

FORCED SECESSIONS

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I

INTRODUCTION

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,” or forced secession, 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? Given that 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?

These are questions of immense significance for many people around the world. Millions live in former colonies that never became independent states¹—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, their former colonizers often 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.

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This article is also available online at <http://lcp.law.duke.edu/>.

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** Faculty, Duke Law School. For helpful comments, we thank James Boyle, Curtis Bradley, Rachel Brewster, Guy Charles, John Coyle, Laurence Helfer, Kimberly Krawiec, Jonathan Wiener, Larry Zelenak, and Taisu Zhang.

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 (2003) (“Of the total population of the Caribbean, an estimated 37 million people, almost fifteen per cent live in areas which still maintain constitutional ties with the mother country.”).

3. *Id.* 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.”).

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 Would the answer be different if the colonies were committing human rights violations and had resisted all political and economic interventions?

Our goal in this article is to identify the default rules of international law with regard to expulsion of national territory. We argue that the traditional rules, based on international law's legitimation of imperial conquest, should be modified with a market-type system that permits forced secession only in limited circumstances, and with a penalty on the expelling nation.

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 supranational 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 regions⁹ they want to expel.

4. *Id.* at 219. (“[M]ajor public support for the acceptance of independence [in Aruba and the Antilles] has never materialized. . . . 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. *Id.* (explaining that the Dutch Charter rules out expulsion of Antilles); D.J. Latham Brown, *The Ethiopia-Somaliland Frontier Dispute*, 5 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 as universal as some might suppose. See Christina Duffy Burnett, *United 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).

6. Andrew Burghardt, *The Bases of Territorial Claims*, 63 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. See MICHAEL KEATING, STATELESS NATIONS: PLURINATIONAL DEMOCRACY IN A POST-SOVEREIGNTY ERA (2004) (outlining the concept of post-sovereignty); Neil Walker, *The Cosmopolitan Local: Neil MacCormick's Post-Sovereign World* (Nov. 7, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1704409 [<https://perma.cc/ZZ59-Y8NG>]. 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 FILLING THE GAPS IN GOVERNANCE: THE CASE OF EUROPE (Elena Carletti et al. eds., 2016). 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

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 supranational organizations, rather than regions 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 state¹⁰—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 basic tenets of modern international law, especially the principle of self-determination.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 nevertheless 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

to physical places occupied by people. Expelling a people from a territory is, as described in more detail below, *infra* part III.B, subject to a wide range of restrictions.

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 POL’Y, Mar. 23, 2010, <http://foreignpolicy.com/2010/03/23/could-greece-get-kicked-out-of-the-european-union/> [<https://perma.cc/9A5L-UP6Z>].

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 Exit 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. As to the second proposition, we think that international law does permit expulsion from supranational organizations under certain circumstances, but that the rules are different than they are for nations. Blocher, Gulati & Helfer, *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., BRUNO FREY & REINER EICHENBERGER, *THE NEW DEMOCRATIC FEDERALISM FOR EUROPE: FUNCTIONAL, OVERLAPPING, AND COMPETING JURISDICTIONS* (1999); Alessandra Casella & Barry R. Weingast, *Elements of a Theory of Jurisdictional Change*, in *POLITICS AND INSTITUTIONS IN AN INTEGRATED EUROPE* (Barry Eichengreen et al. eds., 1995); 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); Michael J. Hiscox & David A. Lake, *Democracy, Federalism and the Size of States*, Working Paper, 2002, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002686 [<https://perma.cc/M4NH-KDLT>].

provide a failsafe for 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 suggest 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 describe a basic framework with which to evaluate expulsion.¹⁸ Our framework is not suggested as a mandatory rule, akin to *jus cogens*, that would override all agreements to the contrary. If a national constitution provides specific rules for or against expulsion, and the 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, the application of which depends on the actions and governance of the region, just as the rules of secession are pegged to the behavior of the state.²⁰

14. Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L.J. 797, 806–07 (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., 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* 220–23 (1978); Thomas Franck, *Postmodern Tribalism and the Right to Secession*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 3 (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 IV.

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 &

First, there should be a strong default presumption against expulsion in the absence of malfeasance by the region. 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 (and may be attempted again).²² In standard cases, this requirement of mutual assent is 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).²³ 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 in which 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—tentatively—that the region 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.²⁴

This tripartite framework invites many 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 a 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. We note that, for the most part, they are about the implementation of the framework, not its soundness.

This article seeks to show that traditional statements of international law seem to permit nearly unlimited powers of expulsion, and then to argue that this power is and should be subject to restriction. This may bother some readers,

Gulati, *A Market for Sovereign Control*, *supra* note 14.

21. See *infra* part IV.A.

22. See, e.g., Steven Ernlanger & Alan Cowell, *Scotland Rejects Independence From United Kingdom*, N.Y. TIMES (Sept. 18, 2014), <https://www.nytimes.com/2014/09/19/world/europe/scotland-independence-vote.html> [<https://perma.cc/UXP4-CG72>]; Kimiko de Freytas-Tamura, *Scotland Says New Vote on Independence is ‘Highly Likely’*, N.Y. TIMES (June 24, 2016), http://www.nytimes.com/2016/06/25/world/europe/brexit-scotland-independence-referendum.html?_r=0 [<https://perma.cc/UNV4-3L9Z>].

23. See *infra* part IV.B.

24. See *infra* part IV.C.

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 necessary.

II

THE POLITICS AND ECONOMICS OF EXPULSION

How can international law and practice 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 the organization (exit), or express dissatisfaction in an effort to improve the situation (voice).²⁵ 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.”²⁶ He applied this political–economic analysis to firms as well as to states.

This article asks 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, as are various forms of sanction. But what about the equivalent of exit: expulsion?

Some will reject the 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 a mistake to think about borders or nations being “tradable.” The suggested 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 this project. The surprising and ongoing story of decolonization provides an illustration.

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

26. *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.*

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.²⁷

In the standard story, the twentieth century was an era of belated but welcome decolonization. European empires on which the sun never set began retreating to 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.²⁸

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,²⁹ many colonies were no longer profitable investments.³⁰ 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 to human rights and equality in the post–World War II era made it much harder to treat some subjects of the empire as second or third class citizens vis-à-vis their former masters.³¹ As a matter of domestic politics, it was once cheap to promise some form of citizenship—or at least national membership—to far-flung

27. ALDRICH & CONNELL, *supra* note 1, at 113 (emphasis added).

28. *Id.* at 246.

29. *Id.* at 1 (“The age of decolonisation is usually regarded as having peaked during the 1960s. . .”).

30. *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.”).

31. *E.g.*, NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT PROPERTY OVERSEAS, 1893–2010, 236–42 (2013) (describing the U.S.–Philippines relationship in the early to mid-1900s and the U.S. desire to avoid giving rights to outsiders).

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.³²

And then there is 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. For example, Chinese opposition had relatively little effect on British control of Hong Kong in the 1800s.³³ But China became a great economic and military power, which probably helps explain why, when China demanded Hong Kong back in the 1980s, Britain agreed to return it. And it did so even though surveys suggest that the people of Hong Kong would have preferred to stay British subjects—or, at least, would have preferred to stay independent of the mainland Chinese government.³⁴

The incentives of colonies vis-à-vis independence have also changed, albeit in precisely inverse fashion. Existing colonial territories overwhelmingly oppose independence,³⁵ and they have pushed towards the center more than they have tried to pull away from it.³⁶ Those that remain colonies are those that have successfully resisted efforts to make them independent.³⁷ In fact, “[i]n no territory has a majority of the electorate cast its vote for parties or politicians who unequivocally demand independence.”³⁸ This is especially true in smaller, more

32. 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 satisfied 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.

33. For historical detail, see, e.g., JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* (2d ed. 1999); FRANK WELSH, *A BORROWED PLACE: THE HISTORY OF HONG KONG* (1993).

34. For a discussion, see Blocher & Gulati, *A Market for Sovereign Control*, *supra* note 14.

35. 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 (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. . .”).

36. *Id.* at 165 (“Rather than move towards independence, territories have welcomed, even demanded, the greater involvement of metropolitan states.”).

37. OOSTINDIE & KLINKERS, *supra* note 2, at 217.

38. ALDRICH & CONNELL, *supra* note 1, at 247.

isolated territories, where opposition to independence is “almost unanimous” and has rarely even been considered despite support from the UN Special Committee on Decolonisation³⁹:

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.⁴⁰

Such sentiment is not limited to the smallest territories,⁴¹ however 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.”⁴²

The economic incentives are straightforward enough. With a few exceptions like Bermuda, the majority of former colonies are poorer than their colonizers (albeit richer than their neighbors,⁴³ which is also significant), and many are dependent on external aid and subsidies.⁴⁴ Some residents support independence no matter the “cost,” on the basis of dignity or other interests.⁴⁵ 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.⁴⁶

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

39. *Id.* at 139.

40. *Id.* at 137 (internal citation omitted).

41. *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 *départements* . . . and in islands like Guam, where inhabitants sought stronger ties with the metropolitan power.”).

42. *Id.* at 164.

43. *Id.* 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.”).

44. ALDRICH & CONNELL, *supra* note 1, at 112 (“Finance and tourism have enabled some well-placed territories to avoid the drift towards 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.”).

45. “The aspiration for independence is not simply reducible to economic categories or a history of development. Colonisation and decolonisation remain fundamentally a question of dignity.” *Id.* at 113 (quoting Paul Neaoutyine, the former President of the FLNKS).

46. *Id.* at 126; (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.”).

receive is a passport or, perhaps better yet, a right to work,⁴⁷ although this entitlement was not initially given to all subjects of the former colonies.⁴⁸ Nor are colonial residents necessarily treated equally with regard to other political rights.

What if a nation wanted to wipe these costs off the books by expelling its former colonies, perhaps with the pretext of granting them independence? The question is anything but abstract. The globe is still covered with colonies, in which millions of people live.⁴⁹

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.⁵⁰

Their continuing existence shows that the history of decolonization is not over; it’s not even past.⁵¹

For some colonies, domestic law might provide a safe haven against expulsion.⁵² But not always. In the U.S. context, Christina Duffy Ponsa has argued that the *Insular Cases* established that unincorporated 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.”⁵³ Set against the contemporary headlines, this raises a very uncomfortable

47. *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 (noting that non-self-governing states enjoy and intensely use the “right of abode in the metropolis”).

48. OOSTINDIE & KLINKERS, *supra* note 2, at 222 (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 words of a 1996 report: “Saint Helenians are not trying to become British. They are already, and always have been British.”).

49. 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.”).

50. *Id.* at 2.

51. *Cf.* 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.* 754, 755 (2007) (“It has been at least a century . . . since the model of empire was so hotly contested in American public life.”).

52. 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.”).

53. 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

possibility. The people of Puerto Rico have consistently opposed independence from the United States.⁵⁴ But what would international law say if—perhaps in light of the island’s current debt crisis⁵⁵—the rest of the United States were to attempt to force it on them?

Perversely, such efforts at forcible decolonization 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 by the UN General Assembly in 1960, described “the passionate yearning for freedom in *all* dependent peoples” and found that “*all* peoples have an *inalienable* right to complete freedom, the exercise of their sovereignty and the integrity of their national territory.”⁵⁶ If the right to “complete freedom” really exists, and is “inalienable,” then the expulsion we describe could be not only permissible but required.⁵⁷ On this reading, colonies might 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 decolonisation via accession to sovereignty was perceived as *necessary* and desirable.”⁵⁸ 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).

territorial deannexation.”); *see also* Downes v. Bidwell, 182 U.S. 244, 307–08 (1901) (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 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).

54. Burnett, *supra* note 5, at 871–72.

55. Mary Williams Walsh, *Puerto Rican Officials Warn Congress of Major Defaults Without Restructuring*, N.Y. TIMES (Feb. 5, 2016), https://www.nytimes.com/2016/02/06/business/dealbook/puerto-rico-ready-to-accept-federal-control-in-return-for-help-in-debt-restructuring.html?_r=0 [https://perma.cc/J2ZH-CPB4].

56. *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).

57. 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).

58. 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,⁵⁹ 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 this project: Could colonizers loudly proclaim their own guilt, argue that their sovereignty over the territories is not only voidable but void,⁶⁰ and then expel the former colonies for which they no longer have any use?

Moreover, the issue of expulsion is not 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, albeit not in the unlimited way that international law currently suggests. And in some (perhaps most) 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 one must consider the kinds of extreme circumstances that might justify its use: those in which a union is malfunctioning in a way that inflicts 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 been devoted to facilitating the termination of malfunctioning unions by permitting regions to exit.⁶¹ Such exits can improve overall welfare in the short run by ending the painful relationship, while also deterring nations from inflicting harms on their regions.

The same logic applies in the opposite direction. After all, the costs of a harmful political union are reciprocal⁶²—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—the least cost avoider, in some sense.

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

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

61. See *infra* part III.

62. Cf. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

But the state will not always be the one at fault, nor will it always have the power to remedy the situation. If a minority region, even without dominating the national levers of power,⁶³ 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 imposed immense costs on the French government; to the point where the French decided to leave, essentially expelling Algeria and its local population from French citizenship and EU membership.⁶⁴ History is littered with numerous other examples in which a colony or region imposes such high costs on the rump state that it leaves; essentially expelling the trouble-making region.⁶⁵ Of course, nations are generally more able and likely to exploit their regions than vice versa, so the standard for expulsion should perhaps 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, most constitutional lawyers would probably take the view that no matter the misconduct, it is constitutionally out of the question for the United States to expel an individual state, no matter what it does.⁶⁶ Some supranational 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.

63. 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.

64. For discussions of this history, see e.g., NEIL MACMASTER, *COLONIAL MIGRANTS AND RACISM: ALGERIANS IN FRANCE, 1900–62* (1997); TODD SHEPARD, *THE INVENTION OF DECOLONIZATION: THE ALGERIAN WAR AND THE REMAKING OF FRANCE* (2006).

65. The precise role of economics in both the rise and fall of colonial 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); D. K. FIELDHOUSE, *The Economic Dimensions of British and French Decolonization in Black Africa*, in *BLACK AFRICA 1945–1980: ECONOMIC DECOLONIZATION AND ARRESTED DEVELOPMENT* 3 (1986); Herschel I. Grossman & Murat F. Iyigun, *The Profitability of Colonial Investment*, 7 *ECON. & POLITICS* 229 (1995).

66. 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).

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 in which 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. Expulsion should be a default option, but 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, expulsion should be possible. And once one crosses that hurdle, then the question is what rules should govern its use.

C. National Incentives

The challenge is not evaluating the availability or desirability of expulsion in the abstract, but rather establishing when and how it should be an option in practice. Just as a bright line default rule against expulsion should be rejected, so too should a regime in which it is an unrestricted option—part III identifies limitations within international law. As with many 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 the likelihood of its improvement, as measured against the relative certainty of exit.⁶⁷ 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 (for example, involving violence or a high level of subsidies paid by other actors). On the other hand, the threat of expulsion 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.⁶⁸

Viewed purely in terms of national incentives, the availability of expulsion might impose costs on the system. The prospect of nations and organizations

67. HIRSCHMAN, *supra* note 25, at 77.

68. *Cf.* Laurence R. 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.”).

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 reputation).⁶⁹ Nations might use the threat of abandonment to coercively bargain with their regions or members perceived to be underperforming.⁷⁰ Even contemplating the possibility of expulsion, some have argued, might corrode the kind of commitment necessary to make nations and organizations function properly.⁷¹

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.⁷² Likewise, international organizations that have the power to expel a breaching member have rarely chosen to exercise it.⁷³ Plus, if the possibility of expulsion is so corrosive to relationships among regions that collaborate to form a nation, they can include no-expulsion clauses in their constitutions or other formative treaty agreements. These sorts of no-expulsion clauses appear to be 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.

The incentives are not hard to imagine. A nation that expels a region or member would earn a costly reputation as an unreliable partner,⁷⁴ 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

69. Cf. Joel P. Trachtman, *The Economic Structure of the Law of International Organizations*, 15 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.”).

70. Cf. Meyer, *supra* note 68, at 379 (noting that in reaching international agreements, “ascendant” states will typically negotiate either for a higher share of benefits or easier exit).

71. Cf. Jerzy Makarczyk, *Legal Basis for Suspension and Expulsion of a State from an International Organization*, 25 GERMAN Y.B. 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. . .”).

72. 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 68, 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 69, 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.”).

73. See CHRIS. 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).

74. Helfer, *supra* note 68, at 1622 (“Three variables in particular stand out in assessing exit's 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.”).

organizations.⁷⁵ And though 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. Presumably, the bonds of loyalty—patriotism, pride, culture, and the like—will generally be strong within nations (less so within supranational organizations), and 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.⁷⁶ Allowing nations to expel regions or members could trample their interest in, or perhaps right to, self-determination.⁷⁷ 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. The preferable solution, and indeed the best reading of contemporary law, is to provide a set of rules to prevent many of these problems.⁷⁸

In trying to strike a balance between enabling expulsion and regulating it, this endeavor is situated uncomfortably between those who think that law forbids expulsion and those who think that the question is simply one of power and politics.⁷⁹ The former camp is wrong about the content of law—the traditional rules of international law do not forbid expulsion, and actually make it too easy. The latter camp is wrong about the significance of law—although economic and political incentives are important drivers of national behavior, those incentives are responsive to law.

III

THE LAW OF EXPULSION

Traditional rules of international law give some guidance on the issue of expulsion, but those rules are problematic—they give countries nearly unlimited power to expel regions through cession. Such a power is hard to square with the

75. 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 easier for the Soviet Government to achieve its aims").

76. Makarczyk, *supra* note 71, 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.").

77. 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.

78. See *infra* part III.B.

79. See also Blagojev, *supra* note 73, 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.").

principle of self-determination. Accordingly, this part proposes some modifications, and notes 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.⁸⁰

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 sometimes 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. Further, 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.”⁸¹ Importantly, national agreement—and not that of the relevant 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.⁸²

80. Western Sahara, 1975 I.C.J. 12, para. 122 (Oct. 16) (separate opinion of Dillard, J.).

81. OPPENHEIM, *supra* note 15, at 679. *See also* JENNINGS, *supra* note 15, at 16 (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 366–378 (1970) (categorizing cessions as involving either gratuitous transfer, sale, or exchange of territory); Amos S. Hershey, *The Succession of States*, 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 succession”).

82. OPPENHEIM, *supra* note 15, at 684.

Other classic⁸³ and modern authorities are in accord.⁸⁴ Stephen Ratner notes that “states generally are free to agree on the disposition of disputed noncolonial (or non-trust or –mandated) territory and its ultimate borders as they see fit.”⁸⁵ Seokwoo Lee similarly concludes:

International 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.”’⁸⁶

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.⁸⁷

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.”⁸⁸ 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.⁸⁹

83. WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 49 (3d ed. 1884) (“The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded, has not 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. SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 40 (1996) (concluding that, today, the “right of conquest [is] unacceptable not only in terms of international morality but also in terms of international law”).

84. 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.”).

85. Ratner, *supra* note 84, 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. 499, 545 & 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 84, at 811.

86. Lee, *supra* note 15, at 10 (quoting 1 GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 303 (1957)); Castellino, *supra* note 85, at 566 (“The law as it stands suggests that *uti possidetis juris* lines may be modified by consent.”).

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

88. *THE MOVEMENT OF PERSONS ACROSS BORDERS* 85 (Louis B. Sohn & Thomas Buergenthal eds., 1992). See generally JEAN-MARIE HENCKAERTS, *MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE* (1995).

89. See *infra* part III.C.

2. Self-Determination

Despite the breadth of the cession power, there have always been dissenters, 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,⁹⁰ 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.⁹¹

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.⁹²

Vattel concluded that—absent “extreme necessity” or “when the public safety requires it”⁹³—a country cannot make this decision 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.”⁹⁴

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 the territory—the people.⁹⁵ 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.”⁹⁶ Vattel pointed to the Treaty of Madrid, by which King Francis I agreed

90. 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. . . .”).

91. *Id.* at 388.

92. *Id.* at 31.

93. *Id.* at 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.* at 119.

94. *Id.* at 118.

95. *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.”).

96. *Id.* at 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

to cede Burgundy to Emperor Charles V—a cession rejected by the people of Burgundy—and faulted the cession for violating domestic legal principles: “[A]s the laws in express terms refused the king the power of dismembering the kingdom, the concurrence of the nation was necessary for that purpose.”⁹⁷

In other words, and absent extraordinary circumstances, the members of the transferred region must consent to the transfer, explicitly or otherwise.⁹⁸ 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, U.S. 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.”⁹⁹

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 national affiliation.¹⁰⁰ Although its precise legal status remains unclear,¹⁰¹ 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.¹⁰²

To the degree that self-determination operates as either a strict legal limitation or, at the least, an aspirational principle,¹⁰³ it requires nations to account for their regions’ preferences.¹⁰⁴ As one commentator explains: “In the

their mere silence.”)

97. VATEL, *supra* note 90, at 119.

98. Beaulac, *supra* note 96, 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 relaxed so 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.”).

99. 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).

100. KORMAN, *supra* note 83, at 36–37 (tracing the domestic principle to the French Enlightenment, and citing Vattel to support the international version).

101. Allen Buchanan, *Theories of Secession*, 26(1) PHIL. & PUB. AFFAIRS 31, 33 n.2 (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.”).

102. 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 Dillard, J.) (“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*).”).

103. KORMAN, *supra* note 83, 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.”).

104. 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

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.”¹⁰⁵

Importantly, as a matter of practice, nations do, especially in recent years, almost always seek the approval of regions transferred through cession.¹⁰⁶ This is particularly relevant in the context of former colonies because they might be prime candidates for involuntary expulsion and most are determined to remain part of the colonizing country.¹⁰⁷ 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.¹⁰⁸

Such opposition has generally been successful, at least in recent years. Aldrich and Connell note that “No territory has been thrust into independence against its will.”¹⁰⁹ Antonio Cassese has an even stronger take:

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 be declared null and void”); KORMAN, *supra* note 83, 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 102, 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”).

105. Ratner, *supra* note 84, at 829.

106. See OPPENHEIM, *supra* note 15 (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 (2005) (“The practice of holding plebiscites 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, 20–21 (2008) (noting that although “there is no actual obligation,” there is “precedent for the practice of consulting an affected population”).

107. ALDRICH & CONNELL, *supra* note 1, at 247 (“Self-determination increasingly favours constitutional dependency rather than sovereign independence.”).

108. *Id.* at 142 (internal citation omitted).

109. *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.” *Id.* at 164 (internal quotation marks omitted).

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, that is as logically following from the whole thrust and basic content of self-determination.¹¹⁰

The challenge is to reconcile this “basic content” 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.”¹¹¹

This article does not purport to solve that “defining issue.” Its admittedly partial and imperfect solution is to conceptualize both sovereignty and self-determination in functional terms—as legal fictions designed 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, and the responsibility to protect, all of which deny the shield of sovereignty to oppressive and unrepresentative governments.

This suggests 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.¹¹² The framework described in part IV is based on a similar view, and therefore conditions the power of expulsion on the region’s behavior, rather than solely on the nation’s wishes.

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

110. CASSESE, *supra* note 104, at 189.

111. Michael P. Scharf, *Earned Sovereignty: Juridicial Underpinnings*, 31 DENVER J. INT’L L & POL’Y 373, 373 (2003) (citing Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace,”* 6 ILSA J. INT’L & COMP. L. 455,465 (2000)). See also CASSESE, *supra* note 104, at 190; Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177 (1991).

112. See, e.g., Evan J. Criddle & Evan Fox-Decent, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301 (2009).

B. Independent Constraints

Although the preceding discussion indicates that international law does not (and should not) preclude expulsion as a general matter, other rules and principles impose important and desirable constraints on the terms of expulsions.¹¹³

First, expulsion could be disfavored or even ruled out on the basis that it conflicts with international law's norm favoring 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."¹¹⁴ 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.¹¹⁵ The strength of *uti possidetis* is such that it trumps most other considerations of international law, perhaps even including the principle of self-determination.¹¹⁶ Combined with related principles in treaty law,¹¹⁷ 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."¹¹⁸

113. 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.

114. JENNINGS, *supra* note 15, at 70; Stuart Elden, *Contingent Sovereignty, Territorial Integrity, and the Sanctity of Borders*, 26(1) SAIS REV. 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 84, at 810 ("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.").

115. Frontier Dispute (Burk. Faso v. Republic of Mali), 1986 I.C.J. 554, para. 20 (Dec. 22) (describing *uti possidetis* as a system in which "administrative boundaries" are "transformed into international frontiers in the full sense of the term."); Elden, *supra* note 114, 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*.").

116. CASSESE, *supra* note 104, 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."); 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 based on these other principles threatens to destabilize governments.").

117. 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").

118. Castellino, *supra* note 85, at 507. See also CASTELLINO & ALLEN, *supra* note 117, at 114 ("[I]nstead of seeking territorial settlement, *uti possidetis* seeks to 'settle' people within fixed territories.

Stability, however, is favored for an instrumental reason—on the theory that the status quo can help prevent conflict by providing stability.¹¹⁹ 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 1990.¹²⁰ Even scholars who believe that sticky borders have reduced the number of border conflicts note that it has contributed to internal conflicts.¹²¹ Despite—or perhaps because of—the Organization for African Unity’s early support for *uti possidetis*, Africa is full of illustrative examples.¹²²

In other words, the stability norm seems largely to be failing on its own terms, and permitting expulsion—with the limitations and standards discussed below—might facilitate peaceful divorces, and help vindicate the principle of self-determination.¹²³ 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 real commonalities.¹²⁴ To the degree that *uti possidetis* precludes beneficial border changes, it should—and can—be rejected.

Thus the norm treats the need for territorial ‘order’ as being more important than the ‘identity’ of a people.”).

119. 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, 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”).

120. Paulsson, *supra* note 119, at 123 (noting 129 such conflicts) (citing PAUL K. HUTH, *STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT* (1996)). *See also* Burghardt, *supra* note 6, at 226 (“our century has witnessed dozens of conflicting claims on territory and transfers of control over territory.”).

121. Aman Mahray McHugh, Comment, *Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice*, 49 HOWARD L.J. 209, 218 & n.73 (2005) (arguing *uti posseditis* 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”).

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

123. SHARMA, *supra* note 102, 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 v. Mali), 1986 I.C.J. 554, 567 (Dec. 22) (privileging *uti possidetis* over self-determination).

124. 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 117, at 7 (“Post-decolonization, these artificially created entities have been exhorting, 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.”)

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.”¹²⁵ This is not a blanket prohibition. It holds that the power of mass expulsion can only “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.”¹²⁶ And the prohibition on mass expulsion does not squarely apply to the scenarios described here, because the contemplated expulsions do not involve forcing anyone to physically move. Expulsion, in the proffered framework, moves borders, not people. People can stay in their homes and communities, avoiding many of the harms that the prohibition on mass expulsion was meant to address.

Relatedly, international law disfavors the creation of stateless peoples — those with no citizenship in any state recognized by the existing community of nations.¹²⁷ To the degree that an expulsion strips people of citizenship, it could violate this rule. Consider, for example, the Nationality Act of 1981, passed by the Thatcher government, which stripped the right of U.K. citizenship from residents of the British “overseas territories.”¹²⁸

There are at least three ways to prevent the statelessness problem posed by this scenario. 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,¹²⁹ a prospect that would be facilitated if the expelling nation were to recognize it as such.¹³⁰ But it is not enough to count on this uncertain recognition. A stronger, and preferable, remedy would provide that the residents of the expelled territory retain their citizenship in the parent nation until such time as they can acquire alternative

125. Maurice Kamto, Third Report on the Expulsion of Aliens (19 Apr. 2007, A/CN.4/581), at 132.

126. 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.”).

127. *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> [<https://perma.cc/4EVA-A5H4>].

128. 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 United Kingdom well before this — the underlying fear being that British culture would be overwhelmed. In 1981, the underlying concern in the United Kingdom 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*, 37–41 (1996); Anthony Browne, *Banished Islanders are British Again*, *OBSERVER*, May 11, 2002.

129. 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 [on this topic] is singularly undeveloped, uncertain, and . . . comparatively unstudied.”

130. JENNINGS, *supra* note 15, at 504–05.

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.¹³¹

An objection here is that it might be hard to force the nations doing the expelling 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 the nation that expelled it. That claim 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.¹³²

Although this article does not pursue the question in any detail, 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 forced 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. The framework incorporates this rule as well. Expulsion, no less than cession, should be forbidden where it would put the residents of the ceded or expelled territory into harm’s way. To cede a region to a foreign 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: the law 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, because, historically speaking, nations have tended to resolve tensions between people and borders by moving the former, sometimes with horrific force. For the foregoing reasons, we think that some of the same legal restrictions should apply to shifting borders as well.

* * *

131. 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).

132. We describe a conceptually similar damages claim in Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 59 (2016).

Having tilted at a succession of giants, one must consider the possibility that they were windmills all along. Perhaps there is simply no point in discussing expulsion, particularly in the situations here envisioned—oppression, extreme misbehavior, and the like—as if they presented legal questions.¹³³ As with questions of secession or revolution, the only answers might be political.¹³⁴

In fact, the proposed framework is better insulated against this charge than many other projects in international law. To a greater degree than, for example, some approaches to international human rights, the 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—for example, the obligation to repay foreign debt—compliance with directives tends to be much stronger.

Even if it is true that the expulsion can only be evaluated in extra-legal terms, the basic framework would not change much. The framework would be better understood as a description of best practices, rather than legal rules, but the basic principles would be the same. What, then, are those principles?

