Breaking Up Doesn't Have to Be So Hard: Default Rules for Partition and Secession

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I. INTRODUCTION

The creation of smaller new states by partition or secession from larger ones is among the most notable trends in the postwar international system. This trend has often been peaceful—as in the former Czechoslovakia—but conflict and discord seem to be the norm, with the breakup of and resulting war in the former Yugoslavia as perhaps the most tragic example. To the extent that the purpose of international law is, among other things, to promote peaceful relations and mutually beneficial agreements between international actors, it has largely failed to achieve this goal in cases where new states are created. This is not entirely surprising; partition and secession are at root political issues, and are particularly likely to inflame nationalist sentiments. The trend toward dissolution and devolution has probably also developed more quickly than law can adapt. Although international law cannot provide a complete solution to these problems, it can play a greater role.

International law would be more influential and beneficial in the process of new-state creation if it were implemented in a form similar to that of default rules in private contract law. In many ways, parties considering creation of a new state are in a similar position to that of private actors negotiating a contract. They seek agreement, if possible, on a wide range of substantive and procedural issues, lack the information and ability to plan for every contingency, and want to avoid a costly breakdown in talks. There are important differences, of course—above all, that breakdown often results in armed conflict in the international context—but the analogy is useful. Private actors have the benefit of an extensive background of contract law that provides a framework for their negotiations. It is usually possible to contract around these background

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principles, or default rules, but their presence provides a starting point for negotiations, reduces the costs of those negotiations, and ultimately helps prevent negotiation breakdown.

To some extent, the default-rules idea will be familiar to scholars of international law since rules of customary international law operate in a somewhat similar way—though there are important differences between the rules proposed in this Comment and traditional customary-law rules. However, neither customary international law nor treaty law provides many rules of any kind for the creation of new states. In this area, international law currently provides a mix of general principles of uncertain practical meaning (such as the right of all “peoples” to “self-determination”) and specific substantive rules in narrow areas which, in most cases, have yet to be generally adopted.

This Comment argues that default rules are the best way for international law to provide a politically acceptable framework for the creation of new states, thereby reducing the likelihood of negotiation breakdown and conflict. The Comment further argues that states should adopt these default rules by treaty, though in a form that differs significantly from that used in the largely ineffective treaties that currently govern state-succession issues.

A. Framework

Section II of this Comment describes the general trend toward the creation of new states and the role international law plays in such cases. It then outlines the current state and limitations of international law relevant to the creation of new states in more detail. Section III briefly discusses the literature of default rules, identifying their advantages and limitations. Section IV presents default rules as a practical remedy for the problems identified in Section II. It begins by arguing that implementation by treaty is the most likely method to succeed, and moves on to discuss what the content of default rules for the creation of new states should be in three substantive areas. It then describes possible criticisms of default rules in the international context, and raises likely responses to those criticisms. The Comment concludes in Section V by summarizing the key advantages of default rules: potential to reduce conflict, low cost of implementation, and political palatability.

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B. DEFINITIONS

The term “default rule” is applied in a wide variety of contexts to refer to concepts that, though they share underlying similarities, have substantial practical differences. It is important to be as clear as possible about the way this Comment uses this and related terms.

Three different forms of rules are defined in this section and used in the remainder of this Comment: “immutable” rules, “semi-immutable” rules, and, as the term is used in this Comment, default rules themselves.

1. “Immutable” Rules

Immutable rules are rules which cannot be changed by any party, even by mutual agreement. The obligation of good-faith performance imposed by the Uniform Commercial Code is such a rule—a provision in a contract for goods purporting to discard the obligation is effectively invalid.²

2. “Semi-immutable” Rules

As defined in this Comment, “semi-immutable” rules are those that parties can contract around in an agreement, but which apply even in the absence of any agreement. Such rules are often called default rules elsewhere. For example, some scholars have recently suggested that the rule for organ-donor status be changed from opt-in to opt-out.³ This rule (in either form) applies to all parties regardless of whether they have made any agreement—even though the rule can ultimately be shifted by such agreement.

3. Default Rules

The term “default rules” in this Comment refers exclusively to rules that function narrowly by filling gaps in incomplete agreements. These rules have no legal role when there is no agreement, since there are no gaps to fill. Such rules encourage negotiation and agreement not by simply giving an opportunity to opt out or in, but by providing a starting point for negotiations, reducing the costs of negotiation, and reducing the risks of breakdown over complex issues. The simple fact that their benefits are available only if the parties reach a basic agreement further encourages negotiation. Many of the familiar rules of contractual interpretation would fall into this category, but default rules need not be an attempt to reconstruct the intent of the parties; they can in principle operate contrary to that likely intent as so-called “penalty” default rules, or even

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² See UCC § 1-203 (ALI 2007).
cover issues which the parties did not manifest an intent to resolve. As the next section illustrates, these “true default” rules are wholly absent from the international law governing the creation of new states.

II. THE PROBLEM: INTERNATIONAL LAW AND THE CREATION OF NEW STATES

A. THE TREND TOWARD PARTITION, SECESSION, DISSOLUTION, AND DEVOLUTION

Since World War II, and particularly since the end of the Cold War, there has been a dramatic increase in the number of states in the international system. As one writer has stated, this trend is “one of the major political developments of the twentieth century” and at the same time has been “one of the more important sources of international conflict.” This increase has been driven by secession of new states from their former parent states, often their colonial masters, and by partition or dissolution of existing states into two or more new states. Even when new states are not created, these pressures often lead to devolution of power to more local authority. In short, the world is much more decentralized now than it has been for some time.

The creation of new states has often resulted in conflict. Bangladesh, East Timor, Eritrea, Biafra, Chechnya, and the constituent parts of the former Yugoslavia have all either seceded, or attempted to do so, amid violence—and these are but a few of the many examples. To be sure, some new states have entered into existence peacefully. The USSR dissolved into its constituent

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5 Id.
7 See Joshua Castellino, International Law and Self-Determination 147–72 (Martinus Nijhoff 2000); Crawford, The Creation of States at 393 (cited in note 4).
12 See id at 395–401. See generally John Williams, Legitimacy in International Relations and the Rise and Fall of Yugoslavia (St. Martin's 1998).
13 See Crawford, The Creation of States at 391–418 (cited in note 4) (comprehensively listing both successful and unsuccessful partition movements since 1945).
republics bloodlessly, and Czechoslovakia remains the best example of how to conduct a peaceful partition. The trend toward decentralization continues today. Quebec, Iraq, Kosovo, and even Belgium are current or possible near-future cases of secession or partition, with varying degrees of likelihood and potential for conflict.

Scholars have proposed various reasons for this flowering of new states and distributed authority. The most likely explanation is that relative peace and economic changes associated with globalization have made membership in a large state less attractive or necessary. Whatever the cause, the effects of this process have been dramatic. Samuel Huntington has argued that the trend is part of a fundamental change in the structure of the international system. Consideration of such sweeping changes is beyond the scope of this Comment; instead, it focuses on dealing with the effects of the trend within the current international system.

B. INTERNATIONAL LAW (SOMETIMES) MATTERS IN THE CREATION OF NEW STATES

Given this mixed experience, what can the international community do to make it more likely that the process of new-state creation will be peaceful? Some such events, particularly secessions from powerful centralized states, may be doomed to failure, violence, or both. Others, as the Czechoslovakian event likely illustrates, will probably succeed peacefully no matter what the background international law is. This Comment is largely concerned with cases between

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14 See id at 395, 416.
15 See id at 402, 416.
16 See id at 411-12.
17 See, for example, Sarah Baxter, America Ponders Cutting Iraq in Three, Sunday Times (London) 26 (Oct 8, 2006); Leslie H. Gelb, The Three-State Solution, NY Times A27 (Nov 25, 2003). See also Andrew George, We Had to Destroy the Country to Save It: On the Use of Partition to Restore Public Order During Occupation, 48 Va J Intl L 187, 187 n 1 (citing to a list of sources stating the possibility of partition of Iraq).
19 See Elizabeth Bryant, Divisions Could Lead to a Partition in Belgium, San Fran Chron A14 (Oct 12, 2007).
21 See Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order 35 (Simon & Schuster 1996) (noting that the decentralizing trend threatens the end of the Westphalian “nation-states-as-billiard-balls” model of international relations, with it being replaced by a “multi-layered international order more closely resembling that of medieval times”).
these extremes: secession events that are opposed but not crushed, complex partitions, and similar cases in which agreement on the terms of the creation of new states is possible but difficult.

In these cases legal rules can make a difference, since the marginal benefit of rules with a different form or substance may be enough to make agreement on the terms of new-state creation possible when it previously was not, or to make negotiation attractive where it may have seemed pointless. To illustrate this point, consider two recent cases, Kosovo and Iraq, where observers or the parties themselves have contemplated the creation of a new state. In each case, international law rules are likely to make a difference.

First, rules of international law governing the territory of new states likely played a role in the failure of Kosovo to reach agreement with Serbia on the terms of its secession. Kosovo recently seceded from Serbia after a period under UN administration.\(^2\) It appears as if the international community will accept this secession—several countries, including the US and many EU members, have recognized Kosovar independence.\(^3\) Serbia opposed the secession and continues to claim it was invalid.\(^4\) Conflict remains a serious possibility.\(^5\) Agreement between Serbia and Kosovo on the terms of secession, if possible, would certainly be preferable to the current state of affairs (as would agreement by both sides that Kosovo would not formally secede). Such an agreement would reduce the risk of conflict and increase stability. A major issue in the Kosovar independence dispute is the status of majority-Serb territory within Kosovo.\(^6\) Here, the legal rule matters. The customary rule of *uti possidetis*\(^7\) governs the territorial boundaries of Kosovo—even in the absence of any agreement. If the form or substance of this rule were different, it is certainly possible that either or both sides would see greater advantages to negotiating, and, possibly, reaching a peaceful agreement.


\(^4\) See Bilefsky, *Kosovo Declares Its Independence*, NY Times A6 (cited in note 18) (noting that Serbian Prime Minister Vojislav Kostunica has called Kosovo a “false state”).


\(^7\) *Uti possidetis* is discussed in detail in Section II.C.3.b below.
Second, rules of international law governing the succession of state property would be critical to any partition of Iraq. Since the 2003 invasion of Iraq, the US has considered proposals to partition that country into three or more new states. Given the level of violence in the country, distrust between Shiites, Sunnis, and Kurds, and other factors, a negotiated agreement between all three factions (and the US as occupying power) would be greatly preferable to an imposed partition.

Here too, the background legal rules play an important role in making the necessary negotiations for such an agreement more or less likely to occur or to succeed. A critical issue in any such partition would be the division of Iraqi oil resources. A treaty purports to create rules for the division of such property, but has not entered into force. Again, the form and substance of the rule for division of this property (among many other rules) will have a powerful impact on whether parties see negotiations as valuable, and on the likelihood of success of any negotiations. In both of these cases, and many others that are likely to arise in the future, default rules for the interpretation of agreements can provide the legal framework for such negotiations.

C. EXISTING INTERNATIONAL LAW OF NEW-STATE CREATION

International law governs, at least purportedly and at the margins, most activities by states that affect other states or the international community. Despite the general trend toward the creation of new states through secession and partition, these events are relatively unregulated by international law. In fact, the traditional view on the creation of new states is that it is a political issue into which international law cannot or should not intrude. This limitation vividly illustrates the principle that, as one scholar has put it, “the fact that some development is of importance in international relations does not entail that it is regulated by international law.”

There is, of course, a very large body of academic literature on the international law concerning the creation of new states. Almost all of it, however, focuses on the question of when and whether

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28 See George, 48 Va J Int’l L at 187 n 1 (cited in note 17) (citing to a list of sources stating the possibility of partition of Iraq).
29 See generally id.
there is a *right* to secession or other means of the creation of new states—not *how* such an event, whether enabled by a legal right or not, might take place.\textsuperscript{33} The rights debate is beyond the scope of this Comment—this section deals only with the international law governing how and under what terms secession or partition can take place. Further, this section by necessity discusses the international law (whether in force or not) that *does* exist in the context of new-state creation. This should not be interpreted as refuting the general argument that little effective law exists in this context.

1. An Exception to the Legal Vacuum—Immutable Rules of State Succession

Against this backdrop of few legal norms, there are limited substantive exceptions. A few agreements purporting to create substantive rules for creating new states exist in varying stages of implementation. These agreements frequently take the form of immutable rules.

The best example of such rules in international treaty law is the 1978 Vienna Convention on State Succession in Respect of Treaties ("Treaty Convention"), which governs issues of treaty succession.\textsuperscript{34} Only twenty-one states are parties to the Treaty Convention.\textsuperscