Seceding in the 21st Century: A Paradigm for the Ages

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“Any people anywhere, being inclined and having the power, have the right to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable, - a most sacred right – a right, which we hope and believe, is to liberate the world.”

- Abraham Lincoln commenting on the war with Mexico in 1848.¹

INTRODUCTION

On August 30, 1999, the East Timorese people prepared for a referendum on its constitutional status in a fight for self-determination against a background of genocide, injustice and betrayal.² “[N]o place on earth was defiled and abused by murderous forces, in collaboration with the ‘international community’, as East Timor” wrote one journalist.³ “We are dying as a people” wrote the head of the Catholic Church in East Timor in a letter to the United Nations secretary-general.⁴ At least a third of East Timor’s population had died under the Indonesian occupation.⁵ Yet in a showing of courage and determination, the East Timorese people turned out in massive numbers to vote on the future of its territory.⁶ With such threats to a people’s fundamental moral rights,

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¹ Harlan Scholar, New York Law School J.D. Candidate 2009.
the question of when international law should consider a people’s declaration of independence a lawful act is critically important.

This article will argue for a new paradigm through which scholars, advocates, and other decision-makers can analyze the legitimacy of a population’s declaration of independence. Self-determination is presently the focus of claims to secession. A criticism of this approach is that it lacks consideration of the circumstances surrounding secession, thereby failing to properly balance state sovereignty with self-determination. Alternatively, this author has developed the novel concept of the political liberty triangle paradigm, which encompasses the concepts of self-determination, sovereignty, and secession, and focuses on the circumstances surrounding a group’s claim to secession. One analyzing a secessionists’ claim may use this paradigm as a guide by considering factors such as the ability of a territory to be economically self-sufficient, the free will of a territory’s people, and a state’s behavior towards its people. The legitimacy of a territory’s independence may be viewed on a sliding scale, with dependence and independence on opposite ends. As the factors within the political liberty triangle are scrutinized, they shift a territory’s status from dependence to independence. By focusing on the circumstances surrounding a group’s claim to secession, the international community may answer the question side stepped for decades: when is secession legitimate?

Diagram 1 – Political Liberty Triangle

result of the East Timor Popular Consultation, “Thus, on 30 August 1999, in a show of courage and determination, the people of East Timor turned out in massive numbers to vote in the popular consultation, expressing their will as to the future of the Territory.”).
Part II of this article discusses the traditional concepts of sovereignty, self-determination, and secession. These three constructs form the political liberty triangle. The political liberty triangle is a term used to describe the relationship between sovereignty, self-determination, and secession. This author created this terminology to avoid the mistake of studying secession through an under inclusive methodology. It reminds readers to focus not only on the concepts composing the political liberty triangle, but to analyze factors, such as those discussed in part III below, which make up the heart of the triangle. As a whole, the political liberty triangle represents the state. When sovereignty and self-determination are balanced in equilibrium, secession is not a legitimate act. Factors within the triangle ultimately determine whether sovereignty and self-determination are balanced. When sovereignty and self-determination become unbalanced, the triangle crumbles, and secession is a legitimate act necessary to restore a state’s political liberty triangle. The final result is two political liberty triangles: an original state’s triangle and a new state’s triangle created from the seceded territory.

Part III focuses on the factors inside the political liberty triangle. The factors making up the heart of the political liberty triangle depend on the circumstances surrounding a claim to secession. The totality of the circumstances should act as a guide for the international community. To understand how they guide, consider the political liberty triangle’s relationship to the sliding scale of independence. The sliding scale of independence is a mechanism created by this author to determine when a territory has achieved independence. In like manner, it is a tool for ascertaining when the political liberty triangle crumbles. The factors analyzed in part III shift a territory towards either dependence or independence on the scale. These factors include, but are not limited to, human rights violations, attempted peaceful negotiations, the will of the supermajority for independence, economic self-sufficiency, and promotion of international harmony. The factors discussed here are not an exhaustive list and each factor should be given a different amount of weight depending on the circumstances surrounding the claim.
Part IV appraises the discussion in part III using East Timor and Kosovo as case studies. East Timor was granted independence on May 20, 2002. Under the political liberty triangle paradigm, it is arguable whether East Timor should have been granted independence. Considering the totality of the circumstances surrounding the East Timorese people’s claim to secession, East Timor’s position on the sliding scale may not have reached independence. In contrast, Kosovo’s independence was declared on February 17, 2008. In this author’s opinion, independence was appropriate under the political liberty triangle paradigm at the time of Kosovo’s secession. The circumstances surrounding Kosovo’s claim for secession probably shifted Kosovo to independence on the sliding scale.

Finally, in part V, this author makes recommendations and provides concluding thoughts for scholars, advocates, and other decision-makers to ascertain whether a claim to secession is legitimate. These recommendations suggest a transition away from the old paradigm focusing on self-determination. Self-determination explains why secession should be justified. But it fails to guide one how to determine whether secession is actually justified. The political liberty triangle paradigm, like the self-determination paradigm, explains why secession should be justified, and then it guides one to that conclusion through reasoning and analysis.

I. THE FRAMEWORK OF THE POLITICAL LIBERTY TRIANGLE

The political liberty triangle represents a stable, independent state. Together, sovereignty, self-determination, and secession form the political liberty triangle. International documents equate self-determination and sovereignty as international parallels. For example, the United Nations Charter states that a purpose of the U.N. is to respect the self-determination of peoples. It also states that the U.N. is based on the principle of sovereign equality of its members. Secessionist claims

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8 See U.N. Charter art. 1, para. 2; art. 2, para. 1; see also Conference on Security and Co-operation in Europe, Helsinki Final Act, 1(a)(I), 1(a)(VIII) (1975) (declaring both the respect for sovereign equality and the self-determination of peoples as principles guiding relations between states).

9 U.N. Charter art. 1, para. 2 (“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”).

10 U.N. Charter art. 2, para. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”).
are generally based on violations of the right to self-determination within a sovereign state.\textsuperscript{11}

Part II highlights the concepts of sovereignty, self-determination, and secession, providing the framework of the political liberty triangle.

A. Sovereignty and Territorial Integrity

The idea of state sovereignty relates to a state’s claim to and exercise of authority.\textsuperscript{12} State sovereignty is not an “immutable principle decreed in fixed form once and for all time,” but rather a concept “whose meaning and scope are subject to re-evaluation” by the international community.\textsuperscript{13} Although sovereignty is traditionally associated with the idea of supreme authority, today sovereignty must be evaluated in terms of sovereign equality, or equality among the states.

In the Middle Ages, sovereignty was used to signify a superior. People in the Middle Ages had, “a very strong sense of that concrete thing, hierarchy; they lacked the idea of that abstract thing, sovereignty.”\textsuperscript{14} Sovereignty did not exist in Middle Ages in the true sense it does today.\textsuperscript{15}

Sovereignty in today’s sense emerged as a consequence of the formation of the modern state. First, Royalty acquired \textit{plentitude

\begin{footnotesize}
\begin{enumerate}[11]
\item See \textsc{David P. Forsythe}, \textit{Human Rights in International Relations} 20 (2nd ed. 2006) (“the idea of state sovereignty is a claim relating to proper exercise of public authority”).
\item \textit{Id.} at 20–21 (“a claim to [sovereignty is] to be evaluated by the rest of the international community. Thus state sovereignty is not some immutable principle decreed in fixed form once and for all time, but rather an argument about state authority whose meaning and scope are constantly subject to re-evaluation.”); see generally \textsc{Thomas J. Biersteker and Cynthia Weber}, \textit{State Sovereignty as a Social Construct} (1996) (treating sovereignty as a social construct that changes with the time); \textit{see also} \textsc{Stephen D. Krasner}, \textit{Sovereignty: Organized Hypocrisy} 3 (1999) (“Some analysts have argued that sovereignty is being eroded by one aspect of the contemporary international system, globalization”).
\item \textsc{Bertrand de Jouvenel}, \textit{Sovereignty: An Inquiry into the Political Good} 171 (1957).
\item See \textsc{Walter Ullman}, \textit{The Development of the Medieval Idea of Sovereignty}, 64 \textsc{English Historical Review} 1 (1949); J.W. McKenna, \textit{The myth of parliamentary sovereignty in late-medieval England}, 94 \textsc{English Historical Review} 481 (1979).
\end{enumerate}
\end{footnotesize}
potestatis, the supreme power. This meant no authority was able to challenge the power of Royalty. Royalty’s power was further strengthened when they asserted territorial autonomy of its kingdom. Second, the use of law as an instrument of royal power contributed to the establishment of sovereignty. Law was an instrument of command, relying on Roman law maxims such as quod principi placuit legis habet vigorem, what pleases the prince has the force of law, and si veut le roi, si veut la loi; car tel est notre plaisir, what the king wills, the law wills; for such is our pleasure.

Traditionally, sovereignty is associated with supreme authority. Sovereignty is thought of as the concept of a state’s right to exercise certain powers with respect to its territory and citizens. Sovereignty can be described by three characteristics: internal coherence, external independence, and supremacy of law. A sovereign state is characterized by internal coherence and supremacy of law because a sovereign state has the power to make law with the assertion that the law is supreme and ultimate. Furthermore, a sovereign state is externally independent because a sovereign power obeys no external authority outside its territory. States are only bound by those rules of law they agreed to, such as by the conclusion of Treaties or customary international law.

The legal principle of equality of states is another relevant principle to our discussion of sovereignty. The U.N. Charter combines these two terms into sovereign equality. Equality of states is based on the analogy of the status of men in natural law. In the words of Emer

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17 Id.
18 Id.
19 Id.
20 Id. at 59.
24 Id.
25 Id.
de Vattel, a representative of the natural law school of thought, “A dwarf is as much a man as a giant is; a small Republic is no less a sovereign state than the most powerful kingdom.”

The principle of sovereign equality in Article 2(1) of Charter of the United Nations represents a profound change and stands for a change in direction in the meaning of sovereignty. In a report by the drafting subcommittee, the subcommittee stated,

The Subcommittee voted to keep the terminology, ‘sovereign equality,’ on the assumption and understanding that it conveys the following: (1) That states are juridically equal; (2) That they enjoy the rights inherent in their full sovereignty; (3) That the personality of the state is respected, as well as its territorial integrity and political independence; (4) That the state should, under international order, comply faithfully with its international duties and obligations.

Sovereign equality was purposefully adopted as a new term to give precedence over that of sovereignty. Sovereignty was given the position of an attributive adjective modifying the noun equality. This was intended to highlight the new concept of sovereignty as establishing a better community discipline between individual States and mankind.

1776 (“[a]ll men are by nature equally free and independent and have certain inherent rights…”).


29 Report of Rapporteur of Subcommittee I/1/A to Committee I/1, Conference on International Organization, Doc. 723, June 1, 1945 in THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SELECTED DOCUMENTS 483 (1946).


31 Id.

32 C. Tomuschat, ‘Obligations Arising for States Without or Against Their Will’, 241 Recueil des Cours (1993) 195 at 292 (stating that the two elements of sovereignty and equality provide for a “development towards greater community discipline…driven by a global change in the perception of how the right balance between individual State interests and interests of mankind as a whole should be established.”).
B. Self-determination

Self-determination is the ability of an individual or group to make choices free from the bounds of the institutional framework within which they live. The concept of self-determination is disputative in international law because it challenges core principles of the international legal system. In particular, it challenges the sovereignty and territorial integrity of states and interferes with matters in the domestic jurisdiction of states.

Self-determination developed within the international legal system during the post-First World War period. In 1918, President Woodrow Wilson stated, “peoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.” President Wilson was concerned about a people’s right to choose their own form of government. President Wilson’s views of self-determination helped it become an accepted term of use in international relations.

The advancement of the concept of self-determination continued with the establishment of the United Nations. The United Nations Charter mentions the “principle” of self-determination twice. Both references are in the limiting context of developing “friendly relations”

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33 ROBERT MCCORQUODALE, SELF-DETERMINATION IN INTERNATIONAL LAW xi (2000) (“Self-determination is primarily concerned about the ability of an individual or a group to make choices free from the bounds of the institutional framework within which they live.”).
34 Id. (“One reason why self-determination is contentious in international law is that the concept challenges some of the core principles of the international legal system.”).
35 Id. (“It [self-determination] challenges the sovereignty of states and their territorial integrity, it interferes in matters within the domestic jurisdiction of states...”).
36 Id. at xiii. (stating self-determination developed in an international context during the immediate post-First World War period.).
37 Woodrow Wilson, War Aims of Germany and Austria (Feb. 11, 1918), in 3 The Public Papers of Woodrow Wilson: War and Peace 177, 182–183.
38 PATRICIA CARLEY, SELF-DETERMINATION: SOVEREIGNTY, TERRITORIAL INTEGRITY, AND THE RIGHT TO SECESSION 3 (1996) (“Wilson distinguished between ‘internal’ and ‘external’ interpretations of self-determination; the former, referring to a people’s right to choose its own form of government without outside pressure, was of far greater concern to him.”).
39 ROBERT MCCORQUODALE, SELF-DETERMINATION IN INTERNATIONAL LAW xiv (2000) (“The long-term effect of Wilson’s views was that self-determination, despite its vague content and dubious conceptual basis, became an accepted term of use in international relations.”).
40 U.N. Charter, art. 1, para. 2; art. 55.
among nations” and with the principle of “equal rights...of peoples.” Hurst Hannum stated that the reference to “peoples” encompasses a group beyond states and encompasses non-self governing territories “whose peoples have not yet attained a full measure of self-government.”

After it’s inclusion in the U.N. Charter, self-determination quickly evolved from a principle to a right. The most important document in the promotion of the right to self-determination was the 1960 U.N. Declaration on the Granting of Independence to Colonial People. The 1960 U.N. Declaration on the Granting of Independence to Colonial People makes it clear that all colonial territories have the right to independence. This push for decolonization in the 1960s elevated self-determination to a right and brought to full light the need to contend with its humanistic components.

This author believes that the 1960 U.N. Declaration on the Granting of Independence to Colonial People may no longer offer sufficient guidance given the trend in recent decades to redefine self-determination to apply beyond decolonization and to mean that any and every group has a right to independence. For example, Kosovo and East Timor achieved independence after long and bloody struggles for

41 Id.
43 See PATRICIA CARLEY, SELF-DETERMINATION: SOVEREIGNTY, TERRITORIAL INTEGRITY, AND THE RIGHT TO SECESSION 3 (1996) (“Yet, once the idea was written into the Charter, it very quickly evolved from a principle to a right.”); Hurst Hannum, Rethinking Self-Determination, 34 VA. J. INT’L L. 1, 31 (1993) (“self-determination has undoubtedly attained the status of a ‘right’ in international law. Formal statements by governments, the adoption by consensus of numerous United Nations resolutions, and the fact that more than half of the world’s states have accepted the right of self-determination through their adherence to one or both of the United Nations covenants on human rights would seem to confirm the existence of self-determination as a norm of international law.”).
47 See Case Concerning East Timor (Port. V. Austl.), 1995 I.C.J. 90 (June 30); Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (expanding the right to self-determination to apply to people who are deprived of self-determination by oppressive foreign occupying powers).
self-determination. Chechyna seeks its independence from Russia, and Western Sahara is in a struggle for independence with Morocco.

The U.N Declaration on the Granting of Independence to Colonial People was a document of its time. At the time the Declaration was promulgated, there was a trend towards freedom and independence in a large number of colonial territories. It did not allow, however, for secession because the territorial integrity of existing states was assumed. Consequently, the Declaration on the Granting of Independence to Colonial People does not provide assistance with the problems the international community faces surrounding secession. Today, with a trend towards independence for any group, a means for balancing the territorial integrity of existing states with the right to self-determination is called for.

This shift is further evidenced in international declarations and covenants created after the 1960 Declaration on the Granting of Independence to Colonial People. For instance, the 1970 Declaration on Principles of International Law Concerning Friendly Relations states, “the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security.” This document also imposes limits on a state’s

48 See Dan Bilefsky, In a Showdown, Kosovo Declares its Independence, N.Y. TIMES, Feb. 18, 2008, at A1 (“The province of Kosovo declared independence from Serbia…to celebrate what they hoped was the end of a long and bloody struggle for national self-determination.”); Barbara Crossette, Anan Warns Indonesia That Inaction May Lead to Criminal Charges, N.Y. TIMES, Sept. 11, 1999, at A6 (“the people of East Timor are being terrorized and massacred because they exercised their right of self-determination.”).

49 See Zbigniew Brzezinski, Russia Would Gain by Losing Chechnya, N.Y. TIMES, Nov. 19, 1999, at A35 (“The only fair and workable solution, good both for the Chechens and for the Russians, is self-determination for Chechyna.”).


sovereignty when it fails to, “represent the whole people belonging to the territory without distinction as to race, creed, or colour”, suggesting that a state corrodes its claim to sovereignty when subjugation, domination and exploitation occurs. Additionally, both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political rights state that “all peoples have the right of self-determination.” This includes the right to “freely determine their political status,” and to “freely pursue their economic, social, and cultural development.”

This author proposes shifting the focus away from self-determination and towards factors such as those discussed in Part III. While much scholarship has been written on the right to self-determination, what it encompasses, and who it applies to, states have been slow to acknowledge the precept beyond the colonial context. The direct source of confusion over the issues resulting from self-determination arises from the failure of any international document to define who is entitled to claim this right and what exactly this right confers. Until this information can be ascertained through international documents or international norms, the problem requires an alternative solution. A focus away from self-determination and on alternative concepts may balance the much needed tension between self-determination and sovereignty over the issue of secession.

C. Secession

Secession is the process or act of withdrawing, such as a people’s withdrawal from their central government. In this author’s view, secession results because of a state’s failure to balance its right to territorial integrity with its people’s right to self-determination.

54 Id. (“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory and without distinction as to race, creed, or colour.”).


56 Id.


Secession cannot be separated from the concepts of self-determination and sovereignty. The right to self-determination and a state’s claim of sovereignty are parallels in international documents. The relationship between the corners of the political liberty triangle become clear when one considers the following idea: when secession is intended, acceptance of one group’s claim to self-determination results in the denial of another group’s competing claim of territorial integrity.

A balance between secession, the right to self-determination and the right to maintain a nation’s territorial integrity is necessary to alleviate conflicting policy goals. Favoring a state’s territorial integrity over the right to self-determination creates a state of limited freedom and independence for its people. Moreover, territorial integrity was not intended to preclude the right to self-determination. Alternatively, too broad a reading of self-determination will compromise the territorial integrity of the state.

Secession has been argued to be permissible under a number of circumstances. Namely, secession has been thought be justified in extreme situations where definite and substantial grievances are present and all other means of resolving these grievances have been exhausted or repudiated. The historical nature of the grievances, along with the severity, has been given consideration in evaluating a secessionist claim. For example, it has been argued that secession may be legally

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59 See, e.g., U.N. Charter art. 1, para. 2, art. 2, para. 1.
60 Hurst Hannum, Rethinking Self-Determination, 34 VA. J. INT’L L 1, 41 (1993) (“Where independence is the goal, acceptance of one group’s claim to self-determination necessarily implies denial of another group’s competing claim of territorial integrity.”).
61 Brock Lyle, Blood for Oil: Secession, Self-Determination, and Superpower Silence in Cabinda, 4, WASH. U. GLOBAL STUD. L. REV. 701, 707 (2005) (“too strict a reading of territorial integrity creates an internationally sanctioned form of fascism, a nation where the people have no freedom to disagree.”).
62 Pius L. Okoronkwo, Self-Determination and the Legality of Biafra’s Secession Under Internationa Law, 25 LOY. L.A. INT’L & COMP. L. REV. 63, 80 (2002) (“The principle of territorial integrity, however, was not intended to preclude people within a sovereign state from exercising their right to self-determination through secession.”).
65 Id. at 48.
justified when gross violations of human rights, such as genocide, are found.\textsuperscript{66}

Also, the promotion of international harmony has been considered in ascertaining the legitimacy of a claim to secession.\textsuperscript{67} States may freely recognize the independence of a population. When the greater of the international community accepts a group’s declaration of independence, a right to secession is more legitimate. Moreover, the adverse effects on the state being seceded from must be balanced in determining whether international harmony is promoted. Similar reasoning was followed by Professor Lung-Chu Chen, who stated, “the basic question is whether separation or unification would best promote security and facilitate effective shaping and sharing of power and of all the other values for most people.”\textsuperscript{68}

Although a right to secession does not yet exist, the question of whether a right legitimizing secession under certain circumstances should be recognized remains. Because the legitimacy of any government rests upon the consent of the governed, the governed should have an inalienable right to withdraw consent whenever they wish.\textsuperscript{69} This power to withdraw should arguably extend not only to the rejection of a particular government, but to a state as well.\textsuperscript{70}

\textbf{II. A PARADIGM FOR THE AGES}

Part II provided the framework of the political liberty triangle. In part III, this author discusses the heart of the triangle. This author argues that an analysis on the legitimacy of an act of secession should shift away from the paradigm of self-determination and towards the political liberty triangle paradigm.

\textbf{A. The Traditional Paradigm of Self-Determination}

The international community should no longer focus on self-determination to determine when an act of secession is lawful. Self-determination alone is not enough. Self-determination simply

\textsuperscript{66} Id. at 46.
\textsuperscript{67} Id. at 47.
\textsuperscript{68} Lung-Chu Chen, \textit{Self-Determination as a Human Right, in} TOWARD WORLD ORDER AND HUMAN DIGNITY 198, 210 (W. Michael Reisman & Burns H. Weston eds., 1976); see also Lee C. Buchheit, \textit{SECESSION: THE LEGITIMACY OF SELF-DETERMINATION} 238 (1978) (“balancing of the internal merits of the claimants’ case for secession against the justifiable concerns of the international community”).
\textsuperscript{70} Id.
distinguishes legitimate claims from illegitimate claims. It explains why a group may be entitled to secede, but it does not guide the international community how to determine whether an act of secession is lawful.

For example, consider the concept of mathematics. A student is unable to do calculus without understanding the fundamentals of algebra. Additionally, before a student can do algebra, an understanding of basic mathematics such as addition and subtraction is essential. A student may realize the problem can be solved using calculus, but not have the understanding how to solve it until the necessary tools are acquired.

Here, self-determination is analogous to calculus and the student is analogous to a scholar faced with the question of when is the act of secession lawful. The scholar knows the problem faced by an aggrieved population may be answered with self-determination, but cannot solve the problem with self-determination until she acquires the tools necessary to analyze the legitimacy of an act of secession. In other words, the scholar does not have the basic math and algebra skills to understand how to solve the calculus problem. Rather, information on the circumstances surrounding the secessionists’ claim such as human rights violations suffered, attempted peaceful negotiations, whether there is a clear expression of the will of the supermajority to secede and whether the aggrieved population has the ability to be economically viable, will provide the tools needed for the scholar to determine when a state’s act of secession is legitimate.

B. The Political Liberty Triangle Paradigm

The factors needed for the international community to begin viewing secession through the totality of the surrounding circumstances are discussed below. These factors lay in the heart of the political liberty triangle. Scrutinizing factors within the political liberty triangle will shift a state along the sliding scale of independence. When independence is reached on the sliding scale, the political liberty triangle crumbles and the seceded territory forms a new political liberty triangle. The original state’s political liberty triangle will then repair itself because the aggrieved population’s secession results in a balanced equilibrium among the three sides of the triangle once again.

72 Cf. STEPHEN R. COVEY, THE 8TH HABIT: FROM EFFECTIVENESS TO GREATNESS 117 (2004) ("you can’t do calculus until you understand algebra, and you can’t do algebra until you understand basic math").
When does a political liberty triangle crumble? How does a state move from dependence to independence on the sliding scale of independence? These questions are answered by analyzing factors that comprise the heart of the political liberty triangle including, but not limited too: 1) a gross, substantial and extensive record of human rights violations; 2) attempted negotiated settlements by peaceful means; 3) the will of a supermajority of the population to secede; 4) economic viability; and 5) the promotion of international harmony.

The determination of the legitimacy of an act of secession should be made on a case by case basis. The circumstances arising in each case will be unique. Therefore, the enumerated list of factors discussed here are not an exhaustive list. Additionally, because each case is unique, different factors will be accorded more weight than others. For example, the economic viability of a territory may be given more weight than the exhaustion of peaceable negotiations where a territory is small and its population uneducated.

Many of the factors discussed here have been assessed in prior written work by scholars and academics. The forthcoming discussion, however, builds upon and improves this work. For example, previous scholarship has argued that serious human rights violations alone are sufficient for secession. This author, however, argues that it is not. Rather, it is one of many factors that should be considered while looking at all the surrounding circumstances of the territory. Not surprisingly, most academic work dealing with secession has focused on self-determination. If nothing else, this author’s hope in writing this piece is to shift academia’s paradigm away from self-determination, and into a more meaningful in-depth analysis. Unfortunately, paradigms, like traditions, die hard. Flawed paradigms can live on for centuries, even after a better one is discovered.

1. Gross, Substantial and Extensive Human Rights Violations

Human rights are those fundamental moral rights of the person necessary to live a life with human dignity, and a means to a greater social end. The legal system identifies which rights are fundamental

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75 Id.
76 DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 3 (2nd ed. 2006).
and codifies them into the legal system. Respect for the equality and autonomy of individuals is assured through a state’s recognition and application of fundamental legal rights of the person.

Human rights have been internationalized, meaning human rights are no longer a matter solely within state domestic jurisdiction. States answer to the international community for their treatment of individuals. When a state fails to recognize and apply fundamental rights appropriately, a group may seek assistance from the international community. One remedy the international community offers is secession. In this manner, secession acts as a source of protection.

Human rights violations may be a compelling justification for secession. The issue is what degree of human rights violations is

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77 Id. ("[I]t is the legal system that tells us at any given point in time which rights are considered most fundamental in society. Even if human rights are thought to be inalienable…rights still have to be identified – that is, constructed – by human beings and codified into the legal system."). See also Jack Donnelly, The Social Construction of International Human Rights, in HUMAN RIGHTS IN GLOBAL POLITICS 71–102 (Tim Dunne and Nicholas J. Wheeler eds., 1999).


79 DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 4 (2nd ed. 2006) ("Other developments also indicated the central point that human rights was no longer a matter necessarily or always within state domestic jurisdiction…Human rights had been internationalized.").

80 Id. ("In principle, states were to answer to the international community for their treatment of individuals.").

81 See BENYAMIN NEUBERGER, NATIONAL SELF-DETERMINATION IN POSTCOLONIAL AFRICA 71 (1986) (stating a group may defend themselves by seceding from an oppressive state); Onyeonoro Kamanu, Secession and the Right to Self-Determination: An OAU Dilemma, 12 J. MOD. AFR. STUD. 355, 359, 362 (1974) (stating a group may defend themselves when they are subjected to human rights violations).


83 See Hurst Hannum, The Specter of Secession, Responding to Claims for Ethnic Self-Determination, 77 FOREIGN AFFAIRS 13, 16 (Mar/Apr 1998) ("[t]here are two instances in which cession should be supported by the international community. The first occurs when massive, discriminatory human rights violations, approaching the scale of genocide, are being perpetrated…secession may be the only option."); see also ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR
necessary to justify secession. Is the threat of an aggrieved population’s physical existence or extreme discrimination against a particular group such that it results in oppression sufficient to justify secession?\footnote{For example, genocide is illegal under customary international law. But is one act of genocide against a population sufficient to justify secession? Probably not. Secession may not be the proper remedy. The Preamble of the Universal Declaration of Human Rights, for instance, states, “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” And the long established principles of sovereignty and territorial integrity signal that secession may not be the preferable remedy.} When human rights violations are gross, substantial, and extensive, however, secession may become a legitimate goal for an aggrieved population. As discussed above in part II(B), international documents such as the 1970 Declaration on Principles of International Law Concerning Friendly Relations,\footnote{See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the U.N. G.A. Res. 2624, 25 UN GAOR, Supp. 28 at 121, U.N. Doc A/8028 at 121 (1970).} the International Covenant on Economic, Social and Cultural Rights\footnote{See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (Annex to G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316 at 490) (entered into force Jan. 3, 1976).} and the International Covenant

\footnote{INTERNATIONAL LAW 332 (2004); KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 262–63 (2002); Pius L. Okoronkwo, Self-Determination and the Legality of Biafra’s Secession Under International Law, 25 LOY. L.A. INT’L & COMP. L. REV. 63, 106 (2002) (stating secession is permissible when serious human rights violations are present).}
on Civil and Political Rights, suggest that serious human rights violations should not be tolerated by states because of the international community’s respect for a state’s sovereignty.

2. Attempted Peaceful Negotiated Settlements

There is a historical notion that violence rarely, if ever, produces viable and just outcomes. In order for a state’s political liberty triangle to remain intact, a state should repudiate all forms of violence and pursue peaceful negotiated settlements. When a state uses violence and force on an aggrieved population as a means to settle problems such as the denial of self-determination, a state corrodes its right to sovereignty. Additionally, the aggrieved population must not resort to violence as a means of achieving its ends if it aims to secede from the suppressive state.

The establishment of the United Nations in 1945 signaled a movement away from violence and towards institutions that would promote peaceful settlement of disputes. Article 33 of the U.N. Charter states that “the parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” The U.N. Charter empowers the Security Council to resolve disputes that threaten international peace and security. Of course, the U.N. Charter is only binding on member states. The international community should, however, follow the trend towards peaceful solutions to promote global harmony.

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92 Viola Trebicka, Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination, 32 Yale J. Int’l L. 255, 260 (2007) (“In the case of Kosovo, the exercise of self-determination would certainly lead to secession, thus violating the principle of territorial integrity of the sovereign, Serbia. In this case, I argue that emerging international law should favor the right to self-determination over sovereignty claims.”).
93 See U.N Charter, art. 39–51 (forbids the threat or use of force in international relations)
94 U.N. Charter, art. 33.
Peaceful negotiated settlements should be the result of hard bargaining by legitimate representatives of the parties after an examination of all issues that constitute the heart of the conflict. No party can be coerced or pressured into accepting an agreement. When negotiations can not produce a solution that is genuinely acceptable to both parties, the United Nations Security Council should assist in resolving the conflicts. The result of intervention by the Security Council should encourage the parties to reach agreement to lessen the risk of leaving the future status of the territory in the hands of the Security Council.

3. The Will of the Supermajority

Secession is not legitimate without the will of the people. Hurst Hannum argued that secession should be permissible when “reasonable demands for local self-government or minority rights have been arbitrarily rejected by a central government.” When the supermajority of those arbitrarily rejected by the central government expresses a clear will for secession, the territory may becomes one step closer to independence on the sliding scale of independence. Prior discussion and scholarship on secession has focused on the will of the majority of the people. Nonetheless, this author believes a simple majority is insufficient. Rather, the will should be a clear expression of the supermajority of the people.

This author argues that a supermajority is a necessary factor, in contrast to a majority, because it is difficult to gauge whether a majority of a population within a territory wishes to secede. Requiring a supermajority to secede guarantees that secession is the direct wishes of the population within a territory. Furthermore, requiring a supermajority minimizes the risk of minority groups being harmed. Minority interests must be protected when a population secedes from a state. David Miller, in SECESSION AND THE PRINCIPLE OF NATIONALITY, argued that the overall situation for minorities must not be worsened by secession. By

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100 See David Miller, Secession and the Principle of Nationality, in National Self-Determination and Secession 62, 72 (1998).
requiring that the situation for minorities in the secessionist state be at least as good as it was prior to secession, it establishes a greater legitimacy for secession.

The Supreme Court of Canada decided, in an opinion on the issue of self determination and secession, that the right to self determination must “be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”\(^{101}\) The Court, however, noted that there are extreme circumstances that a right to secession may arise.\(^{102}\) Most relevant to our discussion, the Court stated that “when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession,”\(^{103}\) although it noted that this proposition may not yet be “an established international law standard.”\(^{104}\)

This opinion is relevant to our analysis because the Supreme Court of Canada discussed the relationship between the will of the majority and secession. In order for an expression of a desire to secede to be legitimate, the Court stated it would require a “clear expression by the people…of their will to secede.”\(^{105}\) The court indicated that a clear majority of the population’s vote on the question free of ambiguity would qualify as a clear expression.\(^{106}\) Requiring the will of a supermajority to secede is a clear expression of the majority of the population.

4. Economic Viability

This author believes the ability of a territory to be self sustaining should be a prerequisite to secession.\(^{107}\) Little discussion on secession has focused on the economic viability of a territory. This is surprising, especially given the simple fact that a state’s future and security is so closely connected to its economic viability.


\(^{102}\) Id.

\(^{103}\) Id. at ¶ 134.

\(^{104}\) Id. at ¶ 135.

\(^{105}\) Id. at ¶ 87.


Perhaps the economic viability of a territory has been ignored by scholars and academics because Article 3 of the Declaration on the Granting of Independence to Colonial Countries and Peoples states, “[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”\textsuperscript{108} Declarations, however, are not binding.\textsuperscript{109} Additionally, in today’s world, globalization creates new economic challenges that were not known, nor could be ascertained, at the time of the Declaration’s enactment. If a territory cannot survive as an economically viable state, then it should not legitimately secede. Such a state would be a drag on the international community.

An independent state must be able to build a strong, healthy, and self-sustaining economy to survive. Until the state’s final status is resolved, however, the economic development of the territory will be uncertain. Businesses will be reluctant to invest in a territory whose independence has not been recognized, and international financial institutions will be unable to offer monetary assistance.\textsuperscript{110}

One may be able to determine a territory’s economic viability by looking at its size and assets. A territory rich in natural resources is an indicator of future self-sustainability. Additionally, a young population, with a robust drive to succeed, is more likely to contribute to a territory’s economic success. The amount of potential investment by the community, outsiders, and financial institutions will also lead to predictions about economic viability.

A territory should be capable of being self-sustaining and free from direction and assistance if it wishes to secede from an economically stable state. A great emphasis should be placed on the economic state of a territory in determining whether secession is appropriate.

\textsuperscript{109} See Alan Parra, \textit{Human Rights: The Helsinki Process}, 84 AM. SOC’Y INT’L L. PROC. 113, 122 (1990) (stating that a declaration “entails political and moral commitments, rather than legally binding treaty obligations.”); Noëlle Lenoir, \textit{Universal Declaration on the Human Genome and Human Rights: The First Legal and Ethical Framework at the Global Level}, 30 COLUM. HUM. RTS. L. REV. 537, 550 (1999) (“the achievement of consensus on a declaration is a short-lived victory, because declarations are not binding and there is nothing to prevent states from later revoking the commitment they made when the text was adopted.”).
\textsuperscript{110} See \textit{The Balkans After the Independence of Kosovo and on the Eve of NATO Enlargement, Hearing before the Committee on Foreign Affairs, House of Representatives}, 110th Cong. 1 (2008).
5. Promotion of International Harmony

A legitimate act of secession requires recognition. The formation of a state happens first as a matter of fact, and second as a matter of international law. Simply put, the formation of a state first occurs with the recognition of the overall international community. States are free to recognize any territory or population as an independent state. Without recognition by the international community, secession should not be considered a legal act.

The overall international community’s recognition of a secessionist state’s independence will promote international harmony. A state will ultimately weigh the legitimacy of secession, among other facts and policy considerations, as a basis to determine whether to grant or withhold recognition. When the overall international community, minus the dissenters, recognizes a state’s independence, it is a statement of legality and legitimacy for the secessionist state.

This argument, of course, ignores the dissenting state’s wishes. At first blush, a reader will grapple with the idea of promoting international well being when a portion of the international community, will almost certainly, object to the legality of the secessionist movement. But this author believes that each state will take into account the adverse significant affects on the state being seceded from in making its determination on whether to grant or withhold the recognition of

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113 Reference re Secession of Quebec, 2 Can. S.C.R. 217, ¶ 155 (1998) (“The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition”); see also Lung-Chu Chen, Self-Determination as a Human Right, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198, 210 (W. Michael Reisman & Burns H. Weston eds., 1976) (“would [secession] move the situation closer to goal values of human dignity, considering in particular the aggregate value consequences on the group directly concerned and the larger communities affected.”); LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 238 (1978) (“balancing of the internal merits of the claimants’ case for secession against the justifiable concerns of the international community”).
114 Id.; see also K. William Watson, When in the Course of Human Events: Kosovo’s Independence and the Law of Secession, 17 TUL. J’L & COMP. L. 267, 268 (2008) (stating states will likely base their decision to support the independence of Kosovo on realist political tactics).
independence. If the greater of the two halves grant recognition, then international harmony may be promoted.

III. APPRAISING THE POLITICAL LIBERTY TRIANGLE PARADIGM

Part IV of this article appraises the methodology discussed above through case studies on East Timor and Kosovo. East Timor achieved independence from Indonesia and Kosovo recently achieved its independence from Serbia. Part IV looks at whether the conditions in East Timor and Kosovo reached the independence threshold on the sliding scale of independence. If the conditions were present to shift East Timor and Kosovo to independence on the scale, then their declarations of independence may have been legitimate.

Moreover, Part IV analyzes whether Indonesia’s and Serbia’s political liberty triangles faltered. If the political liberty triangle of each respective state did not crumble, then East Timor’s and Kosovo’s declarations of independence were illegitimate acts. By contrast, if their political liberty triangles did crumble, East Timor’s and Kosovo’s secession were legitimate acts.

The history behind East Timor\textsuperscript{115} and Kosovo\textsuperscript{116} is extensive and complicated. To remain within the confines of this article, it is beyond the scope of this paper to discuss the complete history of each state. Thus, the sections below focus on the relevant facts to the analysis of the heart of the political liberty triangle.

A. East Timor

East Timor achieved its independence on May 20, 2002.\textsuperscript{117} It was the first new sovereign state of the twentieth century. East Timor


\textsuperscript{116} For a discussion on the history of Kosovo see United States Dep’t of State, Kosovo Chronology (last visited February 21, 2009), http://www.state.gov/www/regions/eur/fs_kosovo_timeline.html (providing a chronology of the history of Kosovo); KOSOVO: THE POLITICS OF DELUSION (Michael Waller, Kyril Drezov & Bülent Gökay eds., 1999); MIRANDA VICKERS, BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO (1998).

\textsuperscript{117} Fabio Scarpello, Energy deals light the way for nation’s future, SOUTH CHINA MORNING POST, April 7, 2007, at 14; Piers Akerman, Ragged Chorus flies Timor’s tattered flag, THE DAILY TELEGRAPH (AUSTRALIA), May 30, 2006, at 20; Firdaus Abdullah, Dr Mahathir assures East Timor counterpart of continued assistance, NEW STRAITS TIMES (MALAYSIA), Aug. 13, 2002, at 1.
remained a colony of Portugal from the sixteenth century until 1975. In 1975, Indonesian forces took control upon the departure of the Portuguese authorities earlier that year. The United Nations denounced the Indonesian means of exerting control over East Timor and continued to recognize East Timor as a “non-self-governing territory under Portuguese administration.”

Indonesian rule over East Timor was marked by extreme brutality and violence. A report prepared by the Commission for Reception, Truth and Reconciliation in East Timor reported a minimum of 102,800 (+/- 12,000) conflict-related deaths between 1974 and 1999. A comprehensive study commissioned by the Australian Parliament reported at least 200,000 East Timorese died under Indonesian occupation.

Negotiations over the final status of East Timor continued in 1999. On May 5, 1999, Indonesia and Portugal signed an Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor to allow the United Nations to organize a popular consultation of the East Timorese through a direct, secret and universal ballot. If the East Timorese rejected the autonomous framework,

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119 East Timor (Port. v. Austl), 1995 I.C.J. 90, 95 (June 30).
122 John Pilger, Foreword, in THE EAST TIMOR QUESTION: THE STRUGGLE FOR INDEPENDENCE FROM INDONESIA ix, ix (Paul Hainsworth & Stephen McCloskey eds., 2000) (“According to a comprehensive study commissioned by the Australian Parliament, ‘at least’ 200,000 East Timorese, a third of the population, have died under the Indonesian occupation.”); see also IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT, AND INTERNATIONAL INTERVENTION 17 (2001) (“Estimates of the number who died as a result of the conflict…range from tens of thousands…to as many as 200,000.”).
Indonesia would transfer authority of East Timor to the United Nations, which would eventually lead to independence.\footnote{124}{Id. at art. 6.}

On August 30, 1999, nearly 79% voted to reject autonomous status in Indonesia.\footnote{125}{Timor Chooses Independence, BBC NEWS (Sept, 4, 1999), available at http://news.bbc.co.uk/2/hi/asia-pacific/438145.stm.} The status of East Timor was never clear until the popular consultation.\footnote{126}{Amardeep Singh, The Right of Self Determination: Is East Timor a Viable Option for Kashmir?, 8 No. 3 HUM. RTS. BRIEF 9, 10 (2001); see also S.C. Res. 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976, and G.A. Res. 3485(XXX) of 12 December 1975, 31/53 of 1 December 1976, 32/34 of 28 November 1977, 33/39 of 13 December 1978, 34/40 of 21 November 1979, 35/27 of 11 November 1980, 36/50 of 24 November 1981 and 37/30 of 23 November 1982. \textit{Id.}} Mass violence, including murders, massacres, disappearances, forced expulsion, rape, sexual harassment of women and destruction of property, ensued by pro-Indonesia militias as a result of the popular consultation. Angered by the result, pro-Indonesia militias engaged in mass violence, including before and after the ballot.\footnote{127}{Id.} Peace was not restored in East Timor until the UN Security Council authorized the creation of the International Force for East Timor (INTERFET) to protect the results of the popular consultation.\footnote{128}{Id.} East Timor finally won its hard fought battle for self-determination on May 20, 2002.\footnote{129}{Fabio Scarpello, Energy deals light the way for nation's future, SOUTH CHINA MORNING POST, April 7, 2007, at 14; Piers Akerman, Ragged Chorus flies Timor's tattered flag, THE DAILY TELEGRAPH (AUSTRALIA), May 30, 2006, at 20; Firdaus Abdullah, Dr Mahathir assures East Timor counterpart of continued assistance, NEW STRAITS TIMES (MALAYSIA), Aug. 13, 2002, at 1.}

Was granting East Timor its independence the proper result? At first blush, it appears that East Timor’s independence may have been the right outcome. The people of East Timor dealt with decades of violence, brutality, and extensive human rights violations. The popular consultation is evidence of East Timor’s peaceful negotiations. Additionally, the result of the popular consultation—79% favoring independence—is sufficient evidence of secession representing the will of the supermajority.

community. Member states of the United Nations are bound by U.N. resolutions.\textsuperscript{131} In 1975, the date of Indonesia’s invasion, there were 144 member states.\textsuperscript{132} According to the U.S. Department of State, there are 194 independent states in the world.\textsuperscript{133} It appears that international harmony will be most effectively promoted by granting East Timor’s independence.

On a sliding scale, however, concluding East Timor’s secession as a lawful act is not so clear cut. East Timor’s economic viability was in question at the time in which it seceded.\textsuperscript{134} M. Hadi Soesastro stated, “It was a belief that an independent East Timor was not economically viable that provided one of its justifications for incorporation into Indonesia.”\textsuperscript{135} East Timor is small; its population is sparse.\textsuperscript{136} Years of war have left most of its people uneducated.\textsuperscript{137} Additionally, there are few natural resources in East Timor.\textsuperscript{138} In 1999, East Timor’s economy was among the poorest in the world.\textsuperscript{139} Its infrastructure has been neglected and destroyed over the decades of Portuguese and Indonesian rule.\textsuperscript{140} Such a territory may not be able to accept the responsibilities of statehood in the international community.\textsuperscript{141}

\textsuperscript{131} U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council...”).
\textsuperscript{134} Roger S. Clark, The “Decolonization” of East Timor and the United Nations Norms on Self-Determination and Aggression, 7 YALE J. WORLD PUB. ORD. 2, 12 (1980); Jeremy Wagstaff, Independent East Timor Would Rely on Foreign Aid, WALL ST. J., Aug. 30, 1999, at A18 (“Economically, East Timor is unprepared for independence, making it likely that if it chooses to split from Indonesia, it could be on foreign aid for years.”).
\textsuperscript{135} GEOFFREY C. GUNN, EAST TIMOR AND THE UNITED NATIONS: THE CASE FOR INTERVENTION 23 (1997).
\textsuperscript{138} Id.; but see East Timor Natural Resources, MAPS OF WORLD.COM (stating East Timor has a variety of natural resources including gold, petroleum, natural gas, manganese, and marble).
\textsuperscript{139} Id.
\textsuperscript{140} Id. (stating years of war have left land scarred and undeveloped)
\textsuperscript{141} Id.; but see Lindsay Sobel, Rebuilding East Timor’s Economy, MOTHER JONES (Sept, 10, 1999), available at http://www.motherjones.com/news/special_reports/east_timor/features/economy
East Timor, however, has reason to be optimistic. Economists have stated it could take 15 to 20 years before East Timor reaches the levels of economic growth in Indonesia.142 East Timor is rich in oil and gas.143 The Timor Sea Treaty, which replaced the Timor Gap Treaty, gives East Timor a share of the proceeds in the petroleum found in the seabed area provided for in the Agreement.144 Additionally, East Timor’s agriculture has promise. Coffee, marble-mining, fishing off its coast, and tourism are also potential sources for economic development.145

Despite the potential, East Timor has yet to prove it can be economically viable.146 East Timor’s success depends on international assistance, without which their future would be bleak.147 It is arguable whether the people of East Timor are better off in a poor economy marked by starvation, high unemployment, and high mortality rate, then they would have been as territory dependent on an economically self-sufficient state. Therefore, on the sliding scale of independence, this author believes the circumstances surrounding East Timor’s declaration of independence may not have been enough to not shift East Timor independence.

B. Kosovo

.html (stating there are around 30 members States of the United Nations of the same size or smaller and with the same or smaller populations than East Timor).
142 Jeremy Wagstaff, Independent East Timor Would Rely on Foreign Aid, WALL ST. J., Aug. 30, 1999, at A18 (“[E]conomists reckon it could take 15 to 20 years for East Timor to reach the levels of Indonesia.”).
146 Erica Tay, Singapore ranked as world’s easiest place to do business; New Zealand slips to second spot in World Bank report of 175 economies, THE STRAITS TIMES (SINGAPORE), Sept. 7, 2006 (“Among the 175 economies studied, troubled East Timor was second from the bottom. Only the Democratic Republic of Congo fared worse.”).
147 Annemarie Evans, East Timor’s shaky foundations need long-term support, SOUTH CHINA MORNING POST, June 10, 2006, at 16 (“If East Timor is left to its own devices, then with the current unrest, the future doesn’t look rosy. However, both Mr Miller and Mr Jones are optimistic, provided an international taskforce can guide East Timor through a few more years.”).
Kosovo’s declaration of independence was made by members of the Kosovo Assembly meeting in Pristina on February 17, 2008. Kosovo had been under the control of Serbia since 1989, when the Serbian government seized control of Kosovo. At the time, Kosovo was technically part of Serbia, but it enjoyed an independent status. The Serbian occupation of Kosovo in the 1990s was marked by a denial of the right to participate in government life and rampant human rights abuses including beatings, arbitrary arrests and torture.

In the late 1990s, a violent resistance emerged in Kosovo which was met by a vehement response by Serb authorities. The U.N. Security Council issued chapter VII resolutions demanding a cease-fire and peaceful negotiations with international supervision. Serbia resisted international efforts for peaceful settlements. As a result, the U.N. Security Council adopted Resolution 1244 providing for U.N. administration of Kosovo.

Resolution 1244 established the U.N. Interim Administration Mission in Kosovo to promote democratic self-government and “facilit[e] a political process designed to determine Kosovo’s future status.” The U.N. Interim Administration Mission in Kosovo’s duties also included performing civilian administrative functions, promoting human rights, coordinating humanitarian relief and the reconstruction of infrastructure, maintaining civil law and order, and assuring the safe return of refugees.

The U.N. appointed former President of Finland Martii Ahtisaari as Special Envoy to Kosovo to assist in determining Kosovo’s future status. In March 2007, Ahtisaari released the Comprehensive Proposal

150 Id.
151 Id. at 1590.
152 Id. at 1591.
157 Id.
for the Kosovo Status Settlement. The Ahtisaari Proposal called for “[i]ndependence with international supervision.” Serbia refused to accept the plan, and Russian resistance led to the failure of the adoption of the plan by the Security Council. With frustration at its peak among the people of Kosovo, the members of the Kosovo Assembly took it upon themselves to formally announce their independence.

The international community recognized that Kosovo Albanians were subjected to gross human rights violations. Even so, the international community consistently upheld Serbia’s right to territorial integrity. This failure to balance Serbia’s territorial integrity with Kosovo’s right to self-determination inevitably may have led to Kosovo’s declaration of independence.

From the time of Serbia seized control of Kosovo, there was a clear expression of the supermajority. In 1991, Kosovo held a referendum in which the population overwhelmingly chose independence from Serbia. Peaceful negotiations were attempted. The U.N. Security Council issued Resolution 1160, for example, after the violent

160 Id.
Serbian response to Kosovo’s resistance. The Ahtissaari Plan, discussed above, is another example.

Presently, 54 out of 192 United Nations member states formally recognize Kosovo. At first blush, it appears that the international community has failed to recognize Kosovo’s independence. But this statistic is deceiving. The 54 countries that recognize Kosovo’s independence make up 70.94% of the world’s total nominal GDP. Additionally, 3 out of 5 U.N. Security Council Permanent Member States, 22 out of 26 NATO Member States, and 22 out of 27 European Union Member States recognize Kosovo. Arguably, international harmony is promoted because a vast amount of the international community does recognize Kosovo’s independence.

Kosovo faces immense challenges for economic development. Presently, Kosovo is plagued with a high unemployment, a need for major infrastructure, and limited economic growth. Kosovo must focus on building a strong, healthy, and self-sustaining economy for itself if it wishes to survive as an independent state.

Fortunately, Kosovo has tremendous assets such as rich mineral resources, a young and resilient population, and a robust drive to succeed. With the announcement of Kosovo’s final status, business will no longer be reluctant to invest there and international financial institutions including the World Bank and International Monetary Fund (IMF) will be able to offer monetary assistance. Additionally, Kosovo’s economy improved with the arrival of the U.N. Interim

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169 Id.
170 Id.
171 See The Balkans After the Independence of Kosovo and on the Even of NATO Enlargement, Hearing Before the H. Comm. on Foreign Affairs, 110th Cong. 1 (2008) (Rep. Howard Berman stated upon his return from his visit to Kosovo that he “was struck by the immense need for economic development.”).
172 Id. at 2, 20.
173 Id. at 2.
Administration Mission in Kosovo. Within a year of UNMIK’s arrival, Kosovo’s economy was described as “remarkably vibrant” by the Special Representative of the Secretary-General, Bernard Kouchner. Kosovo’s private enterprises surpassed pre-war (1998) production and employment levels. Furthermore, construction was considered to be “booming” and “winter wheat planting was at 80 per cent of the historical average.” Ironically, this progress was attributed to several unusually bold administrative decisions made by the Special Representative Kouchner, which arguably exceeded his mandate as set forth in Resolution 1244. Although much of this progress was hindered by the ongoing struggle over Kosovo’s final status, it suggests that bold decisions by the leaders of Kosovo may lead to economic viability.

The challenges facing Kosovo will take years. For Kosovo to succeed, it is going to be important to learn from what has worked in other states that have gone through an economic transformation. For example, a democratic transformation requires a modernized banking system including credit, financial regulators, and an insurance system. Kosovo can learn from the post-Communist states that a flat tax reduces corruption. The flow of money and investment into Kosovo will increase if corruption is not present. With bold decision-making and following proven models, Kosovo may become a self-sustaining economy in the long term.

The legitimacy of Kosovo’s declaration of independence is not so clear under a political liberty triangle analysis. Kosovo suffered grave human rights abuses under the Serbian regime. To rebel, Kosovo resorted to violent resistance, rather than peaceful negotiated settlements. Kosovo’s clear expression of the will of the supermajority was present under Serbian control as early as the 1992 referendum for independence. Kosovo’s economic viability is bleak, yet hope remains. And finally, only 54 out of 192 U.N. Member States formally recognize Kosovo’s independence, albeit, they represent 70.94% of the world’s total nominal GDP.

176 Id.
177 Id.
180 Id.
181 Id.
These circumstances surrounding Kosovo’s declaration of independence may have shifted Kosovo to independence on the sliding scale to independence. The final result is the collapse of Serbia’s political liberty triangle. Kosovo forms a political liberty triangle to represent its state. And Serbia’s political liberty triangle repairs itself with Kosovo no longer within.

C. Reconciling East Timor with Kosovo

How does one reconcile independence for Kosovo under the political liberty triangle paradigm, but not for East Timor? Both suffered from subjugation, exploitation, and domination. Gross, systematic, and extensive human rights violations occurred in both territories. There is evidence of peaceful negotiations and violent resistance in both states. The supermajority of East Timor and Kosovo expressed clearly their will to secede. The economic instability present in East Timor at the time it seceded can also be seen in Kosovo at the time it seceded. And as shown above, international harmony was promoted in both cases.

Why does this author believe that under the political liberty triangle paradigm, Kosovo reached independence on the sliding scale of independence and East Timor did not? Because Kosovo was a unique situation. U.N. Security Council Resolution 1244 established the U.N. Interim Administration Mission in 1999 in Kosovo to promote democratic self-government and “facilit[e] a political process designed to determine Kosovo’s future status.” The situation in Kosovo involved an unprecedented level of participation by the United Nations and NATO not quite seen in East Timor. Additionally, the former Yugoslavia was broken up. Kosovo had an independent status, even while under the control of Serbia, which East Timor never possessed. Kosovo’s independence was the natural progression of Yugoslavia’s breakup. Every other people in the former Yugoslavia were given their right to self-determination.

The circumstances surrounding Kosovo’s and East Timor’s secession were important factors within the heart of the political liberty triangle that may have justified secession for Kosovo, but not East Timor. Although this author recommends the factors discussed in part III of this article as the basis of an analysis for the legitimacy of secession, they are not an exhaustive list. The totality of the circumstances must be considered. All circumstances surrounding the

states secession are appropriate to analyze under the political liberty triangle paradigm.

What about East Timor one might ask? What alternative solutions to independence does East Timor have? East Timor’s independence was not legitimate under the political liberty triangle in 2001. If instead of declaring independence in 2001, East Timor sought further peaceful negotiations, more involvement by the United Nations, and continued to develop their economy, independence may have been legitimate within years. Think about a situation where Kosovo declared independence in 1998. In such a scenario, their act of secession may not have been legitimate under the political liberty triangle paradigm. Kosovo’s time was ripe under the political liberty triangle paradigm in 2008. The purpose of the political liberty triangle paradigm is to only allow secession in unique situations. Its purpose is to maintain a balance between sovereignty and self-determination. Without that balance, any paradigm is flawed.

IV. RECOMMENDATIONS AND CONCLUSIONS

The power of an accurate paradigm is that it explains, and then it guides. Presently, the international community’s paradigm focuses on self-determination when determining the lawfulness of a claim to secession. Such a paradigm tells one why secession might be justified, but it does not guide one to understand how that conclusion may be reached. Its failure to guide may be attributed to the lack of any international document to define self-determination.

Alternatively, as this article has demonstrated through case studies of East Timor and Kosovo, the political liberty triangle and the sliding scale of independence explain, and then they guide. They explain why a group will seek secession in the name of self-determination. More importantly, however, they have the potential to guide scholars, advocates, and other decision-makers to the conclusion of whether or not secession is legitimate.

Unfortunately, paradigms die hard. Without an accurate paradigm, the confusion and complex issues that have evolved over the doctrine of secession will not fade. For example, think of a paradigm as a map of a city. If a scholar’s map is inaccurate, then it will make no difference how hard or long the scholar searches for her destination. The scholar will remain lost. But with an accurate map, the scholar will effortlessly be guided to her destination with proper reasoning and analysis. The political liberty triangle is the heuristic map to a scholar’s question: when is secession a lawful act?

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