atlantic islands. Spain remained in two North Africa enclaves and the Canary Islands. Britain and France kept a scatter of possessions around the world. Denmark continued to influence Greenland and the Faeroes, and even the Netherlands held on to two groups of islands in the Caribbean. European powers were not alone; the United States retained 'territories' and 'commonwealths' in the Pacific and Caribbean, notably Puerto Rico and Guam, …. These various territories – or some of them – may really be the last colonies.[48]

Their continuing existence shows that the history of decolonization is not over; it's not even past.[49]

For some colonies, domestic law might provide a safe haven against expulsion.[50] But not always. In the US context, Christina Duffy Burnett has argued that the *Insular Cases* established that territories like Puerto Rico "could be separated from the United States, or what I call here 'deannexed,' as long as they remained unincorporated. Preserving the option of deannexation was precisely the reason not to incorporate a territory in the first place."[51] Set against the

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words of a 1996 report: "Saint Helenians are not trying to become British. They are already, and always have been British'").

[47] ALDRICH & CONNELL, *supra* note 1, at 1 ("In an era that is bravely, and sometimes cynically touted as one of a New World Order, there is something seemingly paradoxical about the continued presence of colonies in a supposedly post-colonial world.").

[48] *Id.* at 2.

[49] WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951) ("The past is never dead. It's not even past."); *see also* John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 HARV. L. REV. 744, 745 (2007) ("It has been at least a century, … since the model of empire was so hotly contested in American public life.").

[50] OOSTINDIE & KLINKERS, *supra* note 2, at 219 ("Even if The Hague had wanted this, the Charter does not allow for the imposition of independence on the islands against their own will. Through decade after decade Antillean and Aruban administrators have made clever use of this fact. However much the Dutch insisted, they simply refused to cooperate.").

[51] Burnett, *supra* note 5,, at 802; *id.* at 854 ("[T]he doctrine of territorial incorporation did have something to add to the Court's territorial jurisprudence—namely, it established the constitutionality of territorial deannexation."); *see also Downes*, 182 U.S. at 307-08 (White, J., concurring) ("Suppose at the termination of a war the hostile government had been overthrown and the entire territory or a portion thereof was occupied by the United States, and … it became necessary for the United States to hold the conquered country for an indefinite period, or at least until such time as Congress deemed that it should be either released or retained because it was apt for incorporation into the United

contemporary headlines, this raises a very uncomfortable possibility. The people of Puerto Rico have consistently opposed independence from the United States.[52] But what would international law say if—perhaps in light of the island's current debt crisis[53]—the rest of the US were to attempt to force it on them?

Perversely, such efforts at forcible decolonizations might draw support from earlier statements against colonialism. For example, the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514), adopted in 1960, described "the passionate yearning for freedom in *all* dependent peoples" and found that "*all* people have an *inalienable* right to complete freedom, the exercise of their sovereignty and the integrity of their national territory."[54] If the right to "complete freedom" really exists, and is "inalienable," then the expulsion we describe would be not only permissible but required.[55] On this reading, colonies have not only a right but an *obligation* to be independent, and the former colonizers must facilitate that change. Indeed, it has been said that Resolution 1514 "reflect[ed] the prevailing international view that decolonization via accession to sovereignty was perceived as *necessary* and desirable."[56] Resolving these issues means navigating a central tension in international law: That between the territorial integrity of sovereigns (which would treat nations as the only relevant players) and the self-determination of peoples (which would allow the colonies themselves to have the final say).

States."); Paul R. Shipman, *Webster on the Territories*, 9 YALE L.J. 185, 206 (1900) (arguing that there was no moral or constitutional obligation to retain Puerto Rico); Edward B. Whitney, *The Porto Rico Tariffs of 1899 and 1900*, 9 YALE L.J. 297, 314 (1900) (arguing that annexed territory could be ceded). On the broader issues, see generally JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS (1979).

[52] Burnett, *supra* note 5, at 871-72.

[53] Mary Williams Walsh, *Puerto Rican Officials Warn Congress of Major Defaults Without Restructuring*, N.Y. TIMES, Feb. 5, 2016.

[54] *Declaration on the Granting of Independence to Colonial Countries and Peoples,* G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66-67, U.N. Doc. A/4684 (1960).

[55] Many "rights" guarantee a freedom to choose whether to engage in the protected conduct; inalienable rights typically do not. *See generally* Joseph Blocher, *Rights to and Not To*, 100 CAL. L. REV. 761 (2012).

[56] ALDRICH & CONNELL, *supra* note 1, at 158.

The point here is emphatically *not* to suggest that former colonies should be happy with their lot as territories,[57] but rather to illustrate that the story of decolonization involves colonial powers acting on their own incentives in addition to former colonies pursuing theirs, and that the balance of incentives with regard to independence may have changed. That raises the question at the center of our project: Could colonizers loudly proclaim their own guilt, argue that their sovereignty over the territories is not only voidable but void,[58] and then expel the former colonies for which they no longer have any use?

Nor is the issue of expulsion limited to former colonies. One can imagine all kinds of scenarios in which a nation might want to rid itself of a region on the basis of religious or political differences, or even a straightforward financial cost-benefit analysis. The initial question, then is whether expulsion should *ever* be an option. We think it should. But, in some (perhaps many) cases, the expeller should have to pay for doing so.

B. Against a Bright Line Prohibition on Expulsion

Expulsion is an extreme remedy, so if it is *ever* to be an option then it makes sense to consider the kinds of extreme circumstances that might justify its use: those in which a union is malfunctioning in such a way as to inflict serious harms on the people within it.

Imagine a region that persistently violates the basic principles of its nation, for example through ongoing human rights violations or persistent and severe economic corruption and waste. The nation responds with admonitions, political pressure, even economic sanctions and troops, all to no avail—"voice," in Hirschman's terms, has been ineffective.

Most people do *not* have a strong intuition that such malfunctioning unions must continue. Indeed, a great deal of effort in international law and practice has

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[57] *Cf.* Christina D. Burnett, *The Case for Puerto Rican Decolonization*, 45 ORBIS 433 (2001).

[58] *Cf.* A. RIGO-SUREDA, THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION—A STUDY OF UNITED NATIONS PRACTICE 353 (1973) ("Within the context of colonialism, self-determination has become a pre-emptory norm of International Law whereby a state's title to a territory having colonial status is void.").

been devoted to facilitating their termination by permitting regions to exit.[59] Such exits can improve overall welfare in the short run by ending the painful relationship, while deterring nations from inflicting harms on their regions.

The same logic, we think, applies in the opposite direction. After all, holding aside the question of fault (to which we will return), the costs of a harmful political union are reciprocal[60]—the union and its units all suffer from conflict. In the standard case, those costs are thought to be the *fault* of the nation, which is why the region gets the exit option. This is sensible enough, because the nation is usually the one with the power.

But the rump state will not always be the one at fault. If a minority region, even without dominating the national levers of power,[61] can inflict serious harms on others—the kind of harms that would justify secession, if inflicted by a state on region—then expulsion should be an option, even if not the first. Arguably, this is what happened in Algeria in the 1960s, when it was part of the French empire and the French seemed intent on keeping as much of that empire together as possible. However, the Algerian independence movement was imposing immense costs on the French government; to the point where the French decided to to leave (essentially expelling Algeria and its local population from French citizenship and EU membership).[62] History is littered with numerous other examples of colonies and regions imposing such high costs on the rump state that it leaves; essentially expelling the trouble-making region.[63] Of course, nations are generally more able and likely to exploit their regions than vice versa, so the standard for expulsion

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[59] *See infra* Section __.

[60] *Cf.* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[61] If the minority effectively controls the national government, then we do not think of it as a minority, at least vis-à-vis the nation.

[62] For discussions of this history, see e.g., TODD SHEPARD, THE INVENTION OF DECOLONIZATION: THE ALGERIAN WAR AND THE REMAKING OF FRANCE (2006); NEIL MACMASTER, COLONIAL MIGRANTS AND RACISM: ALGERIAN MIGRANTS IN FRANCE (1997).

[63] The precise role of economics in both the rise and fall of colonia empires is much debated. However, there is no doubt that high costs often played a role in determining whether an imperial power was going to exit a colony. *See, e.g.*, P.J. CAIN & A.G. HOPKINS, BRITISH IMPERIALISM: 1688-2000 (2001); David K Fieldhouse, *The Economic Dimensions of British and French Decolonization in Black Africa*, *in* BLACK AFRICA 1945-1980: ECONOMIC DECOLONIZATION AND ARRESTED DEVELOPMENT (1986); Herschel I. Grossman & Murat F. Iyigun, *The Profitability of Colonial Investment*, 7 ECONOMICS & POLITICS 229 (1995).

might therefore be higher than that for exit. But that is a matter of when and how, not whether, the option should be available.

There is at least one scenario in which expulsion might indeed be off the table, and that is where the nation itself has specified as much in its domestic law. For example, as noted above, most constitutional lawyers would probably take the view that no matter the misconduct, it is *constitutionally* out of the question for the US to expel an individual state, no matter what it does.[64] Some supra national organizations might have similar agreements of perpetual union in their constitutive documents. These explicit agreements regarding expulsion should generally be followed, especially where they specify the process of expulsion.

That said, it is not entirely obvious that a nation or organization should be able to legitimately forbid expulsion in all cases. Perhaps the power to expel should always be there to provide an escape valve in extreme cases where the costs of staying together are simply too high. After all, the principle of remedial secession cannot be contracted around, precisely because it is designed to permit exit in situations where a powerful party is imposing costs on a weaker one, in a fashion that one can safely say was not contracted for (or should not have been), and should not be permitted. For present purposes, our goal is to simply to show that expulsion should be a default option, not necessarily a mandatory one.

In any event, the rules regarding expulsion usually are *not* specified. But the lack of an explicit expulsion provision should not preclude the option, any more than the lack of a pre-nuptial agreement should preclude the possibility of divorce. As a default rule, and subject to proper limitations, explusion should be possible.

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[64] *Cf.* Downes v. Bidwell, 182 U.S. 244, 317 (1901) (White, J., concurring) ("[F]rom the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But [this] . . . cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of."); STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS § 7:2 at 113 (1995)("If the Civil War had established the indivisibility of this Nation, arguably a territory could never be granted independence once it was incorporated in the Union and its residents made citizens."); DAVID M. PLETCHER, THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR 327, 332 (1973) (noting that the power of the President and Congress to cede American territory was also disputed in the context of the Oregon boundary dispute with Britain).

And once one crosses that hurdle, then the question is what rules should govern its use.

C. National Incentives

The challenge, to our minds, is not evaluating the availability or desirability of expulsion in the abstract, but establishing when and how it should be an option. Just as we reject a bright line default rule against expulsion, so too do we reject a regime in which it is an unrestricted option—in Part II, we try to identify limitations within international law. As with most issues in international law and practice, however, the most important limitations would probably be imposed by the political incentives of the nations themselves.

Hirschman suggested that the choice between voice and exit depends on the degree to which members think they can influence the organization and its likelihood of improvement, as measured against the relative certainty of exit.[65] The analogous principle holds true in the context of expulsion: A nation will prefer expulsion when it believes that the region either cannot be induced to cooperate or that the costs of inducing such cooperation are too high (e.g., involving violence or a high level of subsidies paid by other actors). On the flip side, though, the threat that expulsion is possible gives regions an incentive to behave—particularly when membership in the nation brings significant benefits and expulsion is taken as a negative signal by future partners of the misbehaving region.[66]

Thinking purely in terms of national incentives, the availability of expulsion might impose costs on the broader political system. The prospect of nations and organizations dissolving easily might create a disincentive for individual parties to invest in the collaboration in the first place, since they might be opportunistically expelled at any point (absent the presence of strong non-legal sanctions such as

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[65] HIRSCHMAN, *supra* note 24, at 77.

[66] *Cf.* Laurence A. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1583-84 (2005) (noting that sometimes "states pursue exit (and threats of exit) not to dissociate themselves from future cooperation with other nations, but … as a strategy to increase their voice within an intergovernmental organization or treaty-based negotiating forum"); Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. INT'L L.J. 379, 382 (2010) ("A credible threat to exit an international agreement confers power on a state by allowing the state to demand a greater share of the gains from cooperation in exchange for participating.").

reputation).[67] Nations might use the threat of abandonment to coercively bargain with their regions or members perceived to be underperforming.[68] Even contemplating the possibility of expulsion, some have argued to us, might corrode the kind of commitment necessary to make nations and organizations function properly.[69]

In practice, we suspect that political incentives will militate against expulsion, just as they strongly dissuade nations from withdrawing from treaties even where no legal remedy would be available to the other party or parties.[70] Likewise, international organizations that have the power to expel a breaching member have rarely chosen to exercise it.[71] Plus, if the possibility of expulsion is so corrosive to relationships among regions that collaborate to form a nation, they can put a no-expulsion clause into their consititions or other formative treaty agreements. And, as best we know, these sorts of no-expulsion clauses agreements are rare. Indeed, the traditional rules of international law would give nations the power to cede regions as they see fit, and yet, at least for the past century or so, nations have rarely chosen to do so.

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[67] *Cf.* Joel P. Trachtman, *The Economic Structure of the Law of International Organizations*, 15 U. CHI. J. INT'L L. 162, 179 (2014) ("[A]s the cost of exit is reduced, the binding force of international law is also reduced.").

[68] *Cf.* Meyer, *supra* note 66 (noting that in reaching international agreements, "ascendant" states will typically negotiate either for a higher share of benefits or easier exit).

[69] *Cf.* Jerzy Makarczyk, *Legal Basis for Suspension and Expulsion of a State from an International Organization*, 25 GERMAN YEARBOOK INT'L L. 476, 477 (1982) ("[S]uspension or expulsion of a member may cause damage to the organization as well, and even to the whole concept of organized international cooperation ….").

[70] Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 259 (2010) ("[T]o the extent that there are incentives to comply with international law, such as reputational considerations, those incentives will presumably continue to exist despite a right of withdrawal.") (internal citation omitted); Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231 (2009); Meyer, *supra* note 66, at 394 ("Retaliation and reputational sanctions, though, remain available to curb unauthorized exit. In particular, unauthorized exit is a violation of a legal obligation that can result in a reduction of a state's reputation for complying with legal rules."); Trachtman, *supra* note 67, at 165-66 ("While exit is often formally costless, it can be substantively costly: the costs of lost opportunities for cooperation may exceed the benefits of exit.").

[71] *See* CHRISTOPHER F. BRUMMER, SOFT LAW AND THE GLOBAL SYSTEM: RULE MAKING IN THE 21ST CENTURY (2015); Boyko Blagoev, *Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality?*, 16 TILBURG L. REV. 191, 192 (2011).

The incentives are not hard to imagine. A nation that expels a region or member would earn a costly reputation as an unreliable partner,[72] thereby losing future opportunities for collaboration. Expulsion might even be interpreted to free the expelled region from its existing obligations—an argument often advanced against expelling breaching members from international organizations.[73] And while the forces that hold nations together may have weakened in some cases, they have not completely disappeared. In Hirschman's terms, *loyalty* to an organization (whether a nation or a brand) will reduce the likelihood of exit. We expect that the bonds of loyalty—patriotism, pride, culture and the like—will generally be strong within nations (less so, we suspect, within supra national organizations), and that they therefore will not seek thoughtlessly to expel their own regions. The exercise of voice through the normal mechanisms of domestic politics will likely always be the first option.

But it is not enough to rely on the existence of political incentives, because the overuse of expulsion could also threaten the *legal* rights of regions or members.[74] Allowing nations to expel regions or members could trample their interest in (perhaps right to) self-determination.[75] It could also lead to problems of statelessness, if the expelled region were left to fend for itself, or generate further oppression, if it were expelled *into* a repressive regime. These problems are too serious to be left solely to a prediction of national political incentives. As described

[72] Helfer, *supra* note 66, at 1622 ("Three variables in particular stand out in assessing exits' distinctive reputational effects: (1) the frequency of denunciation and withdrawal; (2) the relationship between entering and exiting treaties; and (3) the risks of opportunism in light of the pervasive uncertainty of international affairs.").

[73] Louis B. Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1388 (1964) (in the context of USSR's invasion of Finland, "Colombia made what was to become a stock argument against expulsion—that to expel the U.S.S.R. would release it from the obligations imposed by the Covenant and thus make it easer for the Soviet Government to achieve its aims").

[74] Makarczyk, *supra* note 69, at 481 ("This capacity to suspend a member state—unlimited by law and subjected only to the broadly defined 'interest of the organization'—brings indeed to mind a position of a subordinated entity, imposed on sovereign states … even if formally with their initial consent.").

[75] As we discuss in more detail below, the issue is actually more complicated. If the nation does not *want* the region, then the national majority's "self-determination" rights are also in play.

in more detail below, we favor—and we think that the best reading of contemporary law provides—a set of rules to prevent many of these problems.[76]

In trying to strike a balance between enabling expulsion and regulating it, we have situated ourselves uncomfortably between those who think that law forbids expulsion and those who think that the question is simply one of power and politics.[77] We think that the former camp is wrong about the law—the traditional rules of international law do not forbid expulsion, and actually make it too easy. To the latter camp, we concede the importance of economic and political incentives as drivers of national behavior. But we also believe that law can impact these incentives. We try to identify that law in the following section.

II. The Law of Expulsion

International law has rules that bear on the issue of expulsion, but those rules are problematic—they give countries nearly unlimited power to expel regions through cession. This power is hard to square with the principle of self-determination. Accordingly, we propose some modifications, and note some general principles of international law—prohibitions on physical expulsion and statelessness, for example—that would limit the terms of any particular expulsion.

A. Between Cession and Self-Determination

> It is for the people to determine the destiny of the territory and not the territory the destiny of the people.[78]

Nations have long had the power to cede territory without consulting the people living in that territory, and the world map reflects many examples of regions being expelled from their mother country and taken in by another, or (less

[76] *See infra* Section II.C..
[77] *See also* Blagoev, *supra* note 71, at 192 ("[F]ew authors have considered the question whether the expulsion of a Member State from the EU is legally possible. The intention to expel a Member State has been predominantly *political*, so it would be important to see whether such a possibility is *legally* available.").
[78] Western Sahara, 1975 I.C.J. 12, para. 122 (Oct. 16) (separate opinion of Dillard, J.).

commonly) simply left to fend for themselves. The power to expel looks like a form of the power to cede, which is well-established in international law.

Legally and otherwise, this reading of the rule gives too much power to countries, and not enough to the people living within them. The ascendance of the principle of self-determination (and its counterpart remedial secession), as well as changes in international practice, suggest that nations must obtain the approval of the people living in ceded territory, at least so long that region is respecting its basic obligations to the nation. We also believe—and existing law indicates—that, regardless of their power to cede territory, nations must respect collateral rules regarding citizenship, ongoing treaty obligations, and the like.

1. Cession

Traditionally, international law has accepted the power of states to acquire and dispose of sovereign territory through cession, defined by Oppenheim as "the transfer of sovereignty over state territory by the owner-state to another state."[79] Importantly, national agreement—and not that of the effected regions—is all that is required by the traditional rule:

> The hardship involved for the inhabitants of the territory who remain and lose their old citizenship and are handed over to a new sovereign whether they like it or not, created a movement in favour of the claim that no cession should be valid until the inhabitants had by plebiscite given their consent to the cession . . . But it cannot be said that international law makes it a condition of every cession that it should be ratified by a plebiscite.[80]

Other classic[81] and modern authorities are in accord.[82] Stephen Ratner notes that "states generally are free to agree on the disposition of disputed noncolonial (or

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[79] 1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 679 (Robert Y. Jennings & Arthur Watts eds., 9th ed., 1992). *See also* JENNINGS, *supra* note 15 (defining cession as "the renunciation made by one state in favour of another of the rights and title which the former may have to the territory in question. . . . It is a bilateral mode of acquisition in that it requires the co-operation of the two States concerned, whereas all the other modes are unilateral."); *see also* 3 J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 128-29 (1970) (categorizing cessions as involving either gratuitous transfer, sale, or exchange of territory); Amos S. Hershey, The History of International Relations During Antiquity and the Middle Ages, 5 AM. J. INT'L L. 285, 285 (1911) (describing a situation in which "a state acquires a portion of the territory of another through cession or conquest" as "[p]artial sucession").

[80] OPPENHEIM, *supra* note 79, at 684.

[81] WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 46 (2d ed 1884) ("The principles that the wishes of a population are to be consulted when the territory which they inhabit is ceded, has not

non-trust or –mandated) territory and its ultimate borders as they see fit."[83] Seokwoo Lee similarly concludes that "[i]nternational law does not seem to prescribe any specific limits on the right of a state to cede its territory. Accordingly, 'sovereign States are free to transfer any of their own territories to one another. . . . All that matters is that the cession takes place with the full 'consent of the Governments concerned.'"[84] This is not a legal authority that exists in the abstract—it is one that nations have employed throughout history. Some cessions have been conducted for the sake of political convenience, some in the aftermath of war, and some for straightforward financial reasons.[85]

Although the power of cession has few internal limits (agreement of the relevant nations is all that seems to be required), it is not free from constraint. For example, some argue that the power of cession must be reconciled with the "established rule of international law that a State may not deport or expel its own nationals."[86] As explained below, this may impose constraints on the actual mode of transfer, for example by requiring that residents in an expelled region be given the option to retain their citizenship.[87]

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been adopted into international law, and cannot be adopted into it until the title by conquest has disappeared."). The latter obstacle may well have been removed—it is not clear that a title to conquest would still be recognizable. KORMAN, *supra* note 98, at 40 (concluding that, today, the "right of conquest [is] unacceptable not only in terms of international morality but also in terms of international law").

[82] *See, e.g.*, Lee, *supra* note 15, at 19 ("[T]here is no serious contention to the effect that international law, especially in a non-colonial context, makes the conduct of a plebiscite mandatory in an inhabited territory that is the subject of rival sovereignty claims."); Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT'L L. 808, 811 (2006) ("[D]espite the evolution of the norm of self-determination of peoples, states are still under no general duty to consult or act according to the wishes of the population of a disputed territory with respect to its future status.").

[83] Ratner, *supra* note 82, at 811. Colonial territory is subject to the rule of *uti possidetis*, though even that rule can be contracted around. Joshua Castellino, *Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools*, 33 BROOK. J. INT'L L. 503, 549 & n.262 (2008) (noting that, despite *uti possidetis*, "it has always been possible to change boundaries through the consent of the state parties"); Ratner, *supra* note 82, at 811.

[84] Lee, *supra* note 15, at 10 (quoting 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 303 (1957)); Castellino, *supra* note 83 at 566 ("The law as it stands suggests that *uti possidetis juris* lines may be modified by consent.").

[85] For examples, see Blocher & Gulati, *A Market for Sovereign Control*, *supra* note 14.

[86] LOUIS B. SOHN & THOMAS GURGENTHAL, THE MOVEMENT OF PERSONS ACROSS BORDERS 85 (1992). *See generally* JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE (1995).

[87] *See infra* Section II.C..

2. Self-Determination

Despite the breadth of the cession power, there have always been dissenting voices, questioning the power of nations to cede or expel sovereign territory. Vattel, to take one prominent example, accepted the power of nations to alienate public *property*,[88] but would have placed some restrictions on their ability to transfer sovereign control over *people*:

> Some have dared to advance this monstrous principle, that the conqueror is absolute master of his conquest,—that he may dispose of it as his property …; and hence they derive one of the sources of despotic government. But, disregarding such writers, who reduce men to the state of transferable goods or beasts of burthen,—who deliver them up as the property or patrimony of another man,—let us argue on principles countenanced by reason and conformable to humanity.[89]

Vattel was unconvinced by the apparent examples to the contrary:

> I know that many authors, and particularly Grotius, give long enumerations of the alienations of sovereignties. But the examples often prove only the abuse of power, not the right. And besides, the people consented to the alienation, either willingly or by force.[90]

Vattel concluded that—absent "extreme necessity" or "when the public safety requires it"[91]—this is not a decision that a country can make on behalf of its regions. The nation "has not, then, a right to traffic with their rank and liberty, on account of any advantages it may expect to derive from such a negotiation."[92]

But even Vattel did not conclude that transfers were forbidden. For Vattel, the key was that approval for such transfer must be given by the true "owners" of

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[88] EMMERICH DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, § 25, at 116 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758) ("The nation, being the sole mistress of the property in her possession, may dispose of it as she thinks proper, and may lawfully alienate or mortgage it. This right is a necessary consequence of the full and absolute domain …. Those who think otherwise, cannot allege any solid reason for their opinion …."). [*Eds – I am not entirely sure how to cite Vattel, but I have a PDF of the original short section from which these quotes are taken, which I'd be happy to send you. My apologies for how messy the citations are here. JB]

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[90] Vattel, Law of Nations, at 30.

[91] Emer de Vattel, (Chapter XXL, pg 118). Even in these cases, the "province or town thus abandoned and dismembered from the state, is not obliged to receive the new master whom the state attempts to set over it," *id.*, though "[i]t is true, subjects are seldom able to make resistance on such occasions; and, in general, their wisest plan will be to submit to their new master, and endeavor to obtain the best terms they can." *Id.* pg. 119.

[92] Emer de Vattel, (Chapter XXL, pg 118)

the territory—the people.[93] He explained: "[A]s the nation alone has a right to subject itself to a foreign power, the right of really alienating the state can never belong to the sovereign unless it be expressly given him by the entire body of the people."[94] Vattel pointed to the Treaty of Madrid, by which King Francis I agreed to cede Burgundy to Emperor Charles V—a cession rejected by the people of Burgundy—and faulted the cession for violating domestic legal principles: "As the laws in express terms refused the king the power of dismembering the kingdom, the concurrence of the nation was necessary for that purpose."[95]

In other words, and absent extraordinary circumstances, the members of the transferred region must consent to the transfer, explicitly or otherwise.[96] Along these lines, and in the context of the post-World War I peace treaties and the importance of holding plebiscites regarding the redrawing of a number of national boundaries, US President Woodrow Wilson said in 1918: "Peoples . . . are not to be bartered about from sovereignty to sovereignty as if they were mere chattel and pawns in a game."[97]

Essentially, Vattel anticipated, and Wilson later helped create, what is now known as the right of self-determination—the power of a people to decide its own

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[93] *Id.* at 25 ("The state neither is nor can be a patrimony, since the end of patrimony is the advantage of the possessor, whereas the prince is established only for the advantage of the state.").

[94] *Id.* at 31-32. *See also* Stéphane Beaulac, *Vattel's Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America*, 63 LA. L. REV. 1327, 1345 (2003) ("Vattel is clear that the *express and unanimous consent* of the individuals living in the part of the territory ceded is required because 'sovereignty' belongs to the people and is thus unalienable. The only exception is in situations of pressing necessity or danger to public safety (such as in the context of wars), which validate the cession of territory as between the parties to such treaties. As for the individuals living there, they are not bound by even such a necessary transfer unless they consent to it, which may be implied by their mere silence.").

[95] Emer de Vattel, (Chapter XXL, pg 119)

[96] Beaulac, *supra* note 94, at 1354 (concluding that the Louisiana Purchase, "with the perceived threat of British invasion of the French colony, makes it possible to argue in favour of the exception provided for in cases of extreme necessity or danger to public safety. In this context, the consent requirement is so relaxed that the people's silence can be deemed enough for the necessary approval or ratification of a treaty transferring a part of the national territory. This is no doubt what happened in the case of Louisiana.")

[97] President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances, Delivered in Joint Session (Feb. 11, 1918), reprinted in 1 THE MESSAGES AND PAPERS OF WOODROW WILSON 472, 478 (Albert Shaw ed. 1924).

national affiliation.[98] Although its precise legal status remains unclear,[99] the general trajectory of self-determination has been from a political principle to a right recognized in foundational legal documents such as the UN Charter.[100]

To the degree that self-determination operates as either a strict legal limitation or, at the least, an aspirational principle,[101] it requires nations to account for their regions' preferences.[102] As one authority puts it: "In the end, states may be free to set their borders as they choose, but the norms governing territorial sovereignty offer them critical signposts to reach agreement on the invisible lines that still define our international order."[103]

Importantly, as a matter of practice, nations *do*, especially in recent years, almost always seek the approval of regions transferred through cession.[104] This is particularly relevant in the context of the former colonies

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[98] SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 36-37 (1996) (tracing the domestic principle to the French Enlightenment, and citing Vattel to support the international version).

[99] Allen Buchanan, *Theories of Secession*, 26(1) PHIL. & PUB. AFFAIRS 31, 33 (1997) ("[T]he consensus among legal scholars at this time is that international law does not recognize a right to secede in other circumstances, but that it does not unequivocally prohibit it either.").

[100] International Covenant on Economic, Social, and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171. G.A. Res. 1541 (XV), U.N. Doc. A/Res/1541 (XV) (Dec. 15, 1960) (explaining that self-determination could lead to secession and the formation of a new state, association of a territory with an existing state, or integration of a territory into an already existing state); Western Sahara, 1975 I.C.J. at 122 (separate opinion of Judge Dillard) ("It is for the people to determine the destiny of the territory."); SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES, AND INTERNATIONAL LAW 9 (1997) ("Practice since the establishment of the United Nations leaves no doubt that self-determination has been transformed into a binding rule of international law (*jus cogens*).").

[101] KORMAN, *supra* note 98, at 39-40 ("It was certainly the case, then, that by the nineteenth century, there had been a definite and discernible change in the moral tone or atmosphere in which international relations were conducted, in consequence of the great political push that had been given by the French Revolution to the doctrine of the self-determination of peoples.").

[102] ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 190 (1995) ("In the case of such transfers, the States involved are duty-bound to ascertain the wishes of the population concerned, by means of a referendum or plebiscite, or by any other appropriate means that ensure a free and genuine expression of will."); *id.* at 193 (concluding that a transfer without such a plebiscite "would be contrary to *jus cogens* and could therefore by declared null and void"); KORMAN, *supra* note 98, at 37 ("[I]f the principle of self-determination applies, then a victor cannot have a right to rule by virtue of *conquest*, but only by virtue of the people's *consent*."); SHARMA, *supra* note 100, at 213 (arguing that, with qualifications, self-determination "is a right under international law and its exercise can be fundamental as a modality for the lawful transfer of territorial title").

[103] Ratner, *supra* note 82, at 829.

[104] *See* 1 OPPENHEIM'S INTERNATIONAL LAW 434-35, 455-57 (H. Lauterpacht ed., 5th ed. 1937) (noting that even when territory is obtained through prescription, it is sometimes ratified by plebiscite). *See also* CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 44

discussed above, since they might be prime candidates for involuntary expulsion, and most are determined to remain part of the colonizing country.[105] As Berna Thompson-Murphy, a Cayman Islands leader, explained in the course of opposing a visit from the UN Special Committee on Decolonisation:

> The UN has a responsibility to investigate whether colonies would want to become independent. At one time, this was a useful exercise, as there were some colonies which were oppressed by the mother countries; but there are very few, if any, colonies which still fall into this category. In the case of Cayman we are fully committed to remaining a crown colony. . . . . Even the discussion of independence is out of the question. . . . . If the foreign press headlines say 'UN Commission returns from Cayman following negotiations for independence' you can bet we'll see investors' money leaving Cayman immediately after. We can't allow them any room to suggest that independence can even be discussed.[106]

Such opposition has generally been successful, at least in recent years. As Aldrich and Connell note, "No territory has been thrust into independence against its will,."[107] Antonio Cassese has an even stronger take:

> Neither State practice nor resolutions adopted by the United Nations or other intergovernmental organizations has recently laid special emphasis on the principle that in the case of a transfer of territorial sovereignty by one State to another, the wishes of the people concerned should always be taken into account. This however does not mean that this has been discarded or neglected by States or international organizations. The truth of the matter is that the concept was simply regarded as obvious,

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(2005) ("The practice of holding plebsicites to determine whether a transfer of territory accords with the will of the majority of inhabitants would seem desirable as a rule, as in the case of East Timor in 1999."); KAREN KNOP, DIVERSITY AND SELF DETERMINATION IN INTERNATIONAL LAW 12-13, 159-178 (2004) (detailing recent instances of transfers of sovereign territory, most of which have occurred only after obtaining the approval of the local populations); Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 LAW & HIST. REV. 621, 628 (2008) (crediting 18th century French practice for the norm that cessions of territory between nations are not valid unless popularly approved); Timothy William Waters, *The Blessing of Departure: Acceptable and Unacceptable State Support for Demographic Transformation*, LAW & ETHICS HUM. RTS. 9, 21-22 (2008) (noting that although "there is no actual obligation," there is "precedent for the practice of consulting an affected population")..

[105] ALDRICH & CONNELL, *supra* note 1, at 247 ("Self-determination increasingly favours constitutional dependency rather than sovereign independence.").

[106] *Id.* at 142 (quoting New Caymanian, Apr. 30, 1993).

[107] *Id.* at 162. Elsewhere, however, the authors note that "if the inhabitants of several of the small former British colonies had been offered a referendum on their future status, and specifically asked if they wanted to opt for full British citizenship and integration into the United Kingdom, there is every chance they would have voted overwhelmingly to do so." ALDRICH & CONNELL, *supra* note 1, at 164 (internal quotation marks omitted).

> that is as logically following from the whole thrust and basic concept of self-determination.[108]

The challenge, of course, is to reconcile this "basic concept" with the longstanding and foundational power of cession. Indeed, it has been said that "the defining issue in international law for the 21st century is finding compromises between the principles of self-determination and the sanctity of borders."[109]

We do not purport to solve that "defining issue." Our admittedly partial and imperfect solution is to conceptualize both sovereignty and self-determination in functional terms—as legal fictions deisgned to further basic goals of the international system, including peace, stability, and good governance. When a state egregiously undermines those principles, it loses the benefit of the legal fiction. One sees this in international legal principles—it may be too much yet to call them rules—regarding remedial secession, humanitarian intervention, the responsibility to protect, all of which deny the shield of sovereignty to oppressive and unrepresentative governments.

What this suggests is that sovereignty and quality of governance are linked—a point made at length by those who have argued for recognition of a "fiduciary duty" between states and citizens in international law.[110] The framework we describe in Part III is based on a similar view, and therefore conditions the power of expulsion on the region's behavior, and not—as the standard reading would do—solely on the nation's wishes.

Our framework does not incorporate any *particular* view of governance, but rather rests on the notion that good governance is what entitles nations to the benefits of sovereignty, and, likewise, that good behavior is what entitles regions to stay within a nation even against its wishes. Where a nation becomes oppressive or unrepresentative, it may forfeit its claim to territorial sovereignty—that is the principle of remedial secession. Where a region engages in equivalent behavior, it

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[108] CASSESE, *supra* note 102, at 189.
[109] Michael P. Scharf, *Earned Sovereignty: Juridicial Underpinnings*, 31 DENVER J. INT'L L & POL'Y 373, 373 (2003). *See also* CASSESE, *supra* note 102, at 190 (1995); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L. L. 177 (1991).
[110] *See, e.g.*, EVAN J CRIDDLE & EVAN FOX-DECENT, THE FIDUCIARY CONSTITUTION OF HUMAN RIGHTS (2009).

may forfeit its claim to remain within a sovereign that no longer wants it—that is the principle of expulsion.

B. Independent Constraints

Although the preceding discussion tells us that international law does not (and should not) preclude expulsion as a *general* matter, other rules and principles would impose important and desirable constraints on the terms of expulsions.[111]

First, expulsion could be disfavored or even ruled out on the basis that it conflicts with international law's norm in favor of stable borders. As R.Y. Jennings puts it: "[T]he bias of the existing law is towards stability, the *status quo*, and the present effective possession; the tendency of international courts is to let sleeping dogs lie. This is right, for the stability of territorial boundaries must always be the ultimate aim."[112] Perhaps the most notable instance of this bias is in the doctrine of *uti possidetis*, which freezes the borders of newly independent states based on boundaries drawn by their colonial administrators.[113] The strength of *uti possidetis* is such that it trumps most other considerations of international law, perhaps even including the principle of self determination.[114] Combined with related principles in

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[111] One big exception is worth noting: As a general matter, cessions and other changes in sovereign control do not relieve the host nation of its existing obligations under international law—treaty obligations involving the people or the territory that has been ceded, for example. The same would of course remain true of expulsions, and the usual rules regarding succession and international obligations would remain in effect.

[112] JENNINGS, *supra* note 15, at 70; Stuart Elden, *Contingent Sovereignty, Territorial Integrity, and the Sanctity of Borders*, 26(1) SAIS REV. OF INT'L AFFAIRS 11, 11 (2006) ("Since the end of World War II, the international political system has been structured around three central tenets: the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries."); Ratner, *supra* note 82, at 809 ("Boundaries secured by legal agreement can be changed by future agreement, but states and international organizations view revision as an exceptional remedy. Contemporary manifestations of this principle include the rule in the Vienna Convention on the Law of Treaties precluding reliance on *rebus sic stantibus* to challenge a border treaty, the rule in the Vienna Convention on the Succession of States in Respect of Treaties denying that succession has any effect on border treaties, and the presumptive inheritance of colonial-era boundaries by new states.").

[113] Frontier Dispute (Burk. Faso v. Republic of Mali), 1986 I.C.J. 554, para. 20 (Dec. 22) (describing *uti posseditis* as a system in which "administrative boundaries" are "transformed into international frontiers in the full sense of the term."); Elden, *supra* note __, at 12 ("This norm calling for the perpetuation of the territorial *status quo* was equally apparent during decolonialization, when states inherited the boundaries of colonial divisions under a legal principle known as *uti possidetis*.").

[114] Matthew M. Riccardi, *Title to the Aouzou Strip: A Legal and Historical Analysis*, 17 YALE J. INT'L L. 301, 428 (1992) ("In general, uti possidetis has succeeded in Africa against claims based on historical, ethnic, geographical, or economic considerations, because the adjustment of boundaries

treaty law,[115] the result is that "international law is precluded from raising legal questions and seeking self-correction with regard to the well-documented woes of colonialism."[116]

Stability, however, is favored for an instrumental reason—on the basis that the status quo can help prevent conflict by providing stability.[117] And history suggests that this supposition has not been borne out. One study found that "roughly one-third of the then existing land boundaries were subject to dispute at some time" between 1950 and 1990.[118] Even scholars who believe that sticky borders have reduced the number of border conflicts note that it has contributed to *internal* conflicts.[119] Despite—or perhaps because of—the OAU's early support for *uti possidetis*, Africa is full of illustrative examples.[120]

In other words, the stability norm seems largely to be failing on its own terms, and permitting expulsion—with the limitations and standards discussed

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based on these other principles threatens to destabilize governments."); CASSESSE, *supra* note __, at 192-93 ("In this area, the principle of self-determination, instead of influencing the content of international legal rules, has been 'trumped' by other, overriding requirements.").

[115] JOSHUA CASTELLINO & STEVE ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS 115 (2003) (arguing that the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Succession of States in respect of Treaties "amount to an attempt to rule out the possibility of principled boundary readjustment in the post-colonial era").

[116] Castellino, *supra* note __, at 511; CASTELLINO & ALLEN, *supra* note 115, at 114 ("[I]nstead of seeking territorial settlement, *uti posseditis* seeks to 'settle' people within fixed territories. Thus the norm treats the need for territorial 'order' as being more important than the 'identity' of a people.").

[117] Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1, 65 (2010) ("The primary rationale for the adoption of the principle (of *uti posseditis*) has been to avoid territorial conflict among post-colonial states, particularly in the light of international law's primary role—preservation of order."); Jan Paulsson, *Boundary Disputes Into the Twenty-First Century: Why, How . . . and Who?*, 95 AM. SOC'Y INT'L L. PROC. 122 & n.1 (2001) (noting that "[i]nternational law has developed a normative framework to support the proposition that stable boundaries mean reduced conflict," and offering as support "the Charter of the United Nations, which recognizes that the sovereignty of a state is absolute and exclusive and that states must respect the territorial integrity of one another");

[118] Paulsson, *supra* note __, at 123 (noting 129 such conflicts) (citing PAUL K. HUTH, STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT (1996)); *see also* Burghardt, *supra* note __, at 226.

[119] A.M. McHugh, *Resolving International Boundary Disputes in Africa: A Case Study for the International Court of Justice*, 49 HOWARD L.J. 209, 218 & n.73 92005) (arguing *uti possiditis* has led to "a relatively limited number of border disputes within Africa, and almost no border wars" but that "Africa has been plagued by internal conflicts, due in part to the arbitrariness of borders as drawn up by European colonizers").

[120] Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

below—might facilitate peaceful divorces, and help vindicate the principle of self-determination.[121] Maintaining bad borders can be costly, particularly when people and regions are bundled together according to the whims of colonial masters, rather than as a function of an real commonalities or synergies.[122] To the degree that *uti possiditis* precludes welfare-enhancing border changes, it should—and, we think, can—be rejected.

Second, international law generally prohibits "mass expulsion," defined as "an act or behavior by which a State compels a group of aliens to leave its territory."[123] This is not a blanket prohibition. It holds that the power of mass expulsion can only be "be exercised in conformity with the principles of good faith, proportionality and justifiability, with due regard to the basic human rights of the individual concerned,"[124] a condition that we support. And the prohibition on mass expulsion does not squarely apply to the scenarios described here, because the expulsions we have in mind do not involve forcing anyone to physically move—which makes it less so. Expulsion, in our framework, moves *borders*, not people. People can stay in their homes and communities, thus avoiding many of the harms that the prohibition on "mass expulsion" was meant to address.

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[121] SHARMA, *supra* note __, at 334 ("The additional difficulty is that *uti possidetis juris* reflects the prescription of territorial integrity based on the policy of stability of frontiers, and as such it conflicts with another principle, namely, the rights of peoples to self-determination, which is based on the policy of change."); *see also* Case Concerning the Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. 554, 567 (22 Dec. Judgment) (privileging *uti possidetis* over self-determination).

[122] JOHN AGNEW, GEOPOLITICS: RE-VISIONING WORLD POLITICS 102 (1998) (arguing that colonialism resulted in "lines on a map which had little relation to underlying cultural or economic patterns. . . . These designations continue to haunt these regions to this day."); CASTELLINO & ALLEN, *supra* note __, at 7 ("Post-decolonization, these artificially created entities have been exhorted, in the name of coherent 'national identity,' to create for themselves national myths and legends .... [h]owever, in many instances these myths and legends have not proved adequate in peacefully sustaining the post-colonial state.")

[123] Maurice Kamto, Third Report on the Expulsion of Aliens (19 April 2007, A/CN.4/581), at 132.

[124] JULIA WOJNOWSKA-RADZINSKA, THE RIGHT OF AN ALIEN TO BE PROTECTED AGAINST ARBITRARY EXPULSION IN INTERNATIONAL LAW 17 (2015) ("The power of expulsion must be exercised in conformity with the principles of good faith, proportionality and justifiability, with due regard to the basic human rights of the individual concerned.") (quoting report of the International Law Association); *see also* Andric v. Sweden, App. No. 45917/99, 28 Eur. H.R. Rep. CD218, CD218-20 (1999) ("[C]ollective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.").

Relatedly, international law disfavors the creation of stateless peoples—those with no citizenship in a state recognized by the existing community of nations.[125] To the degree that an expulsion stripped people of citizenship, this rule could be violated. Consider, for example, that in 1981, the Thatcher government passed the Nationality Act of 1981, stripping the right of UK citizenship from residents of the British "overseas territories."[126]

There are at least three ways to prevent the statelessness problem. One is for the region to become part of another country, and its people to obtain new citizenship. Another is for the expelled region to be welcomed into the international community as a new state,[127] a prospect that would be facilitated if the expelling nation were to recognize it as such.[128] But it is not enough to count on this uncertain recognition. A stronger remedy, which we support, would provide that the residents of the expelled territory retain their citizenship in the parent nation until such time as they can acquire alternative citizenship (either in their own nation or another). This would effectively mean that they would be expatriates, at least for a time. Similar rules often apply in the case of cessions wherein the nations involved in the cession typically make some provision for the citizenship of the people living in the ceded territory.[129]

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[125] *See, e.g.*, The Concept of Stateless Persons under International Law, Expert Meeting Organized by the Office of the United Nations High Commissioner for Refugees, Prato, Italy, 27-28 May 2010, http://www.unhcr.org/4cb2fe326.html.

[126] Citizens of the former colonies, the members of the Commonwealth such as Pakistan and India, had been stripped of their rights to even visit the U.K. well before this – the underlying fear being that British culture would be overwhelmed. In 1981, the underlying concern in the U.K. appears to have been the fear of immigration from Hong Kong, in the wake of the upcoming Chinese takeover. *See, e.g.*, AVTAR BRAH, CARTOGRAPHIES OF DIASPORA: CONTESTING IDENTITIES, 38-41 (1996); Anthony Browne, *Banished Islanders are British Again*, THE OBSERVER, May 11, 2002.

[127] Christian Hillgruber, *The Admission of New States to the International Community*, 9(3) EUR. J. INT'L L. 491 (1998). Writing in 1963, Jennings noted that the emergence of the new states was "by far the most important case of territorial change at the present time" and yet "international law is singularly undeveloped, uncertain, and … comparatively unstudied."

[128] *Id.* at 504-05.

[129] Christina Duffy Burnett notes that Carman Randolph, in his analysis of the *Insular Cases*, had concluded that Justice White's concurring opinion had discussed "the question of sale from the premise that selling United States territory means selling citizens." Randolph, however, insisted that selling land is not the same as selling the people living on it. Carman F. Randolph, *The Insular Cases*, 1 COLUM. L. REV. 436, 460-61 (1901) (cited in Burnett, *supra* note 5, at 864).

An objection here is that it might be hard to force the nations doing the expulsion to provide citizenship. Or, more realistically, other nations might not wish to exert the effort to police the remedies. One way out of this is for the region that was expelled to have a damages claim against the remainder of that nation that expelled it. That claim that would come into play as a remedy for the failure to grant citizenship. If some other country were to "adopt" the expelled region, it might even take over the claim and pursue it against the originally expelling country.[130]

Although we do not pursue the question in any detail here, it might make sense to create two separate sets of rules governing expulsion from nations: One for scenarios in which a region is transferred into another country (the traditional cession) and another for those in which the region is left on its own (the mandatory secession). In the former case, statelessness is not an issue, though the citizens of the region should still be given an option of retaining their former citizenship. In the latter case, the issue of statelessness is a live question.

Third, international law likely prohibits nations from ceding territory when doing so would put the residents of that territory in danger of oppression and violence. We would retain this rule as well. Expulsion, no less than cession, should be forbidden where it would put the residents of the ceded/expelled territory into harm's way. To cede a region to country knowing that its people would face oppression—giving a religiously homogenous region over to a country known for persecuting that religion—would be little better than inflicting the oppression directly.

Generally speaking, these rules reflect an ambivalence in international law: it places some limits on the power of nations to fit people to borders, but almost none on the power of nations to fit borders to people. This is perhaps understandable, since, historically speaking, nations have tended to resolve tensions between people and borders by moving the former, sometimes with horrific force. For the reasons

[130] We describe a conceptually similar damages claim in Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 49 COLUM. HUM. RTS L. REV. (forthcoming 2016), *available at* http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2674831.

above, we think that some of the same legal restrictions should apply to shifting borders as well.

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Having tilted at a succession of giants, we must consider the possibility that they were windmills all along. Perhaps there is simply no point in discussing expulsion, particularly in the situations we envision—oppression, extreme misbehavior, and the like—as if they presented *legal* questions.[131] As with questions of secession or revolution, the only coherent answers might be political.[132]

The implications of this argument for our project are somewhat ambiguous. It suggests that whatever legal standards we discover or propose are unlikely to have much impact on actual practice and that the political considerations discussed above are all that matters. While we concede (as everyone must) that international law has imperfect enforcement mechanisms, we do not see it as irrelevant.

In fact, we think that our proposal is better insulated against these charges than many other projects in international law. To a greater degree than, for example, some approaches to international human rights, our framework not only accounts for, but actually depends on, nations acting out of self-interest. In areas of international law where the rules are seen as contributing to nations' overall self-interest (even if not in a particular case), compliance with directives is much stronger—consider the remarkably high level of compliance in sovereign debt cases, even where nations might have plausible arguments for avoiding payment.

Even if it is true that the expulsion can only be evaluated in extra-legal terms, the basic framework of our argument would not change much. The framework we propose would be better understood as a description of best practices, rather than

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[131] Weiler, *supra* note 11, at 2412 ("It takes no particular insight to suggest that should a Member State consider withdrawing from the [European Coal and Steel] Community, the legal argument will not be the critical or determining consideration.").

[132] Sohn, *supra* note 73, at 1424 ("Expulsion seems to be more a weapon of the politician than the statesman."); Chi Carmody, *On Expelling Nigeria from the Commonwealth*, 34 CANADIAN Y.B. INT'L L. 273, 285 (1996) ("[E]xtra-legal considerations play a large role in decisions to expel."); *see also* KONSTANTINOS D. MAGLIVERAS, EXCLUSION FROM PARTICIPATION IN INTERNATIONAL ORGANISATIONS 65 (1999) ("[S]tates would not be prepared to adopt exclusion clauses but would seriously attempt to persuade other Members to adopt constitutional acts aiming to bring about results similar to expulsion. These acts, from a legal, as opposed to political, perspective, usually lack the required justification.").

legal rules, but the basic principles would be the same. What, then, are those principles?

III. Towards a Framework

In this final Part, we attempt to set out a framework with which to evaluate the legitimacy of expulsion. Our thoughts here are tentative and general—every nation and supra national organization is unique in its legal arrangements, history, and political incentives. Nevertheless, some tentative observations are possible.

We begin with some general propositions derived from the preceding discussion:

- There are scenarios in which a flat rule against expulsion—whether from nations or supra nationals—is undesirable.
- At the same time, expulsion is a powerful tool that could be misused. It should be subject to limitations.
- Where nations have provided for their own explicit rules regarding expulsion, those should generally be followed.
- The question of expulsion is not solely one of politics; law matters.
- Under traditional rules of international law, nations can cede territory as they wish, thereby giving them the power to expel their own regions.
- This unchecked power to cede territory is inconsistent with the principle of self-determination.
- While international law permits expulsion, it generally does not permit statelessness or stripping citizenship. If territory is expelled, the people who live there must have the option to retain their citizenship.[133]

[133] In this respect, we may be imposing an additional requirement beyond what international law already requires. JOYNER, *supra* note 104, at 44 ("When territory is ceded by one state to another, the ceding state has the power to transfer the allegiance of the inhabitants, and the acquiring state is obligated to confer nationality on those persons, though it is not necessarily required to give them political rights as citizens."). Doing so may make political sense, in any event. *Cf.* ALDRICH & CONNELL, *supra* note 1, at 232 ("Macao's population has been less reluctant about the return of the city to China because .... Lisbon extended rights of citizenship to many Macanese who might wish to settle in Portugal.").

Based on those propositions, and the analysis in the preceding sections, we see three categories of expulsion, each with its own rules, and each separated from the others based on the governance and degree of "fault" in the region being expelled.

A. Scenario 1: Well-behaved Regions Cannot be Involuntarily Expelled

We begin with a strong default rule: So long as a region is honoring its basic responsibilities to the nation, it cannot be expelled against its will.

This would represent a greater restriction against expulsion than international law currently seems to provide. As noted above, international law apparently imposes no *prima facie* limitations on the power of states to cede regions,[134] even in the absence of regional approval. But that rule cannot be reconciled with the principle of self-determination, nor is it desirable on its own terms. If it were accepted, then nations could jettison former colonies or cast off poor regions with impunity, violating the implicit bargains that hold nations together, threatening the welfare of the people living in those regions, and maybe even destabilizing the international order. And as a legal matter, we think that the principle of self-determination—especially when combined with related rules regarding statelessness and citizenship, and also with the current practice of seeking regional approval for cessions—provides strong support for the view that international law no longer tolerates cession (i.e., expulsion) purely at the option of the state.

If a nation wanted to expel a well-behaved but undesirable region, it would have to do so by negotiating directly with the region itself. The way to demonstrate this approval would probably be through a plebiscite—the usual means of

[134] As noted above, such expulsions would have to respect a variety of side constraints, but the expulsion itself is not forbidden.

effectuating self-determination interests.[135] The United Nations might play a role in organizing and conducting such plebiscites, as it has done in the past.[136]

The region could hold out, of course—its right to remain in the nation would be protected by a "property right" in the Calabresi/Melamed sense[137]—but a deal might be reached in some cases. Perhaps the United States could cover Puerto Rico's debts and guarantee its people the option of continuing US citizenship, in return for "granting" the island independence. Some elite European intellectuals want the EMU to offer the same basic deal to Greece.[138] As always, such agreements would have to be monitored for fraud, threats of force and the like, the existence of which would—in keeping with basic principles of existing treaty law—void the relevant agreement.[139] But in general, if a region or member state is not at fault for the deteriorating relationship, then it cannot be expelled against its will. This means, for example, that a nation could not expel a region simply because it is poor.

B. Scenario 2: Malefactor Regions Can be Remedially Expelled

On the opposite end of the spectrum are scenarios in which a region is disregarding its basic obligations to the nation, and is inflicting serious harms on it while refusing to leave. In this narrow set of cases, we argue that the nation should have the option of "remedial expulsion." In arguing as much, we do not assume that remedial expulsion is (yet) an enforceable principle of international law. But we believe that its ascending influence is undeniable, and that it meshes well with the general principle of self-determination.

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[135] JENNINGS, *supra* note 15, at 78 ("Self-determination is frequently coupled with the technique of plebiscite to give it practical realization; though it is clearly a technique suited only to particular kinds of situations, needs careful international control if it is not to be abused, and usually depends in any case upon the initial agreements of the parties concerned.").

[136] JENNINGS, *supra* note 15, at 78-79 & n.1 ("It seems likely that the plebiscite still has a part to play in certain kinds of situation for resolving the question of the proper destination of certain kinds of territory; and indeed the United Nations has already organized plebiscites on a number of occasions."); *id.* (listing, *inter alia*, plebiscites in Togo, the British Cameroons, West Samoa, French Togo-land, and Belgian Ruanda-Urundi)

[137] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[138] *See supra* note 10 and sources cited therein..

[139] Lowell B. Bautista, *The Historical Context and Legal Basis of the Philippine Treaty Limits*, 10 ASIAN-PAC. L. & POL'Y J. 1, 11 (2008).

It is tempting, in fact, to simply treat expulsion as a special category of secession—a majority secession, perhaps—and subject to the same (generally strict) conditions and prohibitions. The two scenarios are very much analogous, but not identical. The general prohibition on secession is a function of the national right to territorial integrity—a prerogative of the national government—and that right simply is not at issue when the "nation" itself is the one severing ties. If Spain were to try to expel Catalonia, for example, that decision would be made through the regular mechanisms of the recognized Spanish government, and so could not be said to threaten the government's own interests. If Catalonia were to secede, that decision would be made by the Catalans, who are not currently a sovereign nation. The former scenario—the one that interests us—employs existing governmental machinery. This is why territorial integrity (a prerogative of the sovereign) is not undermined by cession, but only by *se*cession.

Even so, the logic underlying the right to remedial secession might apply in both cases. In the standard version—a minority attempting to engage in remedial secession—the threshold of mistreatment is high.[140] In practice, it seems that a region must suffer serious human rights violations before it has a legal right to leave or for the international community to intervene.

What's good for the regional goose should be good for the national gander. Where a region imposes the same kind of human rights violations on the rest of the nation that would, if imposed in the opposite direction, justify its remedial secession, then we see no clear reason why the nation should not have the same option. "Remedial secession" of the majority—or a forced remedial secession of the region, amounting to nearly the same thing—would simply vindicate the same underlying principle. (Recall that even Vattel would permit expulsion in cases of "extreme necessity" or "when the public safety requires it."[141])

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[140] Reference re Secession of Québec, 37 I.L.M. 1340, 1371 (1998) ("A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances."); William W. Burke-White, "Crimea and the International Legal Order," (July 2014) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474084.

[141] Emer de Vattel, Chap XXL, pg. 118.

Such scenarios will be rare. If a particular region or majority were able to establish dominance *within* government, then the analysis here would not apply—the government would be the malefactor, and the usual rules of remedial secession would be in effect. And typically, nations have sufficient means to protect themselves against their regions using the basic tools of sovereign power, including force. (These are essentially the elements of "voice" vis-à-vis regions.) But, from the perspective of nearly any important value—general welfare, democracy, humanitarian considerations—why should nations be encouraged to employ *those* tools rather than simply engaging in a clean break?

The analogy between secession and expulsion is not perfect, of course. Either route terminates the union, but not necessarily in identical fashion: compare a spouse who walks out of the home to one who is kicked out. In either case, the relationship may be terminated, but collateral consequences are different. The primary reason for expulsion to be seen as having different implications than exit, is that the party doing the expelling is the rump state – it gets to choose to keep all the benefits that come from the apparatus of statehood. These benefits include things like membership in international organizations, name, flag, currency, reputation as a long-time dependable contracting party, and so on.[142] Because the value of these collateral benefits to the rump state might be quite high, it makes sense to set the standard for expulsion higher than that for exit.

One might worry about a nation using invented violations as a pretext for expelling regions they do not want, or blackmailing them by threatening to do so.[143] But the alternative is not necessarily much better—trapping a nation and a region in an unhappy marriage might be the worst solution of all.[144] The nation can simply *act* as if the region has been expelled, neglecting to meet the basic needs of the region's

[142] Whether they would be able to continue as members of the EU, even after secession, was a particular sticking point in the recently contemplated secessions of Scotland and Catalonia.

[143] Helfer, *supra* note 66, at 1591 ("The existence of this insurance policy enables states to negotiate more expansive or deeper substantive treaty commitments ex ante, although it also raises troubling opportunities for strategic action ex post."); Anna Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 361 (2014) (noting that "states sometimes use exit, or threats thereof, as a strategy to increase their voice in international organizations").

[144] *Cf.* JEAN-PAUL SARTRE, NO EXIT AND THREE OTHER PLAYS 47 (L. Abel trans., Vintage Books Ed. 1955) ("There's no need for red hot pokers. Hell is—other people!").

people.[145] Principles of sovereign integrity will largely shield this mistreatment from international intervention. Indeed, expulsion might be preferred precisely because it is more transparent and public, just as withdrawal from a treaty can be preferable to nonperformance.[146] If the nation inflicts oppression and basic human rights violations on the unwanted region, then the region might be able to invoke its right to remedial secession. But that would simply mean achieving the same result as expulsion, albeit by a more circuitous and painful route.

The goal here is to describe a general proposition, not to flesh out all of the details, but we are not unmindful of the latter's importance or difficulty. Of course, identifying what it means for a region to respect its basic obligations to the country is difficult and contestable, and might vary from country to country. We do not attempt here to flesh out the rule with any precision, but we do not think that the difficulty of doing so is an insuperable obstacle. After all, international law generally provides for withdrawal from treaties in case of material breach,[147] and arguably provides for expulsion by that same standard.[148] What we have in mind is essentially the equivalent of a material breach standard in the national context. In exercising the power of remedial expulsion, nations and organizations should presumably be subject to a requirement of good faith,[149] which would also need to be elaborated. A forum would have to be established, and the judges there would have to be able to identify the relevant sets of facts.[150] Some treaties identify or establish an international court or tribunal in which countries can file complaints

[145] This problem could be mitigated if international law were to more clearly recognize a fiduciary duty between nations and their citizens.
[146] Helfer, *supra* note 66, at 1587 ("Particularly given the international legal system's relatively anarchic environment, in which surreptitious shirking of treaty obligations is often plausible, a state's decision to follow the rules of the game, publicize a future withdrawal, and open itself to scrutiny demonstrates a kind of respect for international law.").
[147] *See generally* Helfer, *supra* note 66.
[148] *See* Blocher, Helfer & Gulati, *supra* note 8.
[149] Vienna Convention, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, para. 142 (Sept. 25) (noting that this provision "obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized").
[150] MAGLIVERAS, *supra* note 132, at 2 (suggesting ICJ in the context of the UN, noting that "the majority of organizations lack juridicial mechanisms for settling such disputes in an authoritative, final, and binding manner").

against a country exiting a treaty.[151] But these are precisely the kinds of problems that confront the principle of remedial secession, and it has grown in strength despite them.

C. Scenario 3: Underperforming Regions *Might* be Subject to a Forced Buyout

In cases of remedial expulsion, the region or member state is at serious fault—its own egregious misbehavior is the very thing that justifies its expulsion. But what about the middle set of cases in which a region or member state is seriously misbehaving (but not to the degree of oppression discussed above), imposing costs (financial and otherwise) on the rest of the nation, but not outright oppressing it? Or what if the union is dysfunctional, but the region is not so clearly at fault?

One response would be to include these scenarios in our broad default rule against involuntary expulsion of well-behaved regions and members. After all, if it were too easy for a nation to shed its poor regions, then expulsion might be overused in all the harmful ways discussed above.[152] To take an obvious example, nations might start shedding their former colonies, having pillaged them of their natural resources, on the theory that they are "seriously underperforming."

But it is still worth considering the possibility of expulsion in situations short of the horrific malefactor regions above. After all, forbidding expulsion—of a former colony, a poor member state, or anyone else—does not mean that the situation will necessarily be resolved peacefully within the existing union. In Hirschman's terms, eliminating the exit option *should* increase voice, but that does not mean that it *will*.

A nation that is forbidden from expelling a region does not, on the current dominant understanding of international law, have a fiduciary duty to provide for that region—it can neglect it; even actively harm it. So long as it doesn't go too far, such actions would essentially be shielded from the world by the cloak of territorial integrity. This is a bad scenario for all involved; and especially for the region. Why have the parent nation go through the inevitably expensive process of

[151] Helfer, *supra* note 66, at 79.
[152] See supra Section I.C.

discriminating against, disadvantaging and generally oppressing the people of the region and then effectively forcing them to seek "independence" (that is then granted benevolently). Why not permit the nation to make the severance official, and *pay* for the severance?

Put another way, there is no easy way to force nations to treat their regions well—no way to ensure specific performance of the social contract, as it were. If they want to be rid of a region, facilitating a way for them to do cleanly through expulsion, rather than through messy internal oppression, may be better overall.

One way to do that would be to permit expulsion in such situations, but at a cost. The nation or supra national organization wishing to expel the region or member state would not only have to show that it was underperforming in some serious way, but would also have to compensate it for the expulsion. Something similar has been contemplated at the individual level, inasmuch as reparation may be required for expulsion of particular individuals.[153] With regard to the regional expulsions we describe, it may make sense to establish something like a standing trust fund, so that regions would not have to wait too long for compensation.

Take the scenario of some former island colony that is located at a great distance from the motherland. Say also that this colony, while providing great revenues at some point in distant history (the original reason for colonizing it), is now a source of big expense to a former imperial power (whose wealth and power has diminished; albeit, with significantly better conditions than those in the colony). over time. Let us also say here that there is a vociferous independence movement on the island, whose primary complaint is the systematic discrimination that its people have faced over the years from the mainland. And, as a result of the numerous protests (and occasional violence), the mainland is having to expend

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[153] H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 286 (1966) ("[T]he view that the undoubted right of expulsion degenerates into an abuse of rights whenever an alien who has been allowed to take up residence in the country, and to establish his business and set up a home is expelled without just reason, and that such an abuse of rights constitutes *a wrong involving the duty of reparation*.") (emphasis added); WOJNOWSKA-RADZINSKA, *supra* note __, at 190 ("State responsibility for an internationally wrongful act, the wrongful act, the arbitrary expulsion of an alien, entails reparation, namely the obligation to redress the damage."); *id.* at 192 (noting that the Human Rights Committee has specified money damages as generally being the appropriate remedy).

large amounts of resources on significant police presence on the island (in addition to providing benefits for the large unemployed population). In such a scenario, should the former imperioal power be able to shed the colony; give it the "independence" that is being sought by some of its population? We don't think that the case is so easy—particularly if the reason for the independence movement is mistreatment.

While we do not think that there should be a bar on expulsion – managing a distant colony for for a formerly great power that has now itself shrunk greatly in size, influence, and income is probably not a sustainable situation. But there should be a remedy for the colony that is no longer proving useful. And perhaps that remedy could come in the form of a buyout – where every colonial inhabitant is given the option of citizenship of the rump state.

Conclusion

To conclude, the question is: what are the conditions under which a state can expel one of its own regions? There are, we argue, surely some sets of conditions under which the relationship has become so costly and so toxic that the parties should be able to walk away. However, exit should not always be as free as it is in the current system. In most cases, the party that wishes to exit because it perceives better options should have to compensate its erstwhile partner for the damages it has sustained from having the relationship broken.