Between Diversity and Disorder: A Review of JORRI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD[1]

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1. JORRI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD (Cambridge: Cambridge University Press, 1996).

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INTRODUCTION

Since the turn of the century observers of international society have predicted that small and medium-sized States will fade from international life. All but the largest polities must, in this view, succumb to the pressures of modern international politics and economics, and soon, the world community will consist of but a handful of mega-States.[2] With the advent of the Cold War, the conviction, as expressed in both fiction[3] and scholarship,[4] grew that international society, in a process of ruthless rationalization, would eliminate most of the several score States then generally recognized, and a homogenized map of continental-scale superpowers would result.[5] From 1918 at the latest, however, other observers began to apprehend just the opposite: impelled by the principle of self-determination, nascent or reawakened nationalities would flee the capture of empires and States and, in so doing, would bring about the disintegration of international order.[6]

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2. Generally fostering the view at the turn of the century were the theorists of 'geopolitics.' On one of the founders of geopolitics, see W.H. PARKER, MACKINDER: GEOGRAPHY AS AN AID TO STATECRAFT (1982). Representative of Mackinder's work is H.J. Mackinder, *The Geographical Pivot of History*, XXIII GEOGRAPHIC J. 421 (1904) (positing that several great powers were competing for global dominion by attempting to control the Eurasian landmass). Among historians popularizing similar views of the future of the State were KARL HAUSHOFER, BAUSTEINE ZUR GEOPOLITIK (1928) and LEOPOLD VON RANKE, DIE GROSSE MÄCHTE (1917).

3. GEORGE ORWELL, NINETEEN EIGHTY-FOUR, 15, 161, 194-95 (Compact Books, 1987) (1949) (discussing three fictional totalitarian States: Oceania, Eurasia, and Eastasia, which are the sole entities in an international society); *see also* Michael Lind, *In Defense of Liberal Nationalism*, FOREIGN AFF., May 1, 1994, at 87 (positing "If the viability of a state is defined as its military invulnerability in the absence of allies and economic autarky, then the only viable states would be isolationist, continental superpowers (rather like Eastasia, Eurasia and Oceania of Orwell's 1984).").

4. *See, e.g.*, David Vital, *The Analysis of Small Power Politics, in* SMALL STATES IN INTERNATIONAL RELATIONS 23, 27 (August Schou & Arne Olav Brundtland eds., 1971) (noting the tendency of small States to be absorbed into the spheres of influence of big States and to preserve their freedom only if "free of pressure").

5. The overshadowing influence of two superpowers between 1945 and 1990 added credence to the proposition that smaller entities were being relegated at best to marginal positions. The concerns of the Non-Aligned Movement supported the proposition, and Cold War political theorists postulated the primacy of the bipolar structure. *See* Stuart Corbridge, *Colonialism, Post-colonialism and the Political Geography of the Third World, in* POLITICAL GEOGRAPHY OF THE TWENTIETH CENTURY: A GLOBAL ANALYSIS 171, 173 (Peter J. Taylor ed., 1993) (relating the anxiety of developing countries in facing the superpowers); HANS J. MORGENTHAU, AMERICAN FOREIGN POLICY: A CRITICAL EXAMINATION 45-48 (1952) (discussing cold war bipolarity). The political, military, and economic weight of the United States and the Soviet Union seemed to some observers to marginalize international law as well. Duursma identifies in Micro-States a potential law-building role. *See infra* notes 140-43 and accompanying text (discussing Liechtenstein's legal structure).

6. Though Woodrow Wilson advocated self-determination, his Secretary of State, Robert Lansing, was one of the first to express concern that the principle would result in

Jorri C. Duursma's new work investigates a phenomenon which seems to confound both these expectations: the persistence in Europe of five diminutive States overshadowed by much larger States as well as by the ever-consolidating structure of the European Union. Duursma examines five Micro-States:[7] Liechtenstein, San Marino, Monaco, Andorra, and the Vatican City, and asks how the diversity born of self-determination can be accommodated in a society of States anxious to enforce the countervailing principle of territorial integrity. The Micro-States which Duursma describes and evaluates in five exhaustively-documented chapters furnish examples of how small communities can perfect a right to self-determination, yet avoid disrupting the organizing structures important to international stability. In all five case studies, Duursma identifies international law and its institutions as critical mediators between pressure for consolidation and principles of diversity and between the interests of larger neighbor States and the right to self-determination of the Micro-States.

Each case study begins with a description of the history and present geography,

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international disorder. Lansing wrote:

> The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late to check those who attempt to put the principle in force. What a calamity that the phrase was ever uttered! What misery it will cause!

ROBERT LANSING, THE PEACE NEGOTIATIONS, A PERSONAL NARRATIVE 97-8 (1921) (writing on December 30, 1918). Lansing would not be the last to fear the consequences of the doctrine attributed to Wilson. *See* Philip Marshall Brown, *The Legal Effects of Recognition*, 44 AM. J. INT'L L. 617, 621 (1950) (noting its inquiry into the domestic affairs of states and unflatteringly comparing the Wilson Doctrine to the doctrine of legitimism espoused by the Holy Alliance after the Congresses of Vienna and Aix-la-Chappelle); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 39-40 (1995) (citing the Colombian delegate to the First Committee of the First Commission of the San Francisco Conference of 1945 (establishing the United Nations) who termed self-determination "tantamount to international anarchy"); *see also* Thomas M. Franck, *Postmodern Tribalism and the Right to Secession*, *in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW (Brölmann et al. eds., 1993); David Fromkin, *The Coming Millenium: World Politics in the Twenty-First Century*, 10(1) WORLD POL'Y J. 1, 3 (1993) (positing that "[l]ike some sorcerer's apprentice, the principle that no people should be ruled by another has accelerated out of control.").

7. DUURSMA, *supra* note 1, at 145-146. Duursma capitalizes "Micro-States" evidently to emphasize their distinctness as a phenomenon. This does not necessarily follow precedent and might have merited a short explanation. *See* JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 70 (1987) (referring to the diminutive State as a 'microstate' or 'ministate'); PATRICIA WOHLGEMUTH BLAIR, THE MINISTATE DILEMMA 2 (rev. ed. 1968) (terming it a 'ministate'); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990) 85-86 (calling it a 'Micro-State'); LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 256 (Hersch Lauterpacht ed., 8th ed. 1955) (describing it as 'very small'); *see also* JAMES CRAWFORD, CREATION OF STATES IN INTERNATIONAL LAW ix (1979) (providing the rationale behind capitalizing "State").

demographics, and economics of its subject.[8] Duursma then describes in great detail the constitutional and legal order of the Micro-State[9] and its external relations and policies.[10] The author treats the latter topic under the separate headings of "Relations with States" and "Relations with International Organizations." The conclusion of each case study analyzes the legal status of the Micro-State in question and discusses its self-determination in view of generally accepted criteria for statehood.

Before examining the Micro-States, Duursma sets the stage with one of the more thorough discussions of self-determination and statehood in recent literature.[11]

I. SETTING THE STAGE

Oppenheim proposed that a scholar of international law would do well to begin any analysis by inquiring into the origins and subsequent usage of the vocabulary of her subject.[12] Duursma appears to have taken Oppenheim's advice to heart. In perhaps one of the most thorough analyses to date of the origins of self-determination and its present place in international law,[13] Duursma seeks the earliest references to the principle and then traces its development, from the French Declaration of the Rights of Man, through Woodrow Wilson's Draft Article 3 of the Covenant of the League of Nations, and on to the present. Opposition of statesmen, including Wilson's own Secretary of State, Robert Lansing, blocked his motion to codify a right to self-determination in the League Covenant. Self-determination had, however, been introduced into the vocabulary of statecraft. Duursma identifies the Third Principle of the Atlantic Charter of August 14, 1941 as the first official reference, albeit by implication only, to a right of self-determination. Without expressly using the term self-determination, the Charter declared illegal "territorial changes that do not accord with the freely expressed wishes of the peoples concerned."[14]

The focus of the author's analysis of self-determination then turns to the United Nations (UN) Charter and its *travaux préparatoires.* Article 1, paragraph 2, and Article 55 of the Charter contain the first explicit references to self-

8. DUURSMA, *supra* note 1, at 147-50, 207-11, 261-64, 316-20, 374-76.

9. *Id.* at 150-60, 211-22, 264-74, 320-34, 376-86.

10. *Id.* at 160-200, 222-55, 264-91, 334-66, 386-410.

11. *See* LEO C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 1-42, 138-215 (1978); ALFRED COBBAN, THE NATION STATE AND NATIONAL SELF-DETERMINATION (1969); CRAWFORD, *supra* note 7, at 3-169 (setting forth in *Part I: the Concept of Statehood in International Law*). *See generally* CASSESE, *supra* note 6 (containing a recent comprehensive treatment of self-determination);

12. Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313, 315-17 (1908).

13. DUURSMA, *supra* note 1, at 7-109.

14. *Id.* at 10 (citing text of the *Joint Declaration of the President and the Prime Minister*, 35 Suppl. AJIL 191-92 (1941)).

determination in a multilateral legal instrument. Duursma argues, however, that despite the importance of the United Nations' early references to self-determination, two other factors were equally important: (1) the fleshing-out of the term through a subsequent half-century of General Assembly practice, and (2) the definition of the units of people possessing the self-determination right.[15]

Duursma posits that the challenge in defining self-determination is defining what groups of humanity are entitled to the purported right. The UN Trusteeship system, under Articles 73(b) and 76(b) of the Charter, call, respectively, for the self-government and independence of Non-Self-Governing Territories. Duursma questions whether: (1) self-government and independence are identical, and 2) *all* Non-Self-Governing Territories are guaranteed independence under the Trusteeship system. Duursma shows that the Charter answers neither question clearly. Consequently, the basic law of the UN is, at best, a starting point for the further development of self-determination.[16]

The General Assembly passed a Declaration on the Granting of Independence to Colonial Countries and Peoples on December 14, 1960.[17] The colonial powers opposed the Declaration; the anxiety was widespread that self-determination could cause the breakdown of international order. Further General Assembly Resolutions, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN of October 24, 1970,[18] continued the debate over self-determination, but UN instruments limited themselves to a *principle* of self-determination. International drafters seemed to shy away from characterizing self-determination as a *right*. The United Nations did not address whether a right to independence might extend outside that special category, leaving unclear even whether the Non-Self-Governing Territories under the Trusteeship system enjoyed a right to independence. The UN was far from specifying regions or peoples as beneficiaries of self-determination, or, for that matter, even from announcing general criteria of eligibility for such a right. Duursma notes that one rule did emerge: it was essential to have a strong link between the putative people subject to self-determination and a particular definable territory. The UN could safely consider Non-Self-Governing Territories to possess a right of self-determination if they were not physically attached to a metropolitan state and if their populations bore a demonstrable connection to them. This covered most European colonies. Politics, however, made a bolder assertion of the right unlikely. The Annex to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in fact clarified, in its section entitled "the Principle of

15. *Id.* at 12-16.

16. *Id.* at 15-17. Cassese puts it less charitably: "[T]he principle [of self-determination] enshrined in the UN Charter boils down to very little[.]" CASSESE, *supra* note 6, at 42.

17. G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/L323 (1960) [hereinafter Colonial Independence Declaration].

18. G.A. Res. 2625 (XXV), U.N. GAOR 6th Comm., 25th Sess., Supp. No. 28, UN Doc. A/8082 (1970).

Equal Rights and Self-determination of People, Paragraph 7," that a countervailing principle must be recognized in any debate over self-determination—the principle of territorial integrity.[19] By taking extra notice of the principle of territorial integrity, the UN moderated its statement in the Declaration on the Granting of Independence to Colonial Countries and Peoples that subjects of self-determination included potentially any peoples under "alien subjugation, domination, or exploitation,"[20] whether or not of a colonial origin, and any peoples lacking representative government.[21]

Pursuant to General Assembly Resolution 545(VI) of 1952,[22] two international human rights covenants were promulgated on December 15, 1966. Duursma discusses the two covenants, the International Covenant on Civil and Political Rights (ICCPR)[23] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[24] in some detail.[25] ICESCR contained the stronger reference to self-determination, stating in Article I that "[a]ll peoples have the right of self-determination."[26] Duursma proposes, however, that this codification may have been premature, stating "Self-determination was regarded as a political principle of very strong moral force, but too complex to translate into legal terms in an instrument which was to be legally enforced." [27] Reflecting the noted complexity, ICESCR called only for "progressive realization" of its terms. By contrast, ICCPR, less ambitious in the rights it posited, called for "immediate respect." States objected to the 1966 Covenants on four grounds: (1) the principles they enunciated were not found in the 1948 UN Declaration of Human Rights; (2) the principles had moral but not legal force; (3) collective rights but not individual rights might have arisen under the headings suggested by the Covenants (ICCPR provides for individual communication to a UN organ in cases where violations are alleged); and, (4) Article 1 of ICESCR, in its vagueness, invited political manipulation. According to Duursma, however, the primary difficulty with the ICCPR and ICESCR was their failure to adopt a definition of "peoples." With no guide to determine what groups are eligible for the rights posited, the rights could have little effect. Nonetheless, Duursma identifies the two 1966 Covenants as a milestone. Despite their limitations, ICCPR and ICESCR are the first interna-

19. *Id.*, *cited in* UNITED NATIONS RESOLUTIONS, series I, vol. XIII 1970-1971, at 340 (Dusan J. Djonovich ed. 1976).

20. Colonial Independence Declaration, *supra* note 17.

21. DUURSMA, *supra* note 1, at 17-26.

22. Inclusion in the International Covenant on Human Rights of an Article Relating to the Right of Peoples to Self-determination, G.A. Res. 545 (VI), 6th Sess., Supp. No. 20, Agenda Item 29, U.N. Doc. A/2119 (1952) [hereinafter G.A. Res. 545 (VI)].

23. DUURSMA, *supra* note 1, at 27, 33-34.

24. *Id.* at 27, 34.

25. *See also* CASSESE, *supra* note 6, at 52-66 (treating self-determination in the ICCPR and ICESCR). Duursma, however, investigates the drafting debates more thoroughly than Cassese.

26. DUURSMA, *supra* note 1, at 27 n.96 (quoting G.A. Res. 545 (VI), *supra* note 22).

27. *Id.* at 29 (citations omitted).

tional binding documents to refer to a *right* of self-determination.[28]

A. DEBATING SELF-DETERMINATION

After setting forth the development of the term self-determination, Duursma presents an equally thorough discussion of the legal debate surrounding the term and its application. The possibility that runaway self-determination would dismember existing States occupied deliberations in the UN and UN organs. The size of possible States, by contrast, scarcely seemed to matter. The UN Commission on Human Rights established a Subcommission on Prevention of Discrimination and Protection of Minorities, and a Special Rapporteur, Héctor Gros Espiell, under the aegis of the Subcommission made extensive findings about small States. Gros Espiell found that diminutiveness is no bar to self-determination, but that several other factors did demand care. These were the possibilities that: (1) very small States would succumb to undue external influence, (2) resource-poor States would have difficulty in discharging the duties of UN membership, and (3) fragmentation of large states into Micro-States could endanger international society.[29] The nascent law of small States did not appear concerned with size, but political and material reality demanded some constraints on State-formation.[30]

Duursma proposes that self-determination meets its limit in a rule that only "peoples" are valid subjects of the right. In proposing this, she also introduces one of the more interesting ideas of this wide-ranging work. In contemplating which parts of humanity are beneficiaries of a right to self-determination, one tends to think of groups which lack their own independent international organization—claimants to (as opposed to possessors of) statehood. Duursma describes the standard debate over self-determination but emphasizes a point generally missed there: self-determination is also a right of peoples who already possess States. This is not a new point. The 1970 Declaration on Friendly Relations lists peoples already possessing independent States as proper beneficiaries of a right to self-determination. Duursma, however, underlines the self-determination of such groups.[31] This is an important point for the subject of a book on Micro-States. The smallest entities in international society are more exposed than others to the forces of economics, politics, demographics, and social change. They rely, then, on the *legal* pillars of their existence perhaps to a greater measure than other sup-

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28. *Id.* at 30-35. Further references to self-determination can be found in instruments outside the UN context. Duursma lists the African Charter on Human Rights and Peoples' Rights of 1981, Articles 19 & 20; the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Declaration of 1975), Principle VIII (a non-binding instrument); and the Charter of Paris for a New Europe of 1990. *Id.* at 35-36.

29. *Id.* at 37-40.

30. *Cf.* Thomas M. Franck & Paul Hoffman, *The Right of Self-determination in Very Small Places*, 8 N.Y.U. J. INT'L L. & POL. 331 (1975-76) (discussing the self-determination of a handful of small Non-Self-Governing Territories: Belize, Djibouti, East Timor, Falkland Islands, Gibraltar, and Western Sahara).

31. DUURSMA, *supra* note 1, at 40.

ports. And their relative reliance on the law is greater than that of larger States. This theme is pervasive in Duursma's discussion.

Defining "peoples" nonetheless has proved fraught with difficulty. The exercise poses particular problems when a putative people composes part of a larger whole or resides within a State in which another people prevails. The attachment of a people to a territory—and, moreover, the *duration* of their attachment—is a critical aspect in the definition of a people. Duursma emphasizes the durational aspect of attachment and identifies time as a distinction between two types of population. A minority is not the same as a people. A minority, Duursma posits, lacks the territorial connection essential to peoplehood.[32] But this formula raises another question: what is the connectedness which merits terming a group a people? Gibraltar offers a case in point. Most of the natives of Gibraltar were expelled by Great Britain in the early eighteenth century.[33] Britain today wishes to characterize the present inhabitants as a colonial people. Britain's preferred characterization would, under the UN Special Committee of Twenty-Four on Non-Self-Governing Territories, give the Gibraltarians the benefit of self-determination.[34] Spain, hoping to win back the strategic territory it lost to England almost three centuries ago, objects to calling the Gibraltarians a colonial people on the grounds that they have not lived in Gibraltar long enough to form that degree of territorial attachment requisite to peoplehood.[35]

Self-determination is a right attributed to seventeen Non-Self-Governing Territories under the Special Committee brief, and their diminutive size does not erode this right.[36] Smallness, especially when exacerbated by poverty, may impede their independence for political and economic reasons. But it presents no legal bar. Little controversy surrounded the size and population issues. Problems arose, however, on the issue of territorial connection. Duursma documents that debates took place within the Special Committee of Twenty-Four and the General Assembly over whether to withhold self-determination from "imported" peoples and how to evaluate when an "imported" people has resided in a place long

32. *Id.* at 37-46.

33. *Id.* at 53-54.

34. *Id.* at 53 n.251 (referencing a referendum vote by Gibraltarians demonstrating their desire to remain British subjects, 12,138 for British citizenship vs. 44 for Spanish).

35. A Spanish UN representative told the Committee of Twenty-Four, "To recognize for a people their entitlement to the right to govern their own destiny, it is essential that there be no doubts as to the existence of identity between that people and its territory." Doc. No. 102: *Intervention of the Representative of Spain Sr. Pinies, before the 'Committee of Twenty-Four'* (September 24, 1964). Documents on Gibraltar Presented to the Spanish Cortes by the Minister of Foreign Affairs 42, 460 (1965).

36. The Non-Self-Governing Territories and Peoples include: American Samoa, Anguilla, Bermuda, the British Virgin Inlands, the Cayman Islands, East Timor, the Falkland Islands, Gibraltar, Guam, Montserrat, New Caledonia, Pitcain, St. Helena, Tokelau, the Turks and Caicos Islands, Western Sahara, and the United States Virgin Islands. DUURSMA, *supra* note 1, at 48 n.18. Of these, Guam has the most inhabitants (139,000), Pitcairn the fewest (52). DUURSMA, *supra* note 1, at 48.

enough to develop the required connection to it. Newly-settled inhabitants, even if forming most of the population of a discrete territorial unit, may fail to qualify as a people for want of sufficient connection to the place they live. This is the issue surrounding Gibraltar.[37] Again, Duursma identifies an interesting problem, which she applies to the peculiar circumstance of the European Micro-States.[38]

International judicial decisions provide an uneven record with respect to self-determination. In 1920, a Commission of Jurists was formed to address the controversy of the Aaland Islands between Sweden and Finland. The Commission held that "it belongs to the sovereign rights of a definitely constituted State to accord or refuse to a fraction of the population the right of determining its political destiny by plebiscite or otherwise."[39] Duursma explains that the Permanent Court of International Justice (PCIJ) came in contact with self-determination only in a request for an advisory opinion on a Russo-Finnish Peace Treaty, but decided not to accept the request. Minority protection arose as an issue before the PCIJ in the *Rights of Minorities in Upper Silesia (Minority Schools)* case in 1928 and the *Greco-Bulgarian "Communities"* case in 1930. The judgments in these inform Duursma's definition of a people. Crucially for the author's subsequent treatment of the Micro-States, a people must possess both objective and subjective aspects of peoplehood. According to the PCIJ, a community is:

> [A] group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language, and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.[40]

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37. DUURSMA, *supra* note 1, at 40-55; *see* CASSESE, *supra* note 6, at 206-14 (discussing Gibraltar and self-determination exclusively); S.K.N. Blay, *Self-determination v. Territorial Integrity*, 18 N.Y.U. J. INT'L L. & POL. 441, 463-64 (1986) (discussing Gibraltar and the Falkland Islands as territories the inhabitants of which are "'plantations' of the colonial administration").

38. The problem brings to mind the population movements and territorial adjustments that took place at the end of World War II. By treaty (Warsaw Treaty of November 14, 1990), Germany and Poland confirmed the border established between the two countries in 1945. Some twelve million Germans had been relocated from the territory once belonging to Germany east of the present border. Nationals of a reconstituted Polish State replaced them. Does Duursma's formula concerning the duration required to form the attachment prerequisite to people status, consider the Poles in the former Silesia, Pomerania, and East Prussia a people (or a fraction thereof) entitled to self-determination? Or can complications arising from such a question be resolved by an agreement such as the Warsaw Treaty of 1990? Can a treaty estopp claims to peoplehood? On the Polish-German border settlement, see Ryszard W. Piotrowicz, *The Polish-German Frontier in International Law: The Final Solution*, 1920 BRIT. Y.B. INT'L L. 367.

39. DUURSMA, *supra* note 1, at 56 (*quoting* 7 LEAGUE OF NATIONS O. J. 394-5 (1920)).

40. Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (the Greco-Bulgarian "Communities" case), 1930 P.C.I.J. (ser. B) No. 17,

Duursma goes on to develop a more liberal definition of peoplehood. The author's apparent aim of demonstrating the peoplehood of the inhabitants of the Micro-States may have required this. The nationals of the Micro-States are often indistinguishable from the nationals of their larger neighbors, at least in terms of race, religion, language, and traditions. This is indeed a weak point in Duursma's argument that the Micro-States are proper subjects of self-determination. The separateness of the Micro-States may justify their status as beneficiaries of the right of self-determination, but the criteria which Duursma identifies as the progenitors of the modern definition of peoplehood are not clearly in evidence in at least four of the five States. Duursma must attribute great importance to the subjective aspect of peoplehood, if the Micro-States' deficiencies in the objective aspect are not to be fatal to their claims.

Duursma further explores the development of self-determination in international decisions. A number of International Court of Justice (ICJ) cases receive attention,[41] but the author's more interesting observations concern the Human Rights Committee (established under Article 1 of the Optional Protocol of the ICCPR) and the Arbitration Commission on Yugoslavia (established by the Peace Conference on Yugoslavia).

The ICCPR Human Rights Committee has received a handful of claims based on self-determination. The claims related to the rights of indigenous peoples in North America, northern Europe, and German-speakers of the South Tyrol.[42] The Committee has dismissed all such individual claims. Duursma identifies this precedent as evidence that existing States continue to worry that self-determination may cause disorder. The author writes, however, that the dismissals

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at 21 (July 31), *quoted in* DUURSMA, *supra* note 1, at 59.

41. DUURSMA, *supra* note 1, at 59-62; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970); *Western Sahara* (1975); and *Portugal v. Australia (East Timor* case) (1995). It is appropriate for Duursma to cover this ground, given her aim to present the full development of self-determination law. For analyses of these cases, see John Dugard, *Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future*, 11 COLUM. J. TRANS. L. 14 (1972); Antony J.M. Zuijdwijk, *The International Court and South West Africa: Latest Phase*, 3 GA. J. INT'L & COMP. L. 323 (1973); John F. Murphy, *Whither Now Namibia?* 6 CORNELL INT'L L. J. 1 (1972); Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-national Conflict: A New Look* at *the Western Sahara Case*, 9 EMORY INT'L L. REV. 133 (1995); Brian F. Fitzgerald, *Portugal v. Australia: Deploying the Missiles of Sovereign Autonomy and Sovereign Community*, 37 HARV. INT'L L. J. 260 (1996); *see also* James Crawford, *The General Assembly, the International Court and Self-determination*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 585 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (discussing East Timor); CASSESE, *supra* note 8, at 214-18, 223-30 (discussing Western Sahara and East Timor).

42. For an overview of problems surrounding indigenous peoples, see SOVEREIGNTY & INDIGENOUS RIGHTS: THE TREATY OF WAITANGI IN INTERNATIONAL CONTEXTS (William Renwick ed., 1991) (containing a collection of essays by anthropologists, historians, jurists, and lawyers on aboriginal treaty rights in Australia and North America).

of the self-determination cases do not conform with the intent of the ICCPR: "The decisions on Article 1 of the Covenant made by the Human Rights Committee are contrary to the intentions of the drafters and not in conformity with the text of Article 1 of the Optional Protocol."[43] In connection with the ICCPR cases as well, Duursma suggests that the critical problem is identifying when a group constitutes a people, and the author notes that this was a task the drafters of the ICCPR declined to address.

Self-determination confronted the international community upon the collapse of the Socialist Federal Republic of Yugoslavia (SFRY) in 1990-91. The Arbitration Commission on Yugoslavia (known as the Badinter Commission after its chairman Robert Badinter, President of the French *Conseil Constitutionnel*) delivered its first opinion on November 29, 1991.[44] Opinion 1 approached the question whether States had seceded from the SFRY or the SFRY had dissolved. Opinion 1 held that the SFRY was "in the process of dissolution."[45] Thus, no issue of secession was presented: the parent State soon would simply cease to exist. Opinion 3, issued January 11, 1992, held that *uti possidetis juris* applied to the inter-republican boundaries of the SFRY.[46] This holding relegated self-determination to a secondary position, after the interests of territorial stability. Opinion 2 (also of January 11, 1992) grappled the most with self-determination.[47] Serbia presented the Peace Conference with the question whether Serbs in Croatia and Bosnia-Herzegovina are beneficiaries of the right to self-determination. "[I]nternational law as it currently stands," the Badinter Commission wrote, "does not spell out the implications of the right to self-determination. It is well established, however, that regardless of the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise."[48] Opinion 2 continues by stating that the Serb communities in Croatia and Bosnia-Herzegovina have the "right to recognition of their identity under international law" and that Article 1 of the ICCPR safeguards human rights, including an individual's right to affiliate with the community he chooses.[49] Opinion 4 held

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43. DUURSMA, *supra* note 1, at 66.

44. *Id.* at 67-72 (citing Joe Verhoeven, *La Reconnaissance Internationale: Déclin ou Renouveau?* XXXIX Ann. Français de Droit Int'l 7, 26 (1993)). A declaration of the Twelve (Member States of the EC) established the Commission on August 28, 1991. It consisted of ten members: one each chosen by the constitutional courts of Belgium, France, Germany, Italy, and Spain; two by the Yugoslav federal presidency; and three by the EC and its Member States. The Commission began meeting in early September. *Id.*

45. DUURSMA, *supra* note 1, at 67 n.323 (quoting Conference on Yugoslavia Arbitration Commission Opinion No. 1, 31 I.L.M. 1494, 1497 ¶ 3 (1992) [hereinafter Yugoslavia Arbitration No. 1].

46. *Id.* at 68 (quoting Conference on Yugoslavia Arbitration Commission Opinion No. 3, 31 I.L.M. 1499, 1500 (1992) [hereinafter Yugoslavia Arbitration No. 3].

47. *Id.* at 69-70 (quoting Conference on Yugoslavia Arbitration Commission Opinion No. 2, 31 I.L.M. 1497, 1498 (1992) [hereinafter Yugoslavia Arbitration No. 2].

48. *Id.* nn.329-30 (quoting Yugoslavia Arbitration No. 2, *supra* note 47, at 1497-98).

49. *Id.* at 70 nn.331-32 (citing Yugoslavia Arbitration No. 2, *supra* note 47, at 1497-

that the Serbs in Bosnia-Herzegovina have a right, under self-determination, to determine in conjunction with its other peoples the status of that republic.[50]

Duursma extracts a great deal from the Badinter Opinions. As noted above, it is important in her analysis of the Micro-States that a strong subjective element underlies the concept of peoplehood. Opinion 2, Duursma notes, posited that former citizens of the SFRY, finding themselves in new States, have the right to choose their nationality.[51] Duursma interprets this, to reiterate the subjective element which she must emphasize to sustain her thesis, that the nationals of the Micro-States constitute peoples to whom flows a right of self-determination. Without prejudice to Duursma's view that peoplehood contains a substantial subjective aspect, it is debatable whether the Commission's holding evidences such a broad proposition. A humanitarian crisis confronted the jurists. In Opinion 2, rather than theorizing about peoplehood, they might have been looking for release valves to vent the nationalist pressures, which had built up in the space of the former Yugoslavia. Emphasizing the right of Serbs to opt out of the nascent Croat State might have been the Commission's attempt to avert further bloodshed in what had become Europe's first major theater of war since 1945. Duursma reads into the Opinion an elaboration of the law of self-determination—in particular, an affirmation of the subjective aspect of peoplehood.[52]

Duursma notes that under Opinion 4, Serbs in Bosnia-Herzegovina shared in the right to determine the future position of that republic.[53] This again serves the

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98 ¶ 2 (1992)).

50. *Id.* at 69-70 (referencing Conference on Yugoslavia Arbitration Commission Opinion No. 4, 31 I.L.M. 1501 (1992) [hereinafter Yugoslavia Arbitration No. 4].

51. DUURSMA, *supra* note 1, at 70.

52. The subjectiveness of membership in a nationality may meet a limit when a government imposes objective criteria as conditions of citizenship. Such objective criteria might be comparatively innocuous, but in certain cases they have been malign. The racial criteria established over German citizenship by the Nuremburg Laws of 1936 were arguably objective. Many (perhaps a majority) of Germans of Jewish ancestry had the subjective state of mind of being German, but professions of loyalty and Germanness did not suffice in many cases to save them from Nazi persecution. The experience of the vast majority of Germans of Jewish ancestry bespeaks a limit on the subjective aspect of peoplehood. By contrast, the experience of a peculiar minority of such Germans—only recently documented in depth—suggests an almost boundless capacity for the subjective aspect to determine an individual's membership in a people. Bryan Rigg explains that a number of Germans of Jewish ancestry (some had a Jewish parent; others a Jewish grandparent) held high rank in the armed forces of the Third Reich. *See* DAILY TELEGRAPH (London) Dec. 2, 1996. These individuals characterized themselves as German, thus establishing themselves, in the subjective sense, as a member of the German people. This choice apparently contributed to their acceptance as Germans even in face of the Third Reich's maniacal anti-semitism. It must be remembered, though, that very few people of Jewish ancestry were able to sustain their German identity through subjective traits (and that those who were able also relied on objective characteristics such as language and religious upbringing). Duursma does not inquire into the limits of the subjective aspect of peoplehood.

53. DUURSMA, *supra* note 1, at 72.

author's emphasis on the subjective element of peoplehood. The Serbs, Duursma writes, could determine Bosnia's future "independently of the wishes of the rest of the people, namely the other Serbs in Serbia."[54] Duursma proposes that Opinion 4 interpreted international law to allow fractions of a people the right of self-determination.[55] The factor distinguishing a fraction of a people seems to be geography. The members of a fraction of a people may not display any traits—at least objective traits—which distinguish them from the people as a whole, but they may reside in a discrete territorial unit. If they demonstrate a tie of sufficient duration and intensity to that unit, then they, as much as the people as a whole, may enjoy a right to self-determination. In arguing for the independence and statehood of the European Micro-States—none of which are populated by a group markedly distinct from the inhabitants of their neighboring States—Duursma must rely on this geographic concept. In Duursma's thesis, geography acts in tandem with the subjective aspect of peoplehood.

Others have invested geography in self-determination. Crawford's concept of the "self-determination unit"[56] offers a recent precedent for the idea, and Duursma cites it as such. "The recognition of a political unit as a people," Duursma writes, "remains then the decisive criterion for the applicability of the right of self-determination, although it is not said that the recognition is always of a constitutive nature rather than just declaratory."[57]

Geographic doctrines have long assisted in defining territorial units. Early this century, Britain and Brazil arbitrated a dispute over the border between British Guyana and the Amazon. The final arbitral award stated:

> [T]he effective occupation of a part of a region, although it may be held to confer a right to the acquisition of the sovereignty of the whole of a region which constitutes a single organic whole, cannot confer a right to the acquisition of the whole of a region which, either owing to its size or to its physical configuration, cannot be deemed to be a single organic whole *de facto*.[58]

The negative portion of this statement rejected to the contiguity doctrine—a nineteenth century theory of sovereignty on the wane by 1904. Contiguity doctrine held that, from real control of one territory, sovereignty may be imputed over a neighboring territory; thus mere contiguity could convey title. In positing that it

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54. *Id.*

55. *Id.*

56. CRAWFORD, *supra* note 7, at 101, *cited in* DUURSMA, *supra* note 1, at 75.

57. Though not in a way that distracts too much distracting from her point, this statement might misconstrue Crawford. Duursma implies that Crawford adheres to the constitutive theory of recognition. Insofar as he takes a position in what he terms the "great debate," Crawford is best described as a declaratist with reservations. On the "great debate," see *infra* note 277.

58. *The Award of His Majesty the King of Italy with Regard to the Boundary between the Colony of British Guiana and the United States of Brazil (the "Guiana Boundary Case"), in* XI REP. INT'L ARBITRAL AWARDS 21-22 (United Nations 1962).

be asked whether a territory makes up a "single organic whole," however, the arbitral opinion advanced its own geographic doctrine. Some pieces of territory form compact units, not logically or cleanly divisible. Islands are the most obvious example. Where only one State exercises any effective control within such a unit, even if that control does not reach every corner, it makes sense to impute title to the whole of the unit to that State. This differs from the assertion that mere proximity of territory to a district effectively controlled by a State gives the State title to that territory. The rationale behind imputing sovereignty over an entire island when the claimant actually controls only a fraction of the island is that the territory, for reasons of geography, should be kept a single political unit. At least absent circumstances militating against such unitary treatment, imputing sovereignty over the whole makes sense in view of the lay of the land. The holding in the *British Guyana* case relied in part on a doctrine of geopolitical economy and rationalization. *British Guyana* posited, in distinction from the contiguity doctrine, a comprehensive geographic logic for claims to territory outside actual control. The emphasis on coherent territorial units seems related to the concept of self-determination units proposed by Crawford[59] and developed further by Duursma.[60]

Analyzing the Badinter Commission opinions, Duursma elaborates rules on peoplehood and the applicability of the right of self-determination. The author may, however, overdraw some of her conclusions about the substance of the Commission holdings. Badinter Commission Opinion 2 holds that the Serbs in Croatia and Bosnia-Herzegovina have a "right to recognition of their identity under international law."[61] From this, Duursma makes a rather bold proposition:

> [T]he members of the Serbian populations in question are recognized as minorities to whom minority rights have been conceded, because they are an ethnic, religious or linguistic community. The Commission implicitly recognizes the applicability of the right of self-determination to these Serbian minorities, because the principle may be applied to them in potential agreements and imply a right to choose their nationality.[62]

Duursma equates the Badinter Commission's phrase "recognized as minorities" to self-determination units; the Serb minorities constitute self-determination units because they are "recognized as minorities." The evidence for the equation is: (1) the allowance granted the Serb minorities to engage in international agreements, and (2) the implied right to choose their nationality. As previously argued, an alternative interpretation for this second factor may have been to provide a safety valve in the Balkan civil wars. The first factor, too, may not be best interpreted as evidence of the Serbs' status as a self-determination unit. Paola Gaeta finds the presence of the Serb and Croat communities of Bosnia unusual in

59. CRAWFORD, *supra* note 7, at 105-06.
60. DUURSMA, *supra* note 1, at 74-75.
61. *Id.*
62. *Id.* at 70.

the Dayton negotiations.[63] Their presence, Gaeta explains, was politically imperative for a peace agreement to be reached.[64] Upon signature of the Dayton Agreements, however, Gaeta posits that the Republika Srpska and the Croat Federation lost their international personality. The sole act that the two republics executed as international persons, then, was to surrender their international personality.[65] Acknowledgment of the communities as "minorities" must be understood in the context of an urgent search for a peace settlement in the Bosnian civil war. It is not accurately understood as a device to create self-determination units in the Serb minorities. Furthermore, Duursma herself earlier emphasized the difference between a "minority" and a "people;" it is the latter in Duursma's view that is eligible for the self-determination right.

It is unclear why Duursma interprets Opinion 2 of the Badinter Commission differently from the holding of the Committee of Jurists in the *Aalands* case. In the *Aalands* case, the jurists declined to attribute a right of self-determination to the Aalanders but did afford them special minority protections. Duursma correctly emphasizes this result. The plain language of Opinion 2 seems to stand for a very similar proposition: a right to separate ethnic identity is accorded (albeit without a detailed mechanism for the maintenance of this identity, as the Jurists prescribed in the *Aalands* case), but Opinion 2 does not accord the Bosnian Serbs the right to determine their place among the society of States. Duursma may over-read the Badinter Commission on this point. From an acknowledgment of minority rights, plain in the opinion text, Duursma discerns a declaration of eligibility for self-determination. The matter would be of little moment, except that Duursma later puts great emphasis on the difference between autonomy within a State and secession from it. This difference forms the basis of her most interesting prescriptions, toward the end of the book.[66] Opinion 2 implies a need for minority rights safeguards, for the very reason that self-determination is *not* properly applied to the Serb minorities. The Badinter Commission's holding with regard to the ethnic identity of Serbs in the secessionist republics is better read as a continuation of a long history of European minority rights protections clauses than as an authority on self-determination law.[67]

B. SELF-DETERMINATION VERSUS TERRITORIAL INTEGRITY

Duursma concludes that a right to self-determination has entered international law: "It is not just a pragmatic principle, but a right which has to be respected. An

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63. Paola Gaeta, *The Dayton Agreements and International Law*, 7 EUR. J. INT'L L. 147, 159-60 (1996).

64. *Id.* at 152.

65. *Id.* at 159-60.

66. *See infra* notes 97-103 and accompanying text (discussing autonomy within an existing state).

67. *See* Barbara Mikotajczyk, *Universal Protection of Minorities: Selected Problems* 1993 POL. Y.B. INT'L L. 137. (summarizing the history of minority rights clauses in treaties); *see also* Rita E. Hauser, *Foreword*, 11 COLUM. J. TRANS. L. 1, at 1-13 (1972).

opinio juris sive necessitatis has been formed and proved not only in the colonial context but also more recently in a non-colonial European context."[68] The scope of self-determination is broad. The right belongs to all peoples, not just those under alien subjugation. To be beneficiaries of the right, a group must: (1) have the character of a "people"; and, (2) bear a close relationship to a territory. The benefits of the right do not run to minorities or to newly-settled peoples. Over time, however, populations such as those of European origin in North America, South Africa, and Australia may acquire the traits of a people entitled to the right.[69]

Duursma notes that self-determination faces a countervailing principle in the concept of territorial integrity. This, of course, is not a new proposition.[70] Peoples with a connection to a territory possess a right to self-determination, but their exercise of this right depends upon whether its exercise respects existing States' rights to territorial integrity. The key question is "when does the right of self-determination take precedence over the obligation to respect the territorial integrity of a State."[71] From this, Duursma suggests an interesting and novel formulation about State recognition. The recognition of States is no stranger to controversy in international law. State practice has witnessed crises over the recognition of putative new States[72] and the legal meaning of recognition itself is uncertain.[73] New views on the subject are welcome. Duursma proposes that recognition amounts to a signal that the burden in favor of territorial integrity has shifted:

> In each case the right of self-determination has to be weighed against respect for the territorial integrity of a State. It is in this weighing process that international recognition becomes relevant. Recognition does therefore not imply that a right of self-determination exists, but that the right of self-determination offsets the inviolability of the territorial integrity in the given case.[74]

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68. DUURSMA, *supra* note 1, at 78.

69. *Id.* at 78-79.

70. *See, e.g.*, Matthew C.R. Craven, *What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood*, 1995 AUSTL. Y.B. INT'L L. 199, 220-21; MALCOLM N. SHAW, INTERNATIONAL LAW 302-05 (3d ed. 1991); SUSAN L. WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 163 (1995).

71. *Id.* at 81.

72. *See* David A. Ijalaye, *Was 'Biafra' at any Time a State in International Law?* 65 AMER. J. INT'L L. 551 (1971) (describing Biafra in the late 1960's as a case in point); JOHN J. STREMLAU, THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967-1970 (1977); Laura Silber, *Bosnia Asks Recognition from EC: Four Republics Seek Independence*, WASH. POST, Dec. 21, 1991, at A15 (providing Bosnia in the early 1990's as another example); Hans W. Maull, *Germany in the Yugoslav Crisis: From Assertiveness to Impotence* (unpublished paper under auspices of Deutsche Forschungsgemeinschaft) (on file with author); Alexander Mühlen, *Die deutsche Rolle bei der Anerkennung der jugoslawischen sezessionsstaaten*, 2 Liberal 9 (1992); Colin Warbrick, *Recognition of States*, 41 INT'L & COMP. L. Q. 473, 474-80 (1992).

73. *See infra* notes 270-83 and accompanying text (discussing theories of recognition).

74. DUURSMA, *supra* note 1, at 80.

The idea of offsetting a value which is inviolable might raise questions—if inviolable how can the value be offset?—but Duursma's formulation is useful nonetheless. In it, Duursma provides a framework for investigating state practice and *opinio juris* in order to determine when indeed self-determination offsets territorial integrity.

Little or no tension arises between the two principles in the most common cases of self-determination. An independent people forming the permanent population of an independent State has, like all peoples with a tie to a territory, the right to self-determination. Exercise of that right does not clash with the territorial integrity of any State. The right of such a people to merge their State with another illustrates the scope of their right.[75] Neither do colonial peoples in Non-Self-Governing and Trust Territories pose a problem. The United Nations declared the integrations of colonies to the metropole a fiction that it would not recognize.[76] Independence of European colonies, therefore, did not disrupt the territorial integrity of the metropolitan States.[77]

Trouble arises, however, where colonies bear ties to a neighboring territory. Can colonial independence disrupt the territorial integrity of a neighboring State? This question leads Duursma to a careful discussion of colonial enclaves, such as East Timor, West Irian, Belize, Ifni, Gibraltar, Walvis Bay, Hong Kong, Macao, and Goa, Daman and Diu. The author's analysis leads to three conclusions about these territories, representing the colonial entities most closely approximating the primary subject of her work: (1) if a colonial enclave once belonged to another State, then the inhabitants of the enclave are probably not a distinct people (and thus not proper beneficiaries of the right to self-determination); (2) there is no legal obligation to consult the inhabitants if the territory is small and geographically connected to the neighboring State claiming the territory; and (3) nothing in State practice excludes small enclaves from lacking a right to self-determination, except in the case of "micro-entities which have formed a clear distinct territory over the centuries, the political history of which cannot be assimilated to that of

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75. DUURSMA cites the unifications of Germany and Yemen in 1990. *Id.* at 81-82.

76. A number of colonies were declared by European colonial powers to constitute integral parts of the metropolitan State. Prominent examples included French Algeria and Portuguese Angola. Upon rejection of this fiction, divorce of the colonies from the colonial power no longer posed a threat to the territorial integrity of the colonial power.

77. *Id.* at 82-83. Duursma mentions the problem of heterogeneous colonies and concludes that self-determination units need not be homogeneous. While homogeneity is, in all likelihood, not a requirement, the problem of the ethnically multifarious colony deserves more attention. The secessionists in Biafra, Katanga, or Kashmir might have contested the proposition that self-determination is not affected by the presence of multiple peoples in one territorial unit. *Id.*; *see* IJALAYE, *supra* note 72, at 551; JOHN J. STREMLAU, THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967-1970 (1977); Alexis Heraclides, *Katanga, in* THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS 71-5 (1991); DUGARD, *supra* note 7, at 86-90; H.S. GURURAJ RAO, LEGAL ASPECTS OF THE KASHMIR PROBLEM (1967).

other States."[78] The exception to this third conclusion, incidentally, covers the five subjects of the author's case studies.

A more difficult case is that of secession from the metropole itself. What institution has the competence to decide when self-determination trumps territorial integrity? Duursma posits that this decision cannot rest with the metropolitan State; if it did, "it would result in the denial of the international character of the competing rules in question."[79] In other words, States would never attribute the right of self-determination to secessionist minorities on their territory. Defining competence in international law, however, tends to rest in large part with individual States. Duursma is unclear in the placing of competence to decide the balance between self-determination and territorial integrity. The recognition of the secessionist republics in Yugoslavia raised questions about the collective nature of recognition—did international law require recognizing States to coordinate their policy with others? It appears that an expectation had arisen by 1991 that States carry out recognition in a collective framework, but each recognizing State appears to have retained the discretion to choose the broadness of the collective framework in which to place itself. The States recognizing Croatia and Slovenia in December 1991 (chiefly Germany and Austria) did so earlier than the majority of Europe seemed to believe prudent (or legal), but the recognizing States, nonetheless, repeatedly acknowledged a requirement to recognize collectively. The requirement was announced expressly and also by implication (the recognizing States characterized their acts of recognition as collective). The early-recognizing States, however, liberally construed the term "collective"; it was up to them to define the framework of collective reference. Duursma is insightful in positing that a rule is necessary to mediate the tension between self-determination and territorial integrity. But she might underestimate the competence of the individual State to decide where to place the competence to conduct the proposed mediation.

Even if her assumption that the competence to decide the relative weight of the two competing principles rests with the international community is flawed, Duursma makes a number of interesting observations about the way in which the community evaluates secessionist claims. Critical to Duursma's proposed mechanism of international evaluation is the institution of State recognition. Central government authorities in a federal State may oppose secession, but "[t]hrough the act of recognition, a preference is expressed for the full right of self-determination of the secessionists."[80] As pointed out above, Duursma sees recognition as a burden-shifting device. If before recognition, the burden rested with the secessionists to prove that their independence would not threaten the territorial integrity of the parent State, then after recognition the burden shifts to the parent State to prove that continued integration does not derogate the secessionists' right to self-determination. In the case of recognition from many States, recognition is even more than a burden-shifting mechanism; such recognition puts "the 'old' State . .

78. DUURSMA, *supra* note 1, at 80-88.
79. *Id.* at 89.
80. *Id.* at 91.

. under the obligation to respect the territorial integrity of the 'new' State."[81] Widespread recognition, for Duursma, is determinative.[82]

Duursma's novel interrelation of recognition to self-determination and territorial integrity places a certain constitutive force in recognition. Recognition can "remedy the possible non-fulfillment of a criterion for statehood."[83] Thus recognition can create elements of statehood lacking in the objective condition of the putative State. Earlier, it was debated whether recognition constituted the object community as a State or merely declared that that community had attained the criteria of statehood.[84] Before the 1990s, the general view was that recognition was declaratory rather than constitutive.[85] State practice since the dissolution of the USSR and the SFRY has, however, led to a re-evaluation of this view.[86] The nature of recognition—whether it is constitutive or declaratory of statehood—is no longer a central subject of discourse, but the terms of what Crawford called the "Great Debate" still provide reference points for analysis of recognition. Duursma, in identifying a constitutive force in recent recognition practice (her example of the federal State resisting secession, but being overruled by generalized recognition, clearly refers to the SFRY case), has contributed to the post-Cold War re-evaluation of recognition.

Duursma also focuses, in connection with secession, on the much-debated issue

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81. *Id.* at 90-91.

82. *Id.* at 102. This formula raises a question: when is recognition sufficiently widespread to overcome the presumption favoring territorial integrity? The question might have deserved more analysis, though, in fairness, Duursma's work does not primarily address recognition. I would propose that recognition take on added weight when it originates from (1) powerful States; and (2) a representative cross-section of the international community. Thus recognition from twenty Latin American States might not be as likely to produce the burden shifting Duursma proposes as recognition from half as many States, representing Africa, the Arab world, East Asia, Eastern Europe, Latin America, and Western Europe. Nor might recognition from thirty or forty States comparatively weak in terms of the effective power processes of the world community have as much impact as, for example, recognition from France, Japan, and the United States. Note in this connection that jurists posit that the number of signatories to a treaty is relevant to determining the weight of the treaty in international law. The more parties, the stronger the evidence that the treaty represents a generally applicable international norm. *See* Reparations for Injuries Suffered in the Service of the United Nations case, 1949 I.C.J. 174, 185 (Apr. 11).

83. DUURSMA, *supra* note 1, at 92.

84. *See infra* note 270.

85. DUURSMA, *supra* note 1, at 111. She acknowledges this and agrees that "[w]hether an entity is a State is a matter of fact, not of recognition." *Id.* She cites to the ample scholarship tending to support a declaratory conception of recognition. *Id.* at 111 n.10.

86. *See* Duncan B. Hollis, Note, *Accountability in Chechnya—Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793 (1995) (proposing non-recognition of Chechnya evidences the constitutive doctrine in operation); *see also* Trent N. Tappe, *Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims*, 34 COLUM. J. TRANSNAT'L L. 255 (1995).

of human rights and statehood. Human rights violations, since the nearly universal nonrecognition of Rhodesian independence,[87] have reduced the prospects of recognition for States perpetrating such violations. States created through or resting upon violations of *jus cogens* have been denied recognition, with the nonrecognition of Manchukuo a forerunner of the practice surrounding Rhodesia.[88] Duursma adds an interesting twist to this matter. Instead of focusing on how human rights violations can diminish the legal stature of their perpetrators, she asks whether being a victim of such delicts entitles a people to recognition. If a people suffers an oppression denying it *jus cogens* rights, does the people thus acquire a right to secede under self-determination? Duursma concludes, after analyzing Nagorno Karabakh and Bangladesh, that violations of fundamental rights do not independently place self-determination ahead of the competing value of territorial integrity. The violations may provide evidence in support of secession, but they do not alone shift the burden against the parent State.[89]

Other factors also provide evidence favoring self-determination. The total disruption of an existing State may expedite recognition of new States.[90] And federal units may generally have an easier time securing self-determination in face of the territorial integrity principle than other pieces of a parent State. This leads to an interesting observation. No rule of law prefers federal units to lesser entities, when international society evaluates the right to secede. However, the prior existence of a putative independent State as a federal unit likely makes proof of statehood easier. The putative State is accustomed to self-administration, and the political desirability of independence has been tested during its federal existence. Other States can approach the putative State with some confidence of its ability to exert effective control over its territory. Duursma notes that the fifteen republics of the USSR received recognition quickly, whereas Abkahzia, Chechnya, and South Ossetia (lower-level entities within the Russian and Georgian republics) proved unable to establish independence, at least as a matter of international law.[91] If a fed-

87. *See* HARRY R. STRACK, SANCTIONS: THE CASE OF RHODESIA 2-3 (1978); Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 3 (1968); J.E.S. Fawcett, *Security Council Resolutions on Rhodesia*, 1995-96 BRIT. Y.B. INT'L L. 103, 112.

88. *See* Louis Cavaré, *La Reconnaissance de l'État et le Mandchoukouo*. XLII REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 8-10 (1935); H.J. Timperley, *Japan in Manchukuo*, 24 FOREIGN AFF. 295 (1934). It is not clear how many States recognized Manchukuo. In his THE BIRTH OF NATIONS, Philip C. Jessup indicated that only four countries recognized Manchukuo: El Salvador, Germany, Hungary, and Italy. *See* PHILIP C. JESSUP, THE BIRTH OF NATIONS 334 (1974). Another commentor, however, includes the Dominican Republic, Poland, and the Vatican. MO SHEN, JAPAN IN MANCHURIA: AN ANALYTICAL STUDY OF TREATIES AND DOCUMENTS 299-300 (1960).

89. DUURSMA, *supra* note 1, at 92-96. The racially discriminatory rule, Duursma proposes, might provide an exception. *Id.*

90. *Id.* Duursma offers Yugoslavia as the chief example. She also mentions the USSR. *Id.* at 96-97.

91. *Id.* at 98-99. For the view that Chechnya possessed the attributes of a State, see Hollis, *supra* note 86, at 793. Hollis proposes that recognition must be constitutive of

eral unit is illegally annexed, it may achieve recognition more readily than other federal units. But, again, Duursma emphasizes that it is not a legal rule which produces this phenomenon. Concluding that no consistent practice has arisen around secession, Duursma characterizes disputes over secession as largely political. Reciprocal use of force by States and secessionists continues, though outside international law. "The balance between the right of self-determination and the inviolability of the State's territorial integrity has thus been struck not by a rule of law, but by the law of the strongest, one of the first principles to be rejected by international law."[92] International law enters contests over secession only in connection with minority rights, humanitarianism (i.e., the law governing the conduct of warfare), and *uti possidetis juris*.[93] A secession struggle ends only when the secessionists quit or win international protection for their putative State.[94]

Duursma concludes her discussion of self-determination by asking whether the principle has risen to the level of *jus cogens*. Self-determination is, she writes,

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statehood, for Chechnya had the internal attributes of a State, yet did not enjoy protection under international law as a State. Chechnya was not widely recognized. Hollis reports that Kuwait and Saudi Arabia alone took steps toward recognizing Chechnya. Elsewhere, however, it has been indicated that Azerbaijan, Estonia, Iran, Lithuania, and Turkey extended recognition. *Id.*; *see* B. SZAJKOWSKI, ENCYCLOPAEDIA OF CONFLICTS AND FLASHPOINTS IN EASTERN EUROPE 63 (1993).

92. DUURSMA, *supra* note 1, at 101. Duursma cites as evidence Eritrea, the Krajina (in Croatia), Nagorno Karabakh, the Republika Srpska (in Bosnia-Herzegovina), and Chechnya. *Id.*

93. *Id.* at 101. This accords with Hollis on Chechnya. He identifies human rights law as the most important contact point between the Chechen conflict and international law. The hesitancy of the international community to address an internal Russian matter prevented the UN from seizing itself of the issue. OSCE statements concerning the conduct of warfare in Chechnya marked the maximum extent to which international law would reach the crisis. Those statements addressed humanitarian concerns, not the issue of Chechen self-determination. Note, however, that Crawford pointed out another contact between the events in Chechnya and international law—namely, the conventional force reduction treaties. International concern over Russian conduct in Chechnya has referred to Russia's obligations under the treaties to limit the number of certain weapons in European Russia. The anti-secessionist campaign in Chechnya required Russia to deploy military resources in excess of those permitted under the treaties. The Chechen conflict thus acquired a second contact with international law.

94. DUURSMA, *supra* note 1, at 102. This last proposition is consistent with Duursma's constitutivist leaning. One of the criticisms commonly leveled against constitutivism is that it posits entities outside the protection of international law. If rights of statehood depend on recognition, the unrecognized entity lies open to abuse. The declaratory view seems more consistent with the contemporary emphasis on individual rights. The declaratory view reasons that even absent recognition, an entity—or at least the people inhabiting it—still enjoys the protections of international law. Duursma apparently steps away from this view. Territorial integrity of the secessionist entity, the author writes, is guaranteed only after recognition. For the declaratist view, see J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 139 (Sir Humphrey Waldock ed., 1963).

nonderogable with regard to Non-Self-Governing and Trust Territories and peoples which form existing States.[95] But self-determination is not *jus cogens* in situations where self-determination will disrupt the territorial integrity of a State. In such situations, Duursma posits that self-determination declines to an ordinary norm of international law.[96]

C. AUTONOMY

Duursma's conclusion about self-determination in turn raises another question: if the principle of territorial integrity blocks the full exercise of self-determination, what recourse does a people have when self-determination threatens the territorial integrity of the parent State? Secession is not a right at international law in such cases. The answer Duursma proposes is an intermediate one: autonomy within the existing State. Such a solution would provide a people the political basis for realizing a separate cultural identity, without threatening the parent State. It would, according to Duursma, reduce the need for independent statehood.