IV

TOWARDS A FRAMEWORK

This final part attempts to set out a framework with which to evaluate the legitimacy of expulsion. Its suggestions are tentative and general—every nation and supranational organization is unique in its legal arrangements, history, and political incentives. Nevertheless, some tentative observations are possible.

Consider some general propositions derived from the preceding discussion:

- There are scenarios in which a flat rule against expulsion—whether from nations or supranational organizations—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.

133. 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.”).

134. 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.”); Sohn, *supra* note 75, at 1424 (“Expulsion seems to be more a weapon of the politician than the statesman.”); *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.”).

- 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.¹³⁵

Based on these propositions and the analysis in the preceding sections, three categories of expulsion emerge, 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

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. International law apparently imposes no *prima facie* limitations on the power of states to cede regions,¹³⁶ 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, 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 (that is, expulsion) purely at the option of the rump 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

135. In this respect, we may be imposing an additional requirement beyond what international law already requires. JOYNER, *supra* note 106, 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.”).

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

means of effectuating self-determination interests.¹³⁷ The United Nations might play a role in organizing and conducting such plebiscites, as it has done in the past.¹³⁸

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 sense¹³⁹—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 U.S. citizenship, in return for “granting” the island independence. Some elite European intellectuals want the European Monetary Union to offer the same basic deal to Greece.¹⁴⁰ 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.¹⁴¹ 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 or because its people are of a different ethnicity from those running the government of the rump state.

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, the nation should have the option of “remedial expulsion.” This argument has obvious symmetry with remedial secession, which might not (yet) be an enforceable principle of international law. But its ascending influence is undeniable, and it meshes well with the general principle of self-determination.

It is tempting, in fact, to simply treat expulsion as a special category of secession (a “majority secession,” perhaps) and subject to the same 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

137. 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.”).

138. *Id.* 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).

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

140. See sources cited *supra* note 10.

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

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 *secession*.

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.¹⁴² 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 is 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 there is 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. Even Vattel would permit expulsion in cases of “extreme necessity” or “when the public safety requires it.”¹⁴³

Such scenarios will be rare. If a particular region or majority were able to establish dominance within government, then the analysis here would not even 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, after all, 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. 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 the collateral consequences are different. The primary reason to see expulsion 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.¹⁴⁴ Because the

142. 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* (Penn Law: Public Law and Legal Theory Research Paper No. 14-24, 2014) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474084 [<https://perma.cc/8C7G-H5MC>].

143. VATTEL, *supra* note 90, at 118.

144. Whether they would be able to continue as members of the EU, even after secession, was a

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.¹⁴⁵ 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.¹⁴⁶ The nation can simply act as if the region has been expelled, neglecting to meet the basic needs of the region's people.¹⁴⁷ 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.¹⁴⁸ 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 nail down 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. Though this article does not attempt to flesh out the rule with any precision, the difficulty of doing so is not an insuperable obstacle. After all, international law generally provides for withdrawal from treaties in case of material breach,¹⁴⁹ and arguably provides for expulsion by that same standard.¹⁵⁰ The framework therefore embraces 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,¹⁵¹ which would also

particular sticking point in the recently contemplated secessions of Scotland and Catalonia.

145. Helfer, *supra* note 68, 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 T. 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”).

146. 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 poker. Hell is—other people!”).

147. This problem could be mitigated if international law were to more clearly recognize a fiduciary duty between nations and their citizens.

148. Helfer, *supra* note 68, 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.”).

149. *See generally id.*

150. *See* Blocher, Gulati & Helfer, *supra* note 8.

151. Vienna Convention, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); *Gabcikovo-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”).

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.¹⁵² 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 previously discussed), 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.¹⁵³ 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 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 so cleanly through expulsion, rather than through messy internal oppression, may be better overall.

152. MAGLIVERAS, *supra* note 134, at 2 (suggesting ICJ in the context of the UN, noting that “the majority of organizations lack juridical mechanisms for settling such disputes in an authoritative, final, and binding manner”).

153. *See supra* part II.C.

One way to do that would be to permit expulsion in such situations, but at a cost. The nation or supranational 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.¹⁵⁴ 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). 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 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 imperial power be able to shed the colony; give it the “independence” that is being sought by some of its population? The case is not so easy—particularly if the reason for the independence movement is mistreatment.

V

CONCLUSION

What are the conditions under which a state can expel one of its own regions? There are 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.

154. 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 126, 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).