Duursma further posits that another factor may also reduce the need for independence. As international law increasingly permeates domestic legal systems,[97] the human rights violations which so often in the past have provided impetus (if not legal imprimatur) for secession may become increasingly rare. Duursma writes:

> It can be maintained that States which have accepted international legal control over the implementation of minority rights and which have recognized the right of individuals or groups of individuals to present claims concerning violations of minority rights to an international judicial body are not legally obliged to give in to secessional movements which justify their secession on the deprivation of the group's human rights. The more effective international legal control on minority rights becomes, the less justifiable a secession by reason of human rights violations.[98]

Grants of internal autonomy may erode the State's minorities' claims to external self-determination. This leads Duursma to question whether the history, economics, and cultural matters cited by Croatia upon its secession from Yugoslavia justified secession. An SFRY willing to concede broad autonomies to its constituent republics, in Duursma's view, would have immunized itself against seces-

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95. DUURSMA, *supra* note 1, at 102-03.

96. *Id.* at 103.

97. *See* Antonio Cassesse, *Modern Constitutions and International Law*, III RECUEIL DES COURS (Hague Recueil) 331, 368-93 (discussing international law's influence on domestic law) [hereinafter Cassese, RECUEIL]; Vladen S. Vereschchetin, *New Constitutions and the Old Problem of the Relationship Between International and National Law*, 7 EUR. J. INT'L L. 29 (1996).

98. Vereschchetin, *supra* note 97, at 104.

sionist claims.[99]

Duursma develops a procedure for autonomy and secession. Autonomy, she proposes, should almost always precede full-fledged secession.[100] Perhaps the chief benefit of this procedure is that it delays the complicating effects of *uti possidetis* and thus may facilitate the pacific settlement of boundary disputes. Secession raises internal boundaries to international stature, and thus freezes in place arrangements which may have better reflected administrative convenience than minority rights.[101] As an autonomous unit—but still part of the parent State—the independence-leaning territory would have the chance to negotiate its boundaries before the boundaries receive the special deference reserved for international frontiers. A period of autonomy would also allow potential secessionists to experience the difficulties of self-administration. These difficulties might deter agitation for separation from the State. Finally, if the secessionists continued their drift toward independence, the period of autonomy would serve as a "training-wheel" phase for statehood—a time to develop the cadres, political habits, and institutions necessary to run a modern State.

The ideas summarized in the preceding two paragraphs are among Duursma's most enticing and most problematic; enticing, because they suggest a peaceful apparatus for satisfying the demands of national minorities; problematic, because, arguably, that apparatus may work at cross-purposes which defeat it and the ideas

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99. *Id.* at 106-07. Additionally, guarantees of autonomy must contain substance beyond their words for Duursma's legal mechanism to function fairly. The Yugoslav government at the time of Slovenian and Croatian secession attempted to woo back the secessionists by pledging increased autonomy within the SFRY. Pledges did not assuage the secessionists' concern over observed federal practice. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992). The position of the province of Quebec may provide a better example of how a parent State can guarantee minority rights and thereby reduce or eliminate legal grounds for secession. *See* James Crawford, *Report: State Practice and International Law in Relation to Unilateral Secession*, Canadian Dep't of Justice Report, Feb. 19, 1997 (interpreting state practice as not constructing a right to unilateral secession) (copy on file with AM. U. J. INT'L L. & POL'Y).

100. *See* CASSESE, *supra* note 6, at 120 (proposing that secession should only be a last resort, after attempts at alternative arrangements have failed).

101. DUURSMA, *supra* note 1, at 108. In this regard, Duursma draws attention to an instrument perhaps not familiar to all readers, the European Charter of Local Self-Government. With sixteen parties, the Charter requires local consultation before internal boundaries change. This rule acquires a special relevance in view of the difficulties caused in the space of the former Soviet Union by inter-republican and sub-republican boundaries drawn up without reference to local wishes. The Yugoslav crisis also comes to mind as a lesson in boundary-drawing. On Soviet internal boundaries, their origins, and some of the problems they pose, see CENTRAL ASIA AND THE CAUCASUS AFTER THE SOVIET UNION: DOMESTIC AND INTERNATIONAL DYNAMICS (Mohiaddin Misbahi ed., 1994); FROM UNION TO COMMONWEALTH: NATIONALISM AND SEPARATISM IN THE SOVIET REPUBLICS (Gail W. Lapidus & Victor Zaslavsky eds., 1992); Patrick Cockburn, *Dateline USSR: Ethnic Tremors*, 74 FOREIGN POL'Y 168 (1989).

may be predicated on trends in international society which ultimately transmogrify the issue of self-determination and secession.

Duursma justifies her proposed procedural rule on the proposition that it both respects territorial integrity and makes statehood easier in the event that the autonomous entity finally chooses a course of complete separation. If this is the inner-working of Duursma's autonomy apparatus, then that mechanism works at cross-purposes with itself. The operative decision-makers in a State are unlikely to view a device which facilitates the complete independence of an entity within that State as conducive to the maintenance of territorial integrity. If the goal of autonomy is to secure territorial integrity, then an effect which Duursma claims for autonomy—i.e., preparation of the autonomous unit for international personhood—runs contrary to that goal.

Of equal concern is a trend in international society, which Duursma identifies as critical to contemporary self-determination and secession law. Autonomy, she posits, will become more common as human rights principles permeate internal order and thus obviate claims to complete independence.[102] Indeed, international human rights law appears to be spreading to domestic arenas through covenants such as the ICCPR and ICESCR, regional arrangements such as the ECHR and OSCE, and admission of a greater role for international society in enforcing principles such as democracy.[103] Other phenomena, once restricted to the domestic realm, however, are simultaneously undergoing internationalization as well. Economic and trade controls number most prominently among these (consider the EU, NAFTA, and GATT). As the internationalization of human rights law may be changing the landscape of the *law* of secession, the internationalization of economic and trade controls may be changing the landscape of the *politics* and *economics* of secession. An internationalized human rights regime may spread conditions conducive to human dignity into all the countries of the world, and the establishment of such conditions may moot calls for independence. Human rights law, in short, has the potential to reduce occurrences of secessionist ambition. Economics once did the same. The insular character of economic and trade law, indeed, long presented one of the biggest impediments to secession. A small entity could little afford divorce from the trade zone formed by its parent State. The chilly prospects of independent economic life deterred secession. Under the new regimes of economics and trade, however, secession may carry much less adverse political-economic consequence than it has historically. An independent Scotland, Corsica, Catalonia, or Wales still inside the EU (or a Quebec still inside NAFTA) would experience change in its material circumstance from the days of incorporation under a larger nation State, but the change may well be judged manageable.

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102. *See supra* notes 97-99 and accompanying text (discussing human rights in relation to an international legal order).

103. On the status of democracy in international law, see James Crawford, *Democracy in International Law*, 1994 BRIT. Y.B. INT'L L. 113, 116-130; Olivier Corten, *La Résolution 940 du Conseil de Sécurité Autorisant une Intervention Militaire en Haïti: l'émergence d'un Principe de Légitimité Démocratique en Droit International?* 6 EUR. J. INT'L L. 116 (1995).

The political-economic result of an internationalizing society may not in all situations push in the same direction as the legal result. International human rights law may remove one of the reasons to seek independence; international economic and trade regimes may remove one of the most effective barriers to independence.

Duursma concludes that certain rules have arisen to endorse self-determination and territorial integrity separately, but what is lacking is a rule to mediate the two conflicting principles. She proposes autonomy as a mechanism to fill this gap. Whether such a mechanism would work remains uncertain.

D. CRITERIA FOR STATEHOOD

Much as she parsed through the UN and other practice relating to the term "self-determination," Duursma conducts an exhaustive analysis of the concept of the State. Particularly welcome is the author's critical survey of the Montevideo statehood criteria. The Montevideo Convention on the Rights and Duties of States[104] enumerated four criteria, which quickly came to be a near-talismanic reference[105] in discussions of statehood: (1) permanent population; (2) defined territory; (3) effective government; and (4) capacity to enter into relations with other States. Duursma notes scholarly dissatisfaction with the criteria, and she documents subsequent efforts to codify a better definition of statehood.[106] None succeeded. From 1949 onward, the International Law Commission (ILC) had a list of fourteen topics deemed to require codification.[107] Statehood and recognition numbered among these, but because they "raised many political problems which did not lend themselves to regulations by law," the ILC never tackled the issues.[108] A Special Rapporteur participating in the drafting of the Declaration on the Rights and Duties of States had earlier characterized the definition offered by the Montevideo Convention as problematic, but political concerns seem to have later prevented the ILC from formulating a new definition.[109] The drafting sessions for the 1969 Vienna Convention on the Law of Treaties,[110] discussions in particular of a draft Article 6 of the 1969 Convention,[111] and discussions of draft Articles on Succession of States in respect of Treaties[112] witnessed efforts to codify the definition of statehood and guidelines for recognition. Again, agreement proved elusive, and statehood and recognition remained uncodified. Like others

104. 165 L.N.T.S. 19; 28 AM. J. INT'L L. (Supp.) 53 (1934).

105. Citation to the Montevideo criteria is widespread. *See, e.g.*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 39 (1994); BROWNLIE, *supra* note 7, at 72-73.

106. DUURSMA, *supra* note 1, at 112-13

107. *Id.*

108. *Id.*

109. DUURSMA, *supra* note 1, at 113 (citing 1 Y.B. INT' COMM'N 61, § 69, U.N. Doc. A/CN.4/Ser.A/1949).

110. 2 Y.B INT'L COMM'N 107, § 4, U.N. Doc. A/CN.4/Ser.A/1956.

111. 2 Y.B INT'L COMM'N 192, § 38, U.N. Doc. A/CN.4/Ser.A/1966.

112. 1 Y.B INT'L COMM'N 19, § 76, U.N. Doc. A/CN.4/Ser.A/1974.

before,[113] Duursma has been left to propose a definition of statehood with the Montevideo Convention as the sole (and limited) guide among multilateral legal instruments.

Duursma's discussion of the requirements that an entity, in order to be a State, possess a territory and a population attached to that territory is distinctive in its focus on the factor of size. Diminutiveness does not seem to matter in assessing whether a putative State has a territory and a population.[114] The author's discussion of the requirement of effective government is more interesting. The requirement of effective government, Duursma posits, varies with the degree to which an entity's claim to statehood faces challenge. Secessionists heavily opposed by the metropolitan State may need to demonstrate a heightened degree of effectiveness over the territory they claim. Duursma notes that a presumption of continuity of effective power survives invasion, civil war, and even occupation.[115] Developing a strand of thought on federal States begun earlier in her discussion of secession,[116] Duursma proposes that federal States are more apt to lose effective control over their federal units than centralized States are over parts of their territory.[117] The Badinter Commission, it is noted, placed little burden on Croatia to prove the attainment of effective control over its territory, despite strenuous efforts by the SFRY to retain that constituent republic of the federation.[118] Duursma characterizes this result as a product of the political position enjoyed by federal units;[119] the author denies a legal aspect to the federal advantage. It seems odd, however, to attribute no legislative effect to the opinions of the Badinter Commission.[120] Scholars should consider the possibility that State practice surrounding

113. *See* CRAWFORD, *supra* note 7, at 110.

114. DUURSMA, *supra* note 1, at 116-18.

115. *See* CRAWFORD, *supra* note 7, at 77-79 (noting that States annexed from 1936 to 1940 continued to enjoy legal personality even though their governments lost all territorial power); *see also* ALEXANDRE-CHARLES KISS, REPERTOIRE DE LA PRATIQIQUE FRANÇAISE DE DROIT INTERNATIONAL PUBLIC ¶ 26-31, at 18-22 (1965) (citing earlier French practice in which France recognized Poland and Czechoslovakia as "nations" during World War I). Though Poland had once been a State, the Polish National Committee headquartered at Paris which benefited by the recognition could make no claim of continuity with a State which had disappeared from the map of Europe in 1815. *Id.* The recognized entities had no territory, yet the act "recognized their right to raise an army, to have a national flag, to have military tribunals authorized to judge their nationals." *Id.*

116. *See supra* notes 91-92 and accompanying text (discussing the lack of consistent practice around secession).

117. DUURSMA, *supra* note 1, at 118-19.

118. *See* Yugoslavia Arbitration No. 1, *supra* note 45.

119. *See* DUURSMA, *supra* note 1, at 199.

120. *See* Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L. L. 178 (1992) (noting that the author, Pellet, a professor at University of Paris X and the IEP (Paris), is a member of the Commission of International Law and drafted much of the Commission's work product in his capacity of legal advisor to the Badinter Commission); Pellet, *Note Sur la Commission d'Arbitrage de la Conférence Européene Pour la Paix en Yugoslavie*, 37 ANNUAIRE

the breakup of Yugoslavia produced a pressure toward greater international legal status for federal units.[121]

Like her discussion of territory and population, Duursma's analysis of independence approaches the requirement of statehood from an angle especially relevant to the European Micro-States. All five of the Micro-States display what larger States would likely regard as serious compromises of their independence. Duursma is at pains to characterize the various treaties and customary arrangements eroding the Micro-States' discretion in a way which leaves their independence intact,[122] and conversely, she characterizes independence as broadly as possible, in order to permit several apparent derogations of the Micro-States' autonomy. A good deal of precedent does support the proposition that a State may, without sacrificing independence, pledge to do or refrain from things which ordinarily lie within its discretion.[123] Nevertheless, Duursma must concede that there exist questions of independence of special concern to Micro-States.

Micro-States face problems stemming from their smallness, lack of raw materials, and historical relationships to larger neighbors. [124] Duursma posits that the various expedients to which Micro-States resort in their international relations are not *a priori* prejudicial to independence. Thus, Micro-States do not compromise their statehood by practical collaboration in the areas of postal service, education, broadcasting, telecommunications, and customs controls, nor by economic cooperation and political cooperation, including delegating defense and diplomatic representation to their neighboring State or States.[125] Duursma notes that Micro-States are susceptible to legal or military coercion, but she does not characterize this weakness as a derogation from independence. Under the principle of *ex injuria jus non oritur*, such illegal action has no legal effect and thus does not derogate a Micro-State's formal independence.[126]

Taken singly, these factors may not merit much concern, but the Micro-States are subject at once to almost all the limitations which Duursma discusses. With such large areas of activity excised from their competence, the Micro-States may suffer a substantial derogation, if not of independence, *per se*, then of some other

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FRANÇAIS DE DROIT INT'L [A.F.D.I.] 329 (1991); Matthew C.R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 1995 BRIT. Y.B. INT'L L. 333.

121. *See* Peter Savigear, *Autonomy and the Unitary State: the Case of Corsica*, *in* FEDERALISM AND NATIONALISM 96-112 (Murray Forsyth ed. 1989) (discussing the possible growth of the international status of federal units); Robert Senelle, *Constitutional Reform in Belgium: From Unitarism Towards Federalism*, *in* FEDERALISM AND NATIONALISM, *supra*, at 51-54. Both Savigear and Senelle point out that modest competences in external relations have been delegated to subunits or regions of certain European States.

122. *See infra* notes 137-269 and accompanying text (discussing Duursma's five case studies).

123. DUURSMA, *supra* note 1, at 121 (citing the classic *Wimbledon* 1923 P.C.I.J. and the *Austro-German Customs Union* 1931 P.C.I.J. cases).

124. *Id.* at 125.

125. *Id.* at 125-26.

126. *Id.* at 125-27.

perhaps less tangible aspect of statehood. Duursma repeatedly emphasizes that, with the exception of Monaco, the Micro-States retain the ability to exit the treaties and conventions under which they have assigned responsibilities to neighboring States. She also emphasizes that it is a serious challenge to their independence that some of the Micro-States lack access to judicial process through which to settle disputes between themselves and those States with which they are most closely associated.[127]

The focus on exit options and judicial process may, however, overlook an element of statehood not always described as such. States perform certain functions, which are, for lack of a better expression, characteristically state-like. So long as it may cancel the arrangement unilaterally, a State does not derogate its independence by, for example, assigning diplomatic responsibilities to another State. But, by such an assignment, the assigning State disengages itself from one of the signal activities of a State. One or two such acts of disengagement may not matter, but the Micro-States, as will be seen, do few of the things generally associated with statehood on their own, or, insofar as they do such things, they do them at a *de minimus* level. Certainly, a State consists in a bundle of rights, and these rights are still held by the Micro-States after they have delegated various functions to other States (provided the delegation is done through treaties which the Micro-States may denounce). Statehood, however, might also consist in *activities.* If a State is only an assortment of discretions or competences, then statehood could be vested in an entity recognized by international society as possessing those discretions or competences, even if it had no real capacities or contracted away its functions to others. The requirements of territory and population make apparent that statehood is more than a collection of abstract rights. Statehood is also concrete power over a segment of the earth's landmass and the permanent presence of a people. Can we properly speak of statehood absent most of the activities generally thought of as state-like? The question is a particularly sensitive one for Micro-States.

Duursma rounds off setting the stage with a brief discussion of a quintessential state-like activity, participation in international organizations.

E. MICRO-STATES AND INTERNATIONAL ORGANIZATIONS

"To admit all the bits and pieces of former empires as independent States," wrote D.W. Wainhouse in 1964, "would not only debase the coinage of membership, but would surely be more than the UN structure could bear."[128] Widespread concern at the governmental level over the multiplicity of small entities seeking UN membership appears to have begun in 1965 with the debate over admission of the Maldive Islands. Article 4, paragraph 1 of the UN Charter provides that Member States should be "willing and able" to discharge the duties of UN mem-

127. *Id.* at 127.

128. D. W. WAINHOUSE, REMNANTS OF EMPIRE: THE UNITED NATIONS AND THE END OF COLONIALISM 134 (1964), *quoted in* DUURSMA, *supra* note 1, at 134.

bership. A UN Committee of Experts convened in 1969 to study the possibility of alternative membership for very small entities. The Committee met eleven times and produced an Interim Report in June 1970, but no special UN membership category was established. The Educational, Scientific and Cultural Organization (UNESCO) and the Food and Agricultural Organization (FAO) amended their constitutions to allow Non-Self-Governing Territories to belong, but no corresponding change was made in the UN Charter. Nevertheless, the 1990s witnessed the admission of seven very small entities into the UN: Liechtenstein (September 18, 1990), Micronesia (September 17, 1991), the Marshall Islands (September 17, 1991), San Marino (March 2, 1992), Monaco (May 28, 1993), Andorra (July 28, 1993), and Palau (December 15, 1994).[129]

The issue of Micro-States in international organizations leads Duursma to introduce a problematic formulation about law and politics. Duursma emphasizes that international law has not barred Micro-State membership. According to Duursma, the League of Nations never excluded Micro-States on grounds of law, though it also never admitted any Micro-States.[130] The impediments to membership, she argues, have been the practical limitations inherent in diminutiveness and politics. "[T]he statehood of the Micro-States is not disputed, but the international community is not prepared to accord them rights which would permit them to exercise a disproportionate political influence on international affairs."[131] This formulation, as will be seen, recurs throughout Duursma's case studies of the five European Micro-States.[132] It is problematic in the way data is classified. Data which runs against the statehood of Micro-States is classified as political, whereas data in favor of statehood is deemed legal. This formulation thus fosters a selective analysis of State practice. For example, Duursma discusses treaties which limit the external autonomy of the Micro-States. These, she argues, are contrary to the UN Charter, Article 2, paragraph 1, which guarantees the sovereign equality of States, and thus such treaties "can have no legal effect" within the United Nations.[133] But State practice reveals data contrary to this proposition. Belarus and the Ukraine were bound, under the Soviet Constitution, to follow policy set by the USSR. The two republics, nonetheless, enjoyed UN membership. Duursma dismisses the Belaussian and Ukrainian cases as "a package deal based on political considerations."[134] Perhaps she is right to categorize admission of the two Soviet republics as political and without legislative effect on international law. But closer cases, arising in connection with the Micro-States, may be a different matter.

In fairness, there does exist a real divide between political action and legal rules. But that divide is often blurry. As such, a taxonomy that categorizes action

129. DUURSMA, *supra* note 1, at 138 n.33.

130. *Id.* at 133-34 (noting further that micro-states could request alternative membership).

131. *Id.* at 139.

132. *See infra* notes 137-269 and accompanying text (discussing in detail the five case studies).

133. DUURSMA, *supra* note 1, at 140.

134. *Id.* at 140 n.42.

as either "legal" or "political" may obscure more than it explains. Decisions dictated by politics can be instrumental in shaping the expectations of operative decision makers as to what conduct is legal. The State actions that legislate international law are often influenced by politics. Declining to attribute legislative effect to actions of a political nature, therefore, can produce an incomplete description of the law.

II. STUDIES IN SMALLNESS

"Micro-States," Duursma writes, "have been obliged to regulate their independence in a certain way."[135] The nature and extent of this regulation occupies Duursma through the five case studies, which constitute the body of the book.[136]

A. LIECHTENSTEIN

The Principality of Liechtenstein, the subject of Duursma's study possessing the soundest footing in terms of statehood criteria, has had throughout its history a close relationship to its neighbors, Switzerland and Austria. A constitutional monarchy, Liechtenstein has a Diet,[137] provisions for referenda, and a Crown Prince, currently Hans-Adam II.[138] As head of State, the Prince can initiate legislation, as can the Diet and referenda. The Prince at his own or the Diet's initiative can dismiss parliament.[139]

All of the courts that serve the Principality lie within its borders, though three of eight "sole judges" are Austrian.[140] Some prison sentences are served in Swiss cantonal jails.[141] International human rights law has substantially entered Liechtenstein's domestic legal system.[142] This transparency to international law makes Liechtenstein a model for Duursma's proposition that the Micro-State can exert a stabilizing—and legalizing—influence on international society. Duursma downplays as a political expedient the fact that non-nationals living in the Principality suffer some legal disabilities: over thirty per cent of the inhabitants are aliens, and Liechtenstein, like the other Micro-States, must take steps to protect its own na-

135. *Id.* at 145.

136. *See supra* notes 4-6 and accompanying text (developing the background for the critique of Duursma's analysis).

137. The Diet is Liechtenstein's Parliament.

138. DUURSMA, *supra* note 1, at 150.

139. *Id.* at 151-53.

140. *Id.* at 154.

141. *Id.* at 155 (explaining that punishments in criminal cases exceeding six months will be served in Swiss prisons).

142. *Id.* at 156-58 (noting that the entry of international human rights norms included Liechtenstein's accession to various human rights conventions and constitutional amendments such as that of 1984 granting women the vote). Broadly accepted rules, such as those against money laundering, have also joined Liechtensteinese law. *Id.* at 190 n.284. To further demonstrate its commitment to international law, Liechtenstein has taken the lead at the UN proposing autonomy for minorities in States. *Id.* at 198.

tionals from economic, and perhaps cultural, inundation. In any event, under the European Economic Area Agreement, Liechtenstein will have to equalize the legal situation as between nationals and aliens from the European Union (EU) and EFTA countries.[143]

Like the other Micro-States, Liechtenstein's foreign policy focuses on preserving its independence and statehood, obtaining membership in international organizations, and intensifying and broadening its diplomatic contacts while keeping the expense of statecraft modest. Neutrality is also a key Liechtensteinese policy.[144] "Independently of other political factors which might have influenced Liechtenstein's survival as a neutral State during both World Wars, it is evident that its neutrality was indispensable in order to stay outside the conflict."[145] By this, Duursma means that the scrupulous maintenance of a *legal status* of neutrality was instrumental to Liechtenstein's survival. As noted above, the author insistently posits a distinction between political and legal factors. It is, however, debatable whether the politics, which worked to the Principality's advantage, ought to be so readily characterized as independent from the legal situation. Legal neutrality did not save Denmark, Norway, or the Benelux countries.

The most serious questions as to this Micro-State's contemporary independence surround its relations with Switzerland. Though it accredits ambassadors to Austria, Belgium, the Holy See, and Switzerland, and maintains diplomatic or consular relations with fifty-three States, Liechtenstein hosts no foreign resident ambassadors.[146] It does, however, send its own representatives to conferences and keeps representatives at some international organizations.[147] The bulk of Liechtenstein's diplomatic contact is through the Swiss diplomatic corps. Duursma emphasizes that Swiss management of Liechtenstein's foreign relations takes place strictly on a case-by-case basis, and the Principality thus retains legal discretion over its external contact.[148] Similarly, a Canadian sits as the Liechtensteinese judge on the European Court of Human Rights[149] but can be replaced at Liechtenstein's discretion. Switzerland negotiates all postal matters on Liechtenstein's behalf, but Liechtenstein can obtain arbitration of a postal agreement it dislikes.[150] Under a Customs Union with Switzerland, all customs legislation passed in Bern and all customs treaties entered into between Switzerland and third States are in force over Liechtenstein, and Liechtenstein's Value Added Tax case appeals go to the Swiss Federal Court. Liechtenstein is somewhat protected in this arena because it is free to terminate the Customs Union upon one year's notice.[151] Under a Monetary Union, all Swiss banking law applies in Liechtenstein and monetary

143. DUURSMA, *supra* note 1, at 159.
144. *Id.* at 160.
145. *Id.* at 160.
146. *Id.* at 162.
147. *Id.*
148. *Id.* at 161-63.
149. DUURSMA, *supra* note 1, at 162-63.
150. *Id.* at 163 & 163 n.107.
151. *Id.* at 164-66.

and banking cases on final instance go to the Swiss Court of Cassation. Liechtenstein is also a Swiss franc zone to the exclusion of a Liechtenstein currency, which Liechtenstein has agreed to be barred from creating. Again, Liechtenstein may withdraw from the Union and obtain arbitration of disputes with Switzerland arising thereunder.[152] Finally, a decision by Switzerland to expel an alien controls over Liechtensteinese territory as well.[153] In one exception to the assignment of functions to Switzerland, Liechtenstein, which has not had an army since the dissolution of the German Federation in 1866, does not belong to the Swiss defense system.[154]

Duursma does not view this broad deputizing of Switzerland as a derogation of Liechtensteinese statehood. Rejection of the Principality's application for League of Nations membership is a case in point. According to Duursma, political concerns over managerial capacity and resources, not legal hurdles, kept Liechtenstein out of the League:

> At the time of the discussions on Liechtenstein's admission to the League of Nations . . . it could hardly be maintained that Liechtenstein had delegated many attributes of its sovereignty to other Powers . . . . The true reason for the non-admission of Liechtenstein was its smallness, not its deputation of some sovereign attributes by reason of its smallness.[155]

This formulation again raises the question whether statehood survives habitual passivity in areas of key state-like functions. Duursma does acknowledge, without substantial exploration, that some juridical arguments were presented against Liechtenstein's League of Nation's application.[156] Putting these aside, there remains the reality that politics and facts interact with the law. In international law, the expectations of operative decision-makers as to what conduct is permissible, in at least some part, determines juridical rules. Duursma's resort to a law-politics distinction too easily removes critical problems facing a Micro-State's international personality.

Duursma's support for Liechtenstein's international status is most convincing in its exhaustive description of the Principality's ultimately successful drive for membership in international organizations: admission to the International Court of Justice (ICJ) Statute in 1950 over Soviet objections,[157] participation in the

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152. *Id.* at 166.
153. *Id.* at 168.
154. *Id.* at 169.
155. DUURSMA, *supra* note 1, at 172-73.
156. *See id.* at 173 n.185.
157. *Id.* at 175-77. "A review of the economic and political situation of Liechtenstien would show that it had never been an independent state . . . . It had formed a customs union with Switzerland, which country took care of Liechtenstein's post and telegraph service and its diplomatic representation . . . it must be considered a dependent State." (quoting the Belarussian delegate).

Conference on Security and Cooperation in Europe (CSCE) process;[158] admission to the Council of Europe in 1978;[159] and, accession to and participation in the European Free Trade Association (EFTA).[160] But, as will be suggested later, the reliance on international organization membership as evidence of statehood poses problems of its own.[161]

B. SAN MARINO

Surrounded on all sides by Italian territory, the Republic of San Marino, according to some, is the oldest continually functioning democracy.[162] Its long devotion to the right of asylum cost it invasion at the hands of a Papacy pursuing renegades,[163] but may have saved it from integration into the new Italian State in 1861. San Marino had given refuge to Italian nationalists in the 1850s, and after unification, the leaders of the new State respected the Republic's ancient independence.[164]

The Republic is governed by institutions that can trace their roots at least four centuries back.[165] A Great and General Council holds legislative power, and its sixty members appoint the State Congress, San Marino's government.[166] The Council also appoints the Heads of State, called the "Captains Regent," who hold office for six-month terms.[167] During their terms, the Captains Regent cannot resign and must concur to pass decrees.[168] Duursma identifies these rules as leftovers from government structures common in the early middle ages.[169] A "Council of Twelve," chosen from the Great and General Council, have some judicial competence, while an assembly of the heads of families, called the "Arengo,"[170] seems a vestigial organ. Legislative initiative lies with the State Congress, the Council, every constituent commune, and with the general citizenry.[171] Judges are appointed for renewable four-year terms by the Great and General Council

158. *Id.* at 178 (noting that the Soviet Union did not question Liechtenstein's legal statehood, only its independence).

159. *Id.* at 182-84.

160. *Id.* at 184-86.

161. *See infra* notes 221-251 and accompanying text (discussing the tensions of establishing statehood).

162. DUURSMA, *supra* note 1, at 208 (presenting an ancient legend that dates the founding of San Marino to 301 AD).

163. *Id.* at 208-09.

164. *Id.* at 209-10, 223.

165. *Id.* at 211 (explaining that San Marino's institutional organs were first noted in the Statutes of 1600).

166. *Id.*

167. *Id.* at 212.

168. DUURSMA, *supra* note 1, at 212.

169. *Id.*

170. *Id.* at 213.

171. *Id.* at 211-14 (noting that any sixty San Marino nationals can petition for a draft law to be presented).

and cannot be San Marino nationals, unless at least fifty-nine of the Council members vote to confirm them.[172] Removal for political cause is possible, raising doubts over independence of the judiciary.[173] San Marino has no civil code, but rather an admixture of common law, cannon law, ancient Roman law, codes known as the Statutes of 1600, and "ordinary law."[174] One wonders whether possession of a distinctive legal system can be an element of peoplehood. Duursma does not suggest this, but the peculiarity of some Micro-State legal systems raises the possibility.

Like Liechtenstein, San Marino readily admits international human rights standards into its law. The Republic is a State party to the ICCPR, ICESCR, European Commission an Human Rights (ECHR), and the Convention on the Rights of the Child.[175] It files reports, pursuant to ICCPR Article 40, paragraph 1, and guarantees universal franchise. Given the transparency of the Republic to international legal norms, the concern seems unwarranted, as expressed by a member of the ICCPR Human Rights Committee, that the ICCPR might be treated as legally inferior to the San Marinese constitution.[176] A more serious matter raised by the Committee is the provision that San Marinese generally cannot serve as judges.[177]

San Marino is a neutral State, though this status remained unwritten until 1971.[178] Nonetheless, San Marino has not been at war since 1462.[179] This history

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172. *Id.* at 214.

173. *Id.* at 214-15 & n.52 (explaining that the judiciary is "guaranteed by law").

174. DUURSMA, *supra* note 1 at 215 n.60.

175. *Id.* at 218.

176. *Id.* at 217-19. Such concern is misplaced in a more general respect. Other countries demonstrating some readiness to effectuate international norms in municipal law have expressly subordinated international conventions to the national constitution. *See* Malachtou v. Armefti and Armefti 88 I.L.R. 199, 205 (Cyprus 1987) (noting that the Supreme Court of Cyprus in addressing the relation between the European Convention on the Legal Status of Children Born out of Wedlock to the municipal law of Cyprus, judged the Convention inferior to the Cypriot Constitution). At the same time, the Court applied the Convention to the case at bar. *Id.; see also* Pavlou v. Chief Returning Officer, Mayor of Nicosia, 86 I.L.R. 109, 114 (Cyprus 1987) (noting an example of a petitioner claiming that ratification of the ICCPR and the 1958 Convention on Discrimination "were superior to all of domestic Cypriot laws with the exception of the Constitution"). The Court dismissed the petition, noting that Cypriot law did not contravene the treaties. *Id.*; *see also* Vienna Convention on the Law of Treaties, UNGAOR, 24th Sess., U.N. Doc. A/CONF. 39/27 art. 46 (1969). This convention provides:

> [A State] may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned *a rule of its internal law of fundamental importance.*

Id. (emphasis added).

177. DUURSMA *supra* note 1, at 220. For discussion of this aspect, see *infra* text accompanying notes 299-301 (analyzing the judicial structure of the five case studies).

178. DUURSMA, *supra* note 1, at 222.

amplifies doubt over Duursma's formulation regarding Liechtensteinese neutrality.[180] If it was legally formalized neutrality that saved Liechtenstein from the World Wars, what protected San Marino before 1971?

Duursma identifies neutrality, reinforcement of international status, and contribution to international problem-solving as the focus of San Marinese foreign policy.[181] A sometimes-rocky relationship with Italy reached a low point when, between 1949 and 1951, Italy placed customs controls around the Republic.[182] San Marino had construed the 1939 Treaty of Friendship with Italy as permitting San Marino to operate gambling casinos. Italy interpreted the Treaty's bar against fiscal measures deleterious to Italy as reaching casinos.[183] San Marino ended the gambling, to Italy's satisfaction, and the quasi-blockade was lifted. Duursma does not consider this episode evidence that San Marinese independence is compromised by its relationship to Italy.[184]

Recalling Swiss-Liechtensteinese relations, a number of arrangements deputize Italy to carry on State functions for San Marino. With various distinctions from Liechtenstein, San Marino defers to Italy on postal matters,[185] television and radio regulations,[186] the monetary system,[187] and bank competition law.[188] Duursma emphasizes that San Marino is paid by Italy for limiting its activity in the broadcasting sphere, but this does not answer questions as to what range of activities an entity may eschew before its passivity begins to erode its character as a State. Duursma correctly points out that San Marino, as evidenced by the payments and other benefits it receives from Italy, retains *rights* to do the things an entity must be free to do in order to be a State.[189] But might the entity actually have to *do* some threshold quantity of such things? Considering that for a fee, San Marino has agreed not to issue currency, levy customs duties, cultivate tobacco, establish gaming houses, or adopt other fiscal measures "deleterious" to Italy,[190] the question is a serious one.[191]

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179. *Id.* at 222.

180. *See supra* note 142 and accompanying text (discussing the adoption of various laws into Liechtenstein's domestic legal system).

181. DUURSMA, *supra* note 1, at 222-23.

182. *Id.* at 225.

183. *Id.* (noting that Italy also doubted whether San Marino's liberal divorce laws were consistent with the Treaty of Friendship).

184. *Id.* at 227, 258.

185. *Id.* at 228-29.

186. *Id.* at 231.

187. DUURSMA, *supra* note 1, at 231-33.

188. *Id.* at 231-32.

189. *Id.* at 255-59.

190. *Id.* at 230 n.61.

191. To the Republic's credit, it does maintain some interesting areas of independent action. The Council of Twelve has exclusive control over the granting of residence permits, and, perhaps in an artifact of the Republic's ancient tradition of asylum, persons expelled from Italy are free to enter San Marino. *Id.* at 230-31. Geography might limit the meaningfulness of this particular allowance. San Marino has no airport, thus one can only reach it

San Marino gained admission to the Statute of the ICJ in 1953, and the Committee of Experts evaluating San Marino at that time raised no questions as to its statehood or independence.[192] The Republic participated in the birth of the OSCE at Helsinki in 1972.[193] The FAO, by contrast with the ICJ and OSCE, did not admit San Marino, out of concern that the diminutive State would have difficulty meeting the obligations of membership.[194] UNESCO also declined admission in 1947, but admitted San Marino in 1974 without debate.[195] In parallel fashion, the World Health Organization rejected San Marino in 1948-49 for the State's fiscal limitations but admitted the Republic in 1980.[196] WHO cited San Marino's international status as a problem in the late forties; Duursma emphasizes the fiscal impediments.[197] When the ILO admitted San Marino in 1983 (reversing a 1950s rejection), it sought assurances from the Republic on financial capacity.[198] Only its application to the Council of Europe appears to have prompted explicitly legal analysis of the entity's status.[199] Council rapporteurs queried whether San Marino is a State.[200] Recognition by States, Duursma concludes, was decisive in the rapporteurs' finding that San Marino constitutes a State. After this finding, the Republic joined the Council of Europe in 1988.[201] The Republic also is in a customs union with the EU and has observer status in EU institutions.[202] Acquisition of this status evidently was eased by San Marino's promise not to make itself a tax haven.[203] It seems fair to ask whether, by undertaking to harmonize its tax law with the EU, San Marino received dignities, which if premised on the virtues of its legal status alone, it would have been denied. At the very least, if membership in the EU and other international organizations is a cornerstone of San Marino's international legal status, then the connection is well-illustrated between politics and law: admission to those bodies depended upon political concession and, once achieved, generated legal rights. Politics does seem to contribute to the international status of the Micro-State.

C. MONACO

The Principality of Monaco has been at least nominally ruled by the Grimaldis, a family from the Guelph faction in Genoa, for most of the time since 1297.[204]

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travelling by land through Italian territory. *Id.* at 231.

192. DUURSMA, *supra* note 1, at 235.
193. *Id.* at 235-36.
194. *Id.* at 237-38.
195. *Id.* at 238-39.
196. *Id.* at 239-40.
197. DUURSMA, *supra* note 1, at 239-40.
198. *Id.* at 242.
199. *Id.* at 242-46.
200. *Id.* at 243.
201. *Id.* at 245.
202. DUURSMA, *supra* note 1, at 246.
203. *Id.* at 247.
204. *Id.* at 262-64.

The 1.95 square kilometers which compose Monaco are surrounded on all but their seaward side by the French *département* of Alpes-Maritimes.[205] Monaco was traded as a protectorate from Spain, to France, to Sardinia, and, arguably, back to France.[206] From a treaty with France, to which Monaco acceded in 1861, Monaco gave up the right to place itself under the protection of any power besides France.[207] The basis of Franco-Monégasque relations at present are a Treaty of July 1918 and a Convention of July 1930.[208] These two instruments set out much of the constitutive structure of the Principality.[209] The Prince Regnant (Rainier III since 1949) shares executive power with the government, which consists of a Minister of State and three Government Counsellors.[210] In theory, these are appointed by the Prince and dismissed by the Prince and are not responsible to parliament.[211] In fact, the Minister of State must be selected from three candidates proposed by France, and one Government Counsellor is similarly French-nominated.[212] These two officials cannot be Monégasque nationals and usually belong to the French diplomatic corps.[213] Various other civil and police officials in Monaco are also French-appointed and of French nationality.[214] For the term of their service to the government of the Principality, officials belonging to the structure of the French civil service are seconded to Monaco.[215] The Minister of State's signature is required to pass a Ministerial Decree. The parliament, the *Conseil National*, consists of delegates elected by universal and direct suffrage. Delegates cannot be Government Counsellors or members of the royal household.[216] The Prince alone initiates legislation, but a draft law goes no further without approval of the Minister of State.[217]

Like the government, the Monégasque judiciary by terms of the 1930 Convention contains substantial foreign elements.[218] A majority of Monaco's judges are French nationals.[219] Prison sentences are served in French jails. The Monégasque criminal and civil codes closely follow the French. The Prince Regnant does enjoy the power of pardon and amnesty, with the advice of a Crown Council.[220]

Monaco appears less receptive to international law than Liechtenstein or San

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205. *Id.* at 261.
206. *Id.* at 262-63.
207. DUURSMA, *supra* note 1, at 263.
208. *Id.* at 263-64.
209. *Id.* at 264-67.
210. *Id.* at 264.
211. *Id.* at 264-65.
212. DUURSMA, *supra* note 1, at 265.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 266.
217. DUURSMA, *supra* note 1, at 266.
218. *Id.* at 268-70.
219. *Id.* at 268.
220. *Id.* at 268-70.

Marino. This has produced an interesting test of the Principality's independence. Though the Monégasque Supreme Tribunal recognizes the supremacy of international conventions in principle,[221] Monaco is not party to the ECHR. Unable to proceed against Monaco under the ECHR, a party in 1993 instead made application against France. The application theorized that because the act challenged a judgment of one of the French judges in the Monégasque judiciary, that act could be imputed to France. The ECHR held that acts of those judges are *not* imputable to France.

Duursma reads this judgment to strengthen Monégasque independence: it makes clear, according to the author, that the French judges in Monaco do not answer to France.[222] I believe such a reading is strained. The plainer reading is that decisions of French personnel in the Monégasque judiciary are not reviewable by the ECHR. Whether the judges are under French influence is quite a different matter. The 1993 ECHR holding, rather than strengthening the independence of the Principality, may in fact weaken it. France is freed of any legal liability, which might have arisen from the power France exercises over the Monégasque judiciary. The judges, French-appointed, French-recalled, and of French nationality, are free from French influence only in the most formal sense. The fact that France may inevitably exercise this power without any review only amplifies the weakness of judicial independence in Monaco.

A further problem arises from the requirement that French nationals hold these and other Monégasque posts: Article 25(c) of the ICCPR guarantees a person "access, on general terms of equality, to public service in his country." A national of Monaco cannot serve as his nation's head of government. Nor can a Monégasque who is not a member of the Grimaldi family ordinarily serve as head of State. Concededly, some entities, the statehood of which nobody would deny, have constitutional arrangements that withhold high offices from most citizens. In constitutional monarchies, only members of the royal household become head of State,[223] and in the United Kingdom, for example, the upper legislative chamber consists, in part, of hereditary nobles.[224] This factor alone, then, is not disabling, but given certain other problems in status, nonconformity with Article 25(c) seems noteworthy.

More than with Liechtenstein and San Marino, foreign relations cast doubt on Monaco's independence. If, as I argued earlier,[225] the delegation of certain com-

221. DUURSMA, *supra* note 1, at 270.

222. *Id.* at 272-73, 284-85 (discussing Meignan v. France, App. No. 21392/93, 75 Eur. Comm'n H.R. Dec. & Rep. 251 (1993)).

223. Countries with monarchs as heads of State include Bahrain, Belgium, Bhutan, Brunei, Denmark, Japan, Kuwait, Lesotho, Liechtenstein, Luxembourg, Malaysia, Monaco, Morocco, the Netherlands, Norway, Oman, Qatar, Saudi Arabia, Spain, Swaziland, Sweden, Thailand, Tonga, and the United Arab Emirates. *World Heads of State and Government Leaders*, FACTS ON FILE WORLD NEWS DIG., Sept. 30, 1993, at 736.

224. ROLAND YOUNG, THE BRITISH PARLIAMENT 57-67 (1962) (discussing the structure of the British House of Lords).

225. *See supra* notes 146-61 and accompanying text (noting Liechtenstein's method of

petences by Liechtenstein may compromise the alpine Principality's statehood, then, *a fortiori*, a more extensive delegation by Monaco must compromise that entity's statehood. Under the 1918 Treaty, Monaco even appears to have surrendered rights, not just delegated activities. "On its part," the Treaty reads, "the Government of His Serene Highness the Prince of Monaco undertakes to exercise its rights of sovereignty in perfect conformity with the political, military, naval, and economic interests of France."[226] France, afraid of German influence in the Grimaldi family, took preemptive steps, and some scholars have termed the result a French protectorate over the Principality.[227] Agreement is required with France before Monaco may establish a new diplomatic mission, appoint a chief of mission, or enter into a treaty.[228] Except where scientific, social, or moral problems are under discussion, Monaco must conform its position in international conferences and organizations to those of France.[229] The 1918 Treaty also provides: "In case of vacancy of the crown, especially by absence of a natural or adopted heir, the territory will form, under the protectorate of France, an autonomous State under the name 'State of Monaco.'"[230] Duursma refers to this provision as evidence that Monaco is not now a protectorate.[231] The author, however, must concede a problem here; the provision authorizes France under certain conditions to turn the Principality into a protectorate. France, moreover, can create those conditions. The 1918 Treaty accords France the power to veto a proposed regent or successor to the throne, and no reason need be given for the veto. France can thus preserve the vacancy which triggers France's discretion to turn Monaco into a protectorate.[232] Duursma is right to emphasize that neither the 1930 Convention nor the 1918 Treaty permits Monégasque denunciation.[233]

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representation abroad).

226. DUURSMA, *supra* note 1, at 275.

227. BRIERLY, *supra* note 94, at 136.; BATY, THE CANONS OF INTERNATIONAL LAW 8, 402-03 (1930) (terming Andorra, Monaco, and San Marino, as even "something less than Protected States" and interpreting the 1930 Treaty between Monaco and France to "deprive the former Power of important attributes of sovereignty").

228. DUURSMA, *supra* note 1, at 279-80.

229. *Id.* at 279.

230. *Id.* at 281.

231. *Id.* at 281.

232. *Id.* at 281-82.

233. DUURSMA, *supra* note 1, at 285. Elsewhere, Duursma emphasizes the legal right of particular Micro-States to denounce treaties. *Id.* Denunciation clauses, she argues, are critical to the independence of the entities; so long as the assignment of functions which treaties make to other countries is reversible, the assignor retains the independence to perform those functions. *Id.* Recent commentary on multi-lateral intervention has, similar to Duursma's discussion on the treaty relations of the Micro-States, emphasized the consensual and revocable nature of the pertinent arrangements. Countries may consent to a temporary surrender of autonomy in the interests of domestic order or democracy. The surrender remains lawful, so long as consent was validly given and the treaty allowing external intervention by the State can be denounced subject to the intervention. *See* David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607 (1995) (advocating the use of treaties for intervention in State parties' internal humanitarian cri-

Duursma finds support for Monégasque statehood in international law rules, which may undermine the agencies eroding Monégasque independence.[234] First, the *Nuclear Tests* case teaches that a treaty limiting a State's freedom of action should be given a restrictive interpretation.[235] The 1918 and 1930 instruments, therefore, do not work the dependency their plain language expresses. Second, effectuating France's purported discretion to veto nominees for the throne, preserve a vacancy, and create a protectorate in response would violate the self-determination of the Monégasque people. Self-determination, as a *jus cogens* rule, is nonderogable. Thus, the instruments purporting to convey the veto discretion to France are void.

Once again, Duursma might have done better had she moderated her formalist approach by focusing on how the legal structures in question actually operate. In the Monaco case study, the author has parsed through the relevant instruments with admirable thoroughness yet has also kept a needed eye on the practical derogations of Monégasque independence. I wonder only whether the conclusion is a little too generous.

D. ANDORRA

If Micro-States seem eccentric in the world community, then Andorra seems eccentric even among Micro-States. The Principality of Andorra, ensconced in the Pyrenees between France and Spain, is headed by two co-princes—the Spanish Bishop of Urgell and the President of the French Republic—who serve as a "joint and indivisible" head of State.[236] Ancient founding charters, called the *pariatges*, are at least notionally the basis for Andorra's trilateral relationship with France and the Bishop.[237] Through the Bishop, cannon law and Catholic doctrine enter Andorran constitutive processes,[238] as must the politics of a third foreign entity, the Holy See. Through the French co-prince, the politics and constitutive processes of France are also felt in the Principality. Under the *pariatge* of 1278, the Andorrans give biennial fief payments, called the *qüèstia*, to their co-princes, in person.[239]

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ses); *see also* Corten, *supra* note 103, at 124-25 (proposing, among four prerequisites for an armed humanitarian intervention, that the "legitimate" authorities of the country subject to the intervention sign an accord stating that such intervention ought to be executed).

234. DUURSMA, *supra* note 1, at 307.

235. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 267 (Dec. 20), *cited in* DUURSMA, *supra* note 1, at 308.

236. DUURSMA, *supra* note 1, at 322.

237. *Id.* at 318; *see also* A.E. Dick Howard, *Constitution-Making in Central and Eastern Europe*, 28 SUFFOLK U. L. REV. 5 (1994) (discussing the "constitutional foundation myth"); *How Ideas Travel: Rights at Home and Abroad*, 63 N.Y. ST. B.J. 6 (1991) (noting the difficulties of exporting the ideas of the American Bill of Rights to other countries in the process of drafting their own constitutions).

238. DUURSMA, *supra* note 1, at 351-52.

239. *Id.* at 318. Others have noted the unusual character of the Andorran State. For example, the CIA-authored WORLD FACTBOOK, which describes the governance of virtually

In 1993, Andorrans approved a new constitution by referendum and vote of the legislature. The constitution of 1993 recognizes Catholic cannon law and the French Constitution as governing the replacement of the co-princes. A General Counsel consisting of twenty-eight counselors legislates. Draft laws can be presented to the Council by the Government, a parliamentary group, any three Counsellors, any three Parish Counsels, or on the initiative of a ten percent bloc of the electorate. Signature of the head of government and both co-princes is required to promulgate a law. The co-princes may negotiate treaties.[240] On two-thirds vote of the General Council and popular referendum, the constitution may be amended. A Constitutional Tribunal, which has advisory jurisdiction, consists of four judges, one appointed by either co-prince and two by the General Council. The co-princes may veto a proposed law, a treaty, or appointment of the head of government. They jointly hold the power of pardon.[241]

The ECHR has expressed concern over lack of independence on the part of the Andorran judiciary. Two deficiencies in particular have disturbed the ECHR: lack of equality before the law and no express prohibition against discrimination. Andorra limits the freedom of association, requires that two thirds of the capital in an enterprise be held by Andorran nationals, prohibits non-nationals from commerce and industry, and bars trade unionization and collective bargaining.[242] The UN Declaration of Human Rights is in force, but in other respects Andorra is not maximally transparent to international law.[243]

France long maintained that Andorra was not a State, but this official position has changed. The 1993 Constitution shifted some foreign policy discretion from the co-princes to the Head of Government. Andorra aims to secure its neutrality and statehood, and, to the latter end, the co-princes have helped secure Andorran representation in international organizations. The 1993 Treaty of Vicinage requires Andorra to act consistently with the "fundamental interests" of France and Spain. The Treaty provides no arbitration procedure, nor does it contain a denunciation clause. French and Spanish missions provide diplomatic assistance to Andorrans in third countries, and Andorra can grant an exequatur to a third-State ambassador only on the signatures of the co-princes.[244]

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every territorial entity in the world by reference to a small handful of simple types, cannot fit Andorra into its authors' taxonomy. It refers to the Andorran system as "unique." WORLD FACTBOOK 1993-94 8 (1993).

240. DUURSMA, *supra* note 1, at 321-24.

241. *Id.* at 325-28.

242. *Id.* at 326-34.

243. On the general matter of transparency to international law, see Cassese, Recueil, *supra* note 97, at 368-393 (positing four degrees of deference to international law in national constitutions). The phenomenon is noted in the Bosnian Constitution set up under the 1995 Dayton Agreements. Gaeta, *supra* note 63, at 161. ICJ Judge Vereschchetin notes it in many of the new constitutions of Central and Eastern Europe. Vereschchetin, *supra* note 97, at 32; *see also* A. Bleckmann, *Die Völkerrechtsfreundlichkeit der Deutschen Rechtsordnung*, 23 DIE ÖFFENTLICHE VERWALTUNG 309 (1979).

244. DUURSMA, *supra* note 1, at 334-39.

Andorra confronts serious and long-established inroads against its independence. Recollecting her approach to Monaco, Duursma meticulously examines the formal structure of Andorran law to identify limits on the external influences, which bedevil the Micro-State's status. The French Constitution of 1958 makes no provision for the President's role as co-prince of Andorra. Duursma infers that there is thus no legal requirement that the French President, *qua* co-prince, conform Andorran policy to French.[245] The author must concede that the absence of law on the President's role in Andorran affairs "creates a legal insecurity with regard to the personal and exclusive character of the French co-Prince's position in Andorra."[246] If the ECHR precedent concerning the French position in Monaco has any predictive value for Andorra, it would seem that, in a contest over an act by the French President as co-prince, this "legal insecurity" would accentuate French discretion over Andorran affairs. Applying the Monaco precedent, the French chief executive would not be accountable before the ECHR for acts done pursuant to governing Andorra. Freedom from legal responsibility increases power.[247] Duursma reiterates the point with regard to Monaco that international law requires a conservative reading of restrictions on sovereignty. Though the *Nuclear Tests* case requires this, there must come a point when such an interpretive approach turns into an exercise in legal fiction. I wonder, again, whether in the case of Andorra that point has been reached.

The Bishop of Urgell, as the other co-Prince, also poses some problems. That he is appointed by the Church raises the complication of a third intervention in Andorra, that of the temporal power of the Holy See. Duursma suggests that because the Papacy is to exercise no continuing authority over Bishop-*qua*-co-Prince,[248] there is little threat of the Holy See eroding Andorran independence.[249] I am unsure about this proposition. The power of appointment is potent and that of promotion perhaps more so. Another problem is the requirement that the ecclesiastic co-Prince be a Roman Catholic male. Again, such restrictions in a State enjoying a more robust independence may be of little consequence to international law, but inconsistencies with international provisions (ICCPR Article 25(c) in this

245. *Id.* at 342-43.

246. *Id.* at 344.

247. *See supra* notes 221-22 and accompanying text (analyzing Monaco's independence from France). In fact, in the *Case of Drozd and Janousek v. France and Spain,* the French and Spanish governments were held not internationally responsible by the ECHR for acts of French and Spanish judges in the Andorran judiciary. 240 Eur. Ct. H.R. (ser. A) (1991), *cited in* DUURSMA, *supra* note 1, at 331-332.

248. DUURSMA, *supra* note 1, at 351-52 (stating that the Holy See only controls his appointment and possibility for elevation further in the Church hierarchy). *See generally* ERIC O. HANSON, THE CATHOLIC CHURCH AND WORLD POLITICS (1987) (discussing the extent to which the Pope is involved in the Bishop of Urgell's promotion and its political effect).

249. *Id.* In this connection, Duursma emphasizes the separation of temporal and ecclesiastic responsibilities in the Church and its officials. Note, however, that that separation has not always been uncontroversial. *See* IGNAZ SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW, 69 n.16 (1987).

matter) may raise questions about Andorra.

Though membership in international organizations provides a substantial reinforcement for Andorran statehood, membership has carried qualifications, which may shed doubt on that statehood. France at one time posited that Andorra belonged to international organizations in a lesser capacity than other States. In a communication to the Director-General of UNESCO in 1970, France, while permitting Andorra's participation in international conferences, announced that France "does not imply that this is on a footing of equality with States." France added: "Similarly, if Andorra had been mentioned in various documents of UNESCO alongside contracting States or among signatory States, this was an error or an inadvertence which cannot confer on that territory the status of a sovereign State."[250] Although Andorra gained admission to the UN in July 1993 and the Council of Europe in November 1994, neither body held extensive discussions on whether Andorra possessed the qualities of an independent state.

E. VATICAN CITY

The State of the Vatican City, seat of the Holy See, comprises the smallest entity to claim statehood.[251] Covering less than half a square kilometer and claiming only 165 resident nationals (431 nationals in total), the Vatican State traces its origins to AD 395 when Emperor Constantine extended recognition to the Christian Church. The territorial power of the Papacy witnessed many vicissitudes. Napoleon invaded and annexed the Papal States in 1807 and 1809. Independent again after 1815, the Vatican State came under pressure in the 1850s, when Italian nationalists began unifying the peninsula. The nationalists faced, however, a French military contingent that defended the Pope's territorial domain from 1850 until the end of the French Second Empire in 1870. In 1871, Italy annexed the Papal States, by then the last substantial Italian territory not consolidated into the new Kingdom of Italy. The nationalists offered the Pope a guarantee of pontifical control over the Vatican, but he rejected it. The "Roman Question" remained a complication in Italian politics for over a half a century.[252]

The Lateran Agreements, concluded between Italy and the Holy See in February 1929, established the State of the Vatican City and gave the State its present territory.[253]

All legislative, executive, and judicial powers under Vatican law reside in the Sovereign Pontiff. The Sacred College of Cardinals holds power during vacancies of the Papacy, but its legislative acts lapse upon selection of a new Pope. The Pope

250. *See* DUURSMA, *supra* note 1, at 356 (quoting Communication of French Minister of Foreign Affairs to Director-General UNESCO, December 8, 1970).

251. *But see* Samuel Pyeatt Menefee, *Nation-Building on the Continental Shelf and in the World's Oceans*, 25 CAL. W. INT'L L.J. 81 (1994) (documenting a litany of eccentrics who purported to set up States on oil platforms, coral atolls, sand bars, and the like).

252. DUURSMA, *supra* note 1, at 374-76.

253. *Id.* at 376.

delegates certain powers to a Pontifical Commission. Four law courts sit in the Vatican, and their judges need not be Vatican citizens. The sources of law are canon law, the Sovereign Pontiff, and delegates of the Sovereign Pontiff. Divine and natural law provide guidance to fill gaps in the other sources, and the Italian Code of Civil Procedure applies where it is consistent with the Lateran Agreements, canon law, and divine law. Unspecified acts not punishable under any applicable penal law may result in up to six months detention. Such acts fall under the broad categories of violations of the principles of religion, civil order, and public safety.[254]

Although the Vatican is a Contracting Party to the Convention Relating to Status of Refugees of 1951 and the Convention on the Rights of the Child, human rights ombudsmen note deficiencies in the State's implementation of certain international norms. In particular, the possibility of punishment for unenumerated offenses draws criticism.[255] The requirement that all Vatican employees profess the Catholic faith and eschew organizations deemed anti-Catholic also proves problematic. Foreigners in the Vatican do not enjoy the same ready access to residency permits as nationals, and Vatican law contains no guarantee of freedom of expression or assembly.[256] Vatican citizenship derives from official functions in the Church. Cardinals are Vatican nationals, and, under unusual terms of the Lateran Treaty, the revocation of Vatican citizenship results in automatic Italian citizenship. In evaluating these problems, however, it is important to bear in mind that the Vatican has the unique purpose of physically accommodating the Holy See.[257] Arguably the special international religious mission of the Holy See necessitates a restrictive legal regime within that entity's territorial host.

The international role of the Holy See largely determines the international relations of the Vatican. The Holy See governs the Vatican's foreign policy. The international policy of the Church centers on maintaining its own neutrality, while engaging actively in Christian diplomacy. The Holy See also cultivates relations between individual States and the Church[258] through diplomatic missions in the name of the Holy See.

The Vatican retains numerous ties to Italy despite its claim as an independent state. The Vatican maintains a postal union with Italy and follows Italian postal regulation.[259] A similar relationship controls telephone and telegraph matters.[260]

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254. *Id.* at 377-81.

255. *See, e.g.,* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 7, para. 1, 213 U.N.T.S. 221 (stating that "[n]o one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time it was committed"); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 15, para. 1, 999 U.N.T.S. 171 (restating the same language).

256. DUURSMA, *supra* note 1, at 383-85.

257. *Id.* at 383.

258. *Id.* at 386-89. The earliest of these pontifical nunciatures dates from 1500. *Id.*

259. *Id.* at 390-91.

260. *Id.*

Monetary union also links Italy and the Vatican.[261] The Vatican remains exempt from Italian customs and has no value-added tax (VAT). A Merchandise Office grants permission to bring goods into the Vatican. To prevent use of Vatican customs-free status to dodge the Italian tariff regime, export of goods from the Vatican is prohibited. Italo-Vatican relations changed in 1984 when a Concordat between the two States affirmed the separation of church and State by eliminating the Catholic Church as the official Italian State church.[262]

The foreign policy of the Holy See remains unusual because it has little to do with the worldly aspects of the Vatican. Although the Vatican does belong to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict with every building in the Vatican City registered thereunder, Holy See foreign relations generally, however, are not concerned with the Vatican territory. Characteristic of Holy See diplomatic activities are mediations, such as those in 1885 between Germany and Spain over the Caroline Islands and 1979 between Argentina and Chile over the Beagle Channel.[263] The Holy See (not the Vatican) has Permanent Observer status at the UN and belongs to several UN specialized organizations, including the ITU, UPU, and the International Wheat Council. The Holy See also occupies a permanent observer post at the Organization of American States. The OSCE, since the 1991 Madrid Conference, receives two representatives from the Holy See as "guests of honor." Though the Holy See voices moral support for the Council of Europe without indicating an interest in membership, Duursma speculates that some human rights issues surrounding the Vatican pose obstacles to Council membership. Unlike the other four Micro-States in Duursma's study, the Vatican remains unbound by the EU customs regime. There has been an Apostolic nuncio to the EC/EU since 1970.[264]

The lack of a permanent population in the Vatican seems to defeat a claim to statehood under the traditional criteria. As outlined below, Duursma accounts for the near-universal acceptance of the Vatican as a State by reference to a constitutive recognition.[265] The subordinate status of the Vatican to the Holy See raises interesting questions of Vatican independence even though the Holy See lacks territorial entity status ordinarily contemplated when evaluating State independence. Inquiry into whether Japan exercised *de facto* control over the putative State of Manchukuo (1933-45),[266] or Germany over the Independent State of Croatia (1941-44),[267] or South Africa over the Bantustans (1976-1993)[268] focuses on in-

261. DUURSMA, *supra* note 1, at 391-92.

262. *Id.* at 395.

263. *Id.* at 396-97.

264. *Id.* at 401-10.

265. *See infra* note 286 and accompanying text (recognizing the Vatican's constitutive effect).

266. *See supra* note 88 (discussing the state of Manchukuo).

267. *See* Socony Vacuum Oil Company Claim, 21 I.L.R. 55 (U.S. 1954) (rejecting an International Claims Settlement Act petition by an American corporation seeking compensation from post-World War II Yugoslavia for losses suffered under the independent State of Croatia).

tervention by a *State*. The Holy See, though an international person, is not a State. If the Holy See can effect a material erosion of the independence of the Vatican, the question arises whether entities other than States can generally effect such erosion. Practice suggests that it has been States alone which could erode a State's independence, but the case of the Holy See and Vatican State may show otherwise. In a world of non-governmental international organizations multiplying in importance and number, the possibility deserves further reflection.[269]

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268. *See* Republic of Transkei Constitution Act, July 9, 1976, 15 I.L.M. 1136 (entered into force Oct. 26, 1976) (creating, within South Africa, the nominally self-governing homelands of Bophuthatswana, Venda, Ciskei, and Transkei). The Republic of Transkei Constitution Act also provided for "non-independent" homelands. These were Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebow, and QwaQwa. *See also* John Dugard, *South Africa's 'Independent' Homelands: An Exercise in Denationalization*, 10 J. INT'L L. POL'Y 11 (1980) (discussing the international legal status of the South African homelands); Johan D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9 (1991) (detailing various statehood recognition methods).

269. *See* SEIDL-HOHENVELDERN, *supra* note 249, at 4. Seidl-Hohenveldern offers an intriguing analysis in this direction. Extrapolating from State practice acknowledging the international legal personality of the United Nations and other international organizations, one might postulate an international business organization achieving "complete . . . disentanglement from all municipal legal systems."*Id.* Seidl-Hohenveldern further suggests registration for business enterprises created under international law, scrutinized by UN regulatory agents, and enjoying "diplomatic protection" granted by the UN. *Id.* at 23. Seidl-Hohenveldern traces the idea to Goldman, *Les Entreprises Multinationales*, I Ann. Inst. Droit Int'l 57 (1977), but acknowledges that the Institut de Droit International "quite simply balked at the idea that there could exist a corporation not subject to the national law of any State." *Id.* at 25-26. If such a postulated entity came into being, however, the Holy See would present a close analogue to it, and the possibility that that entity could effect erosions of State independence would have to be admitted. If multi-national corporations became, *à la* Seidl-Hohenveldern, possessors of international legal personality (and assuming from the Holy See-Vatican example that non-State international persons may erode the legal independence of States), then a great many States would suffer abridgement of their legal independence. This would demand a reconceptualization either of recognition or of statehood. States in which multinational corporations exercised controlling influence would retain statehood only if the recognition of those States was of a constitutive or 'reparative' nature or independence was no longer an element of statehood. Constitutive recognition is now generally assumed to be exceptional; under the former, it would be commonplace. Independence is now viewed as critical to statehood; under the latter, it would be dispensable. *See also* Texaco Overseas Petroleum Co. v. The Libyan Arab Republic, 53 INT'L. L. REP. 389 (1977) (holding that a contract between an oil company and a State was a contract under international law and that the corporate party had capacity under international law).

III. LESSONS FROM THE MICRO-STATES AND SOME NEW QUESTIONS

From the experience of the Micro-States, Duursma has drawn a number of conclusions about self-determination, statehood, and recognition. I have summarized the author's exposition in the preceding sections and offered some commentary and criticism. The first section below places Duursma's description of recognition in the framework of contemporary discourse. Then, in the two sections following, I will briefly discuss further lines of inquiry suggested by this book.

A. THE EFFECTS OF RECOGNITION

The economy of legal thought permits a certain amount of fiction. But if a proposition relies on a whole series of attenuated arguments, the limits of that economy may be exceeded. Through the five case studies, Duursma demands stretches of legal imagination to sustain the proposition that her subjects are States in the full sense of the term. In addition, the author dismisses a variety of factors as political and/or extra-legal, and thus not material to the juridical position of the Micro-States. This is a conceptual flaw. The condition of the Micro-States requires a less sanguine evaluation than Duursma's. These entities face serious diminutions in their capacity for free action, especially in international affairs, and in their domestic realm as well. Duursma's formalist approach tends, with its emphasis of rights on paper, to obscure real disabilities.

A skeptical view of the Micro-States must nevertheless concede to these entities great strides in international status. Micro-State membership in international organizations throughout the 1990's provides the greatest evidence of these strides. Although States have essentially enjoyed a monopoly on such membership, Micro-States, with their observed deficiencies in statehood criteria, currently are well-represented in the UN and other international organizations. It is to this puzzling fact that Duursma applies a more satisfying, if still provocative, conceptual approach.

The most convincing evidence which Duursma provides of the Micro-States' statehood is their admission into international organizations and the statements which in many instances of such admission confirmed the entities' legal status as States. The Security Council Committee of Experts, for example, noted in 1949 that Liechtenstein "possessed all the qualifications of a State."[270] During the run-up to San Marino's admission to the Council of Europe in 1988, Council rapporteurs expressed the view that "relations between Italy and San Marino are not such as to detract from the latter's sovereignty" and that "it is vital to note that the sovereignty and independence of San Marino also derive from recognition of the country by the international community."[271] The UNESCO Executive Board con-

270. DUURSMA, *supra* note 1, at 175.

271. *Id.* at 243 (quoting Parliamentary Assembly, Documents: Working Papers, Council

cluded in the late 1940s that Monaco is "essentially a small independent State," and Duursma treats this as support for Monégasque statehood.[272] Further support for recognition of Monaco took the form of UN permanent observer status and, after May 1993, membership.[273] Andorra provides additional evidence. In accepting Andorra as a participant in certain EEC negotiations, the European Commission in 1988 affirmed that "Andorra is an independent State."[274]

This evidence raises two questions. First, does an international organization possess the discretion to execute through its admissions procedures acts of State recognition legally binding outside the organization? Secondly, can any act of recognition bestow attributes of statehood missing on objective evaluation of the entity claiming statehood? Dugard addressed this first question at length in the late 1980s.[275] Though Dugard attributed a substantial normative force to such admissions, it remains doubtful whether even the UN has, under international law, developed into an organ of collective recognition.[276] Admission clarifies the admitting organization's view of the Micro-State's status, but admission may have less meaning among States (even member States) and other organizations. It does not have binding effect as regards recognition by others. Duursma places a great deal of weight on the admissions of Micro-States to international organizations, yet such events may be less probative of statehood than Duursma implies.

If one accepts Duursma's attribution of broad recognition effect to the admissions, then there still remains the question of the nature of recognition—the old debate that pitted "declaratists" against "constitutivists."[277] Duursma refers at a number of points to constitutive or "reparative" acts of recognition. Such recognition precedes the attainment by its object of some or all attributes of statehood. Notwithstanding deficiency of statehood criteria, the object, in the view Duursma

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of Europe, Doc. No. 5938, at 6, ¶¶15-17 (1988)).

272. *Id.* at 295-96.

273. *Id.* at 303-04.

274. *Id.* at 361 (quoting Session Documents, Eur. Parl., Doc. No. A3-0256/90 at 5, ¶2 (1990)).

275. *See generally* DUGARD, *supra* note 7 (discussing membership in an international organization and its effect on statehood).

276. Hersch Lauterpacht in 1947 proposed such a role for the United Nations. *See* HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 78 (1948) (proposing that the Untied Nations adopt substantial normative recognition of states).

277. Declaratory doctrine held that recognition simply acknowledges that a set of conditions equivalent to statehood obtains within a particular community; constitutivism, by contrast, held that recognition is an essential attribute of statehood and thus recognition at least in part constitutes the State. What James Crawford called the "Great Debate" has been summarized numerously. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 74-81 (3d. ed. 1979); CRAWFORD, *supra* note 7, at 16-23; DUGARD, *supra* note 7, at 7-9; LAUTERPACHT, *supra* note 277, at 38-66; 1 DANIEL P. O'CONNELL, INTERNATIONAL LAW 132-34 (10th ed. 1989); Nkambo Mugerwa, *Subjects of International Law* (describing the doctrinal controversy concerning the nature of recognition in international law), *in* MANUAL OF PUBLIC INTERNATIONAL LAW § 5.18, at 247, 275-77 (Max Sorensen ed., 1968).

seems to adopt, becomes a state *by and through recognition.* In the least, Duursma proposes that recognition can make up for a certain shortfall in sovereign character: "From the Micro-States' point of view, the United Nations not only offers a recognition of their sovereign equality, but also *enhances that sovereignty* by providing more judicial and certainly more political protection against external interference in their internal affairs."[278]

Recognition, "a subject full of paradoxes and curiosities,"[279] presents a new source of puzzlement in its scholars' continuing reference to the categories of an apparently exhausted debate. Contemporary analysis (though not in all instances)[280] tends to pay tribute to the debate without detaining itself over doctrinal preferences.[281] The prevalence of opinion in favor of declaratory doctrine is amply noted.[282] Although the two doctrines today occasion little debate and it is agreed that one of the two old rivals is the "better view," scholars and jurists continue to use both the terms "declaratory" and "constitutive." Hersch Lauterpacht, perhaps foreshadowing the eclipse of the old debate, proposed in 1947 that recognition constitutes some rights but merely declares the existence of others:

> Although recognition is . . . declaratory of an existing fact [the presence of the conditions of statehood], such declaration . . . is constitutive, as between the recognizing State and the community so recognized, of international rights and duties associated with full statehood. Prior to recognition such rights and obligations exist only to the extent to which they have been expressly conceded or legitimately asserted, by reference to compelling rules of humanity and justice, either by the existing members of international society or by the people claiming recognition.[283]

Presumably, the right against external aggression, if asserted by an unrecognized community, falls under Lauterpacht's category of rights independent of recognition. On the other hand, rights of a more active nature are perhaps more dependent on recognition. This formulation and variants of it have recurred in discussions of recognition. The effects of recognition are noted to be pronounced where the community recognized does not enjoy firm footing in international society. "[S]uch recognition may well be constitutive of legal obligation for the recognizing or acquiescing State, but it may also tend to consolidate a general legal status at that time precarious or *in statu nascendi.* Recognition, while in principle declaratory, may thus be of great importance in particular cases."[284]

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278. DUURSMA, *supra* note 1, at 142 (emphasis added).

279. *See* J.G. STARKE, STUDIES IN INTERNATIONAL LAW (1965).

280. *See, e.g.*, MCDOUGAL ET AL., PUBLIC ORDER 301-431 (1981) (emphasizing issues such as putative duties of recognition and nonrecognition and the collective or unilateral nature of recognition; but not addressing directly the classic declaratory-constitutive debate).

281. *See* DUURSMA, *supra* note 1, at 110-11 n.10.

282. DUURSMA, *supra* note 1, at 111.

283. LAUTERPACHT, *supra* note 276, at 6.

284. *See* CRAWFORD, *supra* note 7, at 74. Shaw echoes this proposition. *See* SHAW, *su-*

Duursma's approach is most similar to this last characterization because Duursma treats recognition as possessing a reparative force over "incomplete" States. This approach to recognition represents a trend in contemporary writing. The terms of the old debate—constitutive and declaratory—have been retained, though scholars are now less interested in the *nature* of recognition as a concept. Rather, contemporary writers apply the terms to describe specific instances of recognition. Although acknowledging the declaratory nature of recognition generally, Duursma notes that recognition "can have constitutive effect in certain cases," such as those in which entities recognized as States lack the basic criteria for statehood.[285] The Vatican City, though recognized as a State in international law, lacks a permanent population. Duursma posits that recognition of the Vatican City had a constitutive effect.[286] Its lack of actual independence from France renders Monaco, under Crawford's criteria, a non-State, yet it, too, is recognized. Duursma calls the recognition of Monaco constitutive. Simultaneously, she proposes that at some future time, after Monaco secures independence in practice, the "constitutive effect [of the recognition of Monaco] will turn fully declaratory."[287] Liechtenstein, a more fully-formed State, by contrast did not receive or require constitutive recognition: "Liechtenstein's recognition was not meant to be reparative of a lack of independence."[288] Similar to the Alpine Principality, though according to Duursma somewhat less secure in its independence than Liechtenstein, San Marino needed no "reparative constitutive recognition."[289] Recognition of Andorra, by contrast, seemed aimed at compensating for "the non-fulfillment of all criteria for statehood."[290] Finally, the Vatican exhibits the most pronounced deficiencies, lacking at least two essential statehood attributes. Yet, through recognition, the Vatican is viewed as a State, or as Duursma posits, "any international recognition of the Vatican City's statehood would have a constitutive and reparative effect." [291]

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pra note 70, at 246.

285. *See* DUURSMA, *supra* note 1, at 115.

286. *Id.* at 419.

287. *Id.* at 315.

288. *Id.* Alternatively, Liechtenstein's recognition was "purely declaratory." *Id.* at 202.

289. DUURSMA, *supra* note 1, at 259.

290. *Id.* at 371. Duursma goes on to explain that Andorra was so deficient in independence that recognition alone could not constitute it a full-fledged State. The Trilateral Treaty of Vicinage of 1993, diminishing the role of the French and ecclesiastic co-princes in Andorran affairs, enhanced Andorran independence and thus established Andorra's statehood in international law. The creation of statehood by treaty and external guarantee is another topic. *See, e.g.*, Wippman, *supra* note 233, at 608, 633-640 (proposing that state-making-by-treaty occurred in Bosnia-Herzegovina and Cyprus, among other States); *see also* Thomas Ehrlich, *Cyprus, the 'Warlike Isle:' Origins and Elements of the Current Crisis* 18 STAN. L. REV. 1021 (1965-66) (discussing the formation of Cyprus).

291. DUURSMA, *supra* note 1, at 412-14 (finding that the Vatican lacks a permanent population and independence since persons hold Vatican nationality only while serving the Church in official capacity, and the Vatican is controlled by another international person, the Holy See).

Today, the two classic doctrines of recognition are no longer self-contained theories. Nor are they mutually exclusive. Instead, the declaratory and constitutive doctrines are lenses that assist observers in focusing their analysis of particular incidents of recognition. They are used in tandem to describe different aspects of recognition and to describe the distinguishing features, not so much of the institution of State recognition generally, as of particular incidents of recognition. Two conceptions that once separated opposing schools in a "great debate" over the nature of recognition have retained their vitality as a means to characterize individual events. Thus, Warbrick[292] and Kreća (the Judge ad *hoc* in the recent *Genocide* opinion)[293] refer to the recognition of Bosnia-Herzegovina as "constitutive." The publicist and the jurist do not cite the recognition of Bosnia-Herzegovina as evidence of the "constitutive nature" of recognition; instead they use the expression "constitutive recognition" to describe that discrete event. Another illustration of the terms of the old debate in their contemporary usage is found in an analysis of the peace process in Cambodia: "[W]hereas the recognition of states and governments is best regarded as declaratory only, the recognition of the SNC was clearly constitutive."[294] The term "constitutive" here describes recognition of a new governmental structure in Cambodia, not the nature of a general form of international legal action. Judge *ad hoc* Kreća's usage, and possibly Warbrick's as well, invests in the term "constitutive" a connotation of censure. This, too, was not seen in the traditional usage. Publicists may have criticized the constitutive conception of recognition,[295] but in the main, they did not use the term to censure particular instances of State conduct.[296] Unlike Kreća or Warbrick, Duursma does not add a connotation of censure to "constitutive." In positing that "a State can also be established by means of a constitutive recognition with reparative effect,"[297] Duursma seems, in fact, to narrow the circumstances in which recognition may be considered a delict.

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292. Warbrick identifies in EU practice regarding Bosnia-Herzegovina a reliance on recognition as some kind of constitutive device. Colin Warbrick, *Recognition of States*, 41 INT'L & COMP. L. Q. 473 (1993).

293. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 1, 25 (Jul. 11) (Kreća, J., dissenting) (characterizing Western Europe's recognition of Bosnia-Herzegovina as an "instrument" to establish conditions suitable for a peace agreement) [hereinafter Genocide].

294. Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1, 11 (1993).

295. *See, e.g.*, CHEN TI-CHIANG, THE INTERNATIONAL LAW OF RECOGNITION, WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES 46 (1951).

296. *See, e.g.*, LASSA OPPENHEIM, INTERNATIONAL LAW 128-29 (Robert Jennings and Arthur Watts eds., 1992). Recognition extended before the attainment of the attributes of statehood is sometimes seen as premature or precipitous. *Id.*

297. DUURSMA, *supra* note 1, at 418. The author posits this even more strongly later noting that "international recognition of a Micro-State can remedy any non-fulfillment of criteria for statehood." *Id.* at 430. Does Duursma mean that widespread recognition of an entity lacking even a territory could create that entity an international person? Judging by the author's analysis of the Holy See, the answer would seem to be yes.

The repeated attention Duursma accords to the difference between constitutive and declaratory acts of recognition may give the appearance of re-opening the recognition debate. To the extent the author takes up the issue of recognition *doctrine*, she may sound rather old-fashioned. Yet, in identifying certain instances of the recognition of Micro-States as constitutive of statehood and others as declaratory, Duursma participates in a current trend.

B. FACT-FINDING AND PEOPLEHOOD

Duursma repeatedly emphasizes that self-determination is a right enjoyed by a people or fraction of a people bearing an attachment to a specific territory. Possession of that right is critical to a population if that population is successfully to allege statehood. Though Duursma develops definitions of self-determination and peoplehood at great length, she offers little analysis of the claims of the inhabitants of the Micro-States to constitute peoples. This may, of course, be of necessity: the author has produced an exhaustive book. Limitations on the scope of the book may well have precluded investigation of what, within Duursma's framework, is essentially a factual question. Nonetheless, I suspect that the author's presumption that the Micro-State populations form peoples deserves more examination. Consider Duursma's discussion of the Monégasque:

> Monaco has been a separate territory at least since the sixteenth century, though receiving military protection from other States. Moreover, since its admission to the United Nations, there can be no doubt that Monaco is a State entitled to the legal protection flowing from the principle of self-determination. If therefore Monaco were to have a people within the meaning of the right of self-determination, it would have a *jus cogens* right of self-determination. The 5,070 Monégasque nationals distinguish themselves from their neighboring people on historical, traditional, cultural and to a certain extent on linguistic grounds. There exists a distinct Monégasque language, which is not the official language of the State and is no longer spoken by all Monégasque nationals. The objective characteristics of the Monégasque nation have been formed by ages of togetherness, relative autonomy and an attachment to the traditional organization and reign of the Grimaldi family. The subjective element is present in the we-consciousness of the Monégasque nationals who want to be considered a people desirous to live in a separate State. The core of the Monégasque people is composed of the descendants of families who have lived in the Monégasque territory for centuries, some since the Grimaldi family took possession of Monaco. The objective characteristics, though not striking, are noticeable and strengthened by a traditional attachment to the territory and the monarchy. Therefore, the Monégasque people has a *jus cogens* right of self-determination without prejudice to whether it constitutes one people or fraction of a people.[298]

This is the extent of Duursma's analysis of the objective and subjective ele-

298. DUURSMA, *supra* note 1, at 310-11; *see also, id.* at 204-05 (discussing Liechtensteinese peoplehood); *id.* at 259 (exploring San Marinese peoplehood); *id.* at 372-73 (examining Andorran peoplehood).

ments of Monégasque peoplehood. Its brevity would not stand out, but for the exhaustiveness of Duursma's methodology elsewhere. Here, the conclusive tone is incongruent with the encyclopedic support marshaled behind most other propositions advanced in the book. Peoplehood occupies an important position in Duursma's proposed law of statehood. Yet, whether the inhabitants of the Micro-States form peoples receives only cursory attention. The flaw is probably unavoidable, given the limits of scope which constrain any author. Indeed, the feature may not even represent a flaw, but rather an invitation to a separate work on the peoplehood of Micro-State populations. Such a work, perhaps combining sociology, anthropology, political theory, and history would provide a useful companion to the present book.[299]

C. JUDGES AND INDEPENDENCE

External contribution to the judicial structures of nascent States is a topic of some current interest. Trevor Findlay, examining the United Nations Transitional Authority in Cambodia (UNTAC),[300] describes various impediments to achieving a stable municipal order in Cambodia. Among these, he emphasizes the lack of a functioning legal system.[301] Findlay proposes that future UN interventions like that in Cambodia would meet their goals more readily if they included what Findlay terms "judicial packages."[302] By "judicial packages," Findlay means placing foreign prosecutors, defense counsel, judges, and prison administrators in office in the country subject to UN intervention—in short, "importing" whole cloth an independent judicial system.[303] Although attractive for its potential to hasten the return of tranquility to troubled lands, the "judicial package" raises concerns over independence.[304]

All five Micro-States in Duursma's study contain foreign elements in their judiciaries. In the case of Liechtenstein, three of eight Sole Judges are Austrian and prison sentences over six months are served in a Swiss cantonal prison.[305] The San Marinese judiciary, by law, consists of non-nationals. Only a special "Conciliatory Judge" may be a citizen of the Republic or a judge approved by near-unanimous vote of the Great and General Council. In practice, San Marinese

299. The difficulty in assessing whether in a particular case a "people" exists has been noted elsewhere. *See, e.g.*, SUSAN L. WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 163 (1995).

300. TREVOR FINDLAY, CAMBODIA: THE LEGACY AND LESSONS OF UNTAC 238 (1995).

301. *Id.*

302. *See* Jamie Fredric Metzl, *Book Review: The Legacy and Lessons of UNTAC*, 37 HARV. INT'L L.J. 293, 302 (1996) (discussing Findlay's proposal).

303. *Id.*

304. *See id.* at 293, 302. Metzl, who is critical of Findlay writes: "While this approach is appealing, it poses a danger of crossing the invisible line distinguishing United Nations peacemaking missions from multilateral colonialism." *Id.*

305. *See* DUURSMA, *supra* note 1, at 154-55 (describing the judicial system of Liechtenstein).

judges come from Italy.[306] Under the Convention of July 1930, a majority of judges in the Monégasque judiciary must be French nationals belonging to the judicial administration of France.[307] The French and ecclesiastic co-princes of Andorra appoint members of the Principality's Constitutional Tribunal and Supreme Council of Justice.[308] Judges in the courts of the Vatican need not be Vatican nationals.[309]

In order to reduce internal disorder, the Cypriot Constitution of 1960 required foreign judges in the Cypriot courts. The Supreme Constitutional Court was composed of one judge from the Greek community, one from the Turkish community, and a third from a country other than Greece, Turkey, Britain, and Cyprus (the first three countries were the Guaranteeing Powers who created the Cypriot State under the 1960 Treaty of Guarantee).[310] The third, to act as a neutral, also was President of the Court.[311] A High Court of Justice, holding appellate jurisdiction over matters not under the jurisdiction of the Supreme Constitutional Court, was composed of two judges from the Greek community, one from the Turkish community, and a fourth neutral judge from outside Cyprus or the Guaranteeing Powers who would cast two votes.[312]

The judiciary of the new Bosnian State contains provisions for foreign involvement in the judiciary as well.[313] A General Framework Agreement for Peace in Bosnia and Herzegovina was negotiated in Dayton, Ohio on November 21,

306. *See id.* at 214-17 (elaborating on the structure of the San Marinese judiciary).

307. *Id.* at 268.

308. *Id.* at 26.

309. *Id.* at 379.

310. *See* UK Command Papers, *Draft Treaty of Guarantee between the United Kingdom, Greece, Turkey and the Republic of Cyprus*, Cmnd 1093, Part II, Appendix B, at 86 (July 1960) (on file with AM. U.J. INT'L L. & POL'Y).

311. *Id.* at 91 (containing the draft Constitution of the Republic of Cyprus). Cypriots ratified their Constitution at Nicosia on April 6, 1960. *Id.* at 3. Articles 133 through 151 provide for the Supreme Constitutional Court. Article 133(1) and (3) provide for the foreign judge. The Supreme Constitutional Court had jurisdiction over conflicts among the organs of Cypriot government, election contests, and various other political and constitutional matters, as well as an advisory jurisdiction over questions put to it by the President or Vice President of the Republic.

312. Cyprus Const., arts. 152-64. Article 153(1) and (3) provide for the foreign judge. *Id.* arts. 153(1), (3); *see* Ehrlich, *supra* note 290, at 1033-39; Catherine D. Papastathopoulos, *Constitutionalism and Communalism: the Case of Cyprus*, 16 U. TORONTO L.J. 118 (1965-66) (discussing the roles of communalism, conflict, and compromise in the birth of constitutive documents for Cyprus). From September 1960 until he resigned in the wake of a case concerning the organization of Cypriot municipalities in April 1963, Ernest Forsthoff, a constitutional and administrative law scholar from Heidelberg, sat as President of the Supreme Constitutional Court. *See* Ehrlich, *supra* note 290, at 1040-43. The constitutional order fell apart in December 1963. *Id.*

313. *See* General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, *reprinted in* 35 I.L.M. 75 (1996) [hereinafter GFA; together with the Annexes, the Dayton-Paris Agreement].

1995 and signed on December 14 of that year in Paris.[314] Like the Treaty of Guarantee of 1960, the Framework Agreement committed the relevant parties, plus external guarantors, to support a constitutional framework in the country in question.[315] Annex 4 to the General Framework Agreement contains the Constitution of Bosnia and Herzegovina.[316] Article VI of the Bosnian Constitution provides for a Constitutional Court.[317] The Court's jurisdiction is exclusive over disputes between the constituent ethnic-territorial entities of the Republic and between governmental organs.[318] The Court also has appellate jurisdiction over constitutional issues arising out of judgments of lower Bosnian courts.[319] Making explicit the transparency of the Bosnian legal system to international law, Article VI 3(c) gives the Constitutional Court jurisdiction to decide the compatibility of Bosnian laws with the European Convention for Human Rights and Fundamental Freedoms and to decide issues concerning "the existence or the scope of a general rule of public international law pertinent to [a lower court's] decision."[320] Nine judges compose the Constitutional Court, three of whom are selected by the President of the European Court of Human Rights (in consultation with the Bosnian Presidency) and may not be citizens of the Republic or any of its neighboring States.[321] Annex 6 to the General Framework Agreement makes special provision for human rights, and it provides for a Commission on Human Rights outside the judicial structure set up under the Constitution.[322] The Commission consists of two organs, an Office of the Ombudsman and a Human Rights Chamber.[323] The Ombudsman is appointed by the Chairman of the Organization for Security and Cooperation in Europe, on consultation with the parties to the Dayton-Paris Agreement, and may not be a citizen of Bosnia and Herzegovina or any neighboring State, for at least the first five years of the Office of the Ombudsman's operation.[324] The Human Rights Chamber consists of fourteen members, eight of whom are appointed, at least for an initial five-year term, by the Committee of Ministers of the Council of Europe and may not be a citizen of the Republic or

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314. *Id.*

315. *See* Sienho Yee, *The New Constitution of Bosnia and Herzegovina*, 7 EUR. J. INT'L L. 176, 181 (1996) (noting "nation-building aspirations" in the new constitution). Similarities between the Dayton Agreements and the Camp David Agreements of September 1978 have been noted, though not discussed. *See* Gaeta, *supra* note 63, at 147; *see also* GFA, *supra* note 313, art. I (noting that the external guarantors in the Dayton-Paris Framework Agreement are Croatia, the EU, France, Germany, Russia, the United Kingdom, the United States, and Yugoslavia).

316. *See* Yee, *supra* note 315, at 176.

317. Bosnia & Herzgovina Const., art. VI.

318. *Id.* art. VI (3)(a).

319. *Id.* art. VI (3)(b).

320. *Id.* art. VI (3)(c).

321. *Id.* art. VI 1(a) - (b).

322. *See* GFA, *supra* note 313, art. II (referencing Annex 6 on Human Rights).

323. *Id.*

324. *Id.* arts. IV-VI (noting that the Ombudsman has a broad investigatory role over matters concerning human rights).

any of its neighbors.[325] In the recent International Court of Justice judgment in the *Genocide* case,[326] the Yugoslav judge *ad hoc* issued a dissenting opinion in which he questioned the statehood of Bosnia.[327] In positing that the Republic displayed "a strongly installed element of an international protectorate," Judge *ad hoc* Kreća pointed out the provisions for foreign presence on the Constitutional Court.[328]

To my knowledge, no study has addressed principally the matter of foreign judges in a municipal court system. Scholars have inquired into the "transparency" of domestic legal systems to international law,[329] but the phenomenon of foreign judges seems either distinct from that subject or a discrete subpart of it. Foreign judges may be more suited than local judges to apply international law in a municipal context—particularly rules set forth in human rights conventions—but at least in Liechtenstein, San Marino, and Monaco, foreign judges preside over contests between local parties, address municipal legal issues, and often resolve cases within the framework of municipal rules. Duursma's case studies illustrate that foreign elements are a characteristic feature of Micro-State judiciaries. This may be a product of the personnel and financial limitations which confront Micro-States in many departments.[330] Duursma notes that at least one of the Micro-States has been hard-pressed to keep up with the paper work generated by membership in international organizations.[331] Even if the reliance on foreign judges is in part a product of that same pressure, it produces distinct results. The observed receptiveness of the Micro-States to international law and to the law of their neighboring States may stem in part from the presence of non-national judicial personnel. This unusual aspect of the Micro-States' judicial structures may be important in reducing the potential disordering effects of international fragmentation: if small entities require (or, in practice, nearly always employ) non-nationals on the bench, the entities may be more likely to

325. *Id.* arts. VII, XIV. The Chamber is to hear matters referred to it by the Ombudsman or brought to its attention by individuals, organizations, or groups alleging human rights violations. *See id.* art. VIII(1). How its jurisdiction relates to that of the Constitutional Court under Article VI(3)(c) of the Constitution is unclear. *See id.* art VIII. For discussion of the constitutional order in Bosnia and Herzegovina, see *Gaeta, supra* note 65, at 160-62.

326. *See* Genocide, *supra* note 293.

327. *See id.* at 454 (Kreća, J., dissenting).

328. *See* Genocide, *supra* note 293, at 21 (Kreća, J., dissenting). For discussion, see Thomas D. Grant, *Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case* (Bosnia and Herzegovina v. Yugoslavia) (appearing in 33 STAN. J. INT'L L. 2 (1997)); *see also supra* notes 101-18 and accompanying text (discussing autonomy and statehood).

329. *See supra* note 243 (citing Cassese on the transparency of international law).

330. The resource limitations of small States may, for example, also limit their ability to conduct foreign relations. RONALD P. BARSTON, *The External Relations of Small States, in* SMALL STATES IN INTERNATIONAL RELATIONS 43-44 (August Schou & Arne Olav Brundtland, eds., 1971).

331. DUURSMA, *supra* note 1, at 246 (noting that San Marino encounters difficulty processing the large quantity of documents produced by the Council of Europe).

on the bench, the entities may be more likely to comply with regional and other rules of international law. At the same time, the foreign judicial presence raises questions about independence.[332]

CONCLUSION

A number of minor changes and additions could have enhanced a work already remarkably exhaustive. The European Micro-State is curious, not least of all, in its territorial aspect; this book about the Micro-State would have profited from maps. Their absence highlights Duursma's emphasis on the legal nature of statehood. Statehood interpreted mainly as a bundle of rights, however, might not be the whole of statehood. For a comprehensive view of the phenomenon, one also must draw attention to its manifestations in territory and activity. The territorial and population requirements of statehood do not substantially detain the author, even though the diminutiveness of the entities arguably lurked behind concerns voiced in other terms before international bodies. Their physical situations, enclaved within much larger States, are critical to understanding the constraints, well documented by Duursma, which confront the Micro-States. Indeed, the physical situation of the Micro-States may be the cardinal fact of their peculiar existences. Whether or not one dismisses the limits of geography as "merely" a practical or political issue, some graphic display of those limits would have been instructive. Moreover, questions of politics and law aside, many readers may not be as familiar with European geography as Continental public international law scholars.

Duursma has produced a useful and enlightening book. The work is treatise-like in the depth of its coverage of a comparatively little-known corner of the society of States. Yet, the book convincingly displays that its topic is anything but a backwater of public international law. The European Micro-State exists in spite of pressure for consolidation and the practical, if not legal, dominance of neighbors. At the same time, the demonstrated capacity of the Micro-State to integrate itself into international society may assuage concerns that very small territorial entities present a threat to global order. Through sometimes fruitful participation in multilateral organizations, accession to bilateral and trilateral treaties, and the internalization of international norms, especially those governing human rights, the Micro-State suggests ways to mediate the tension between diversity and disorder.

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332. *See* Papastathopoulos, *supra* note 311, at 138. Papastathopoulos notes that the extent to which that presence erodes independence will depend in part upon the power of the judiciary within the State in question. *Id.* The judicial arrangement in Cyprus under the 1960 constitution was noted to contain "an element of dicastocracy"—rule by the court. *Id.* Where the judiciary has extensive powers, external involvement in the judiciary might pose a more serious problem than where the judiciary's role is modest. Also, the *purpose* of external judicial staffing may be material to the legal effect on State independence. Perhaps a State *in extremis* like Cyprus or Cambodia can more readily admit such external influence. But if installed for purposes less vital than securing the very survival of the State, perhaps the phenomenon more seriously compromises independence.

Whether the diminutive territorial entity has attained and can maintain or amplify the independence Duursma identifies as its legal right is a question over which this book hopefully will spur further debate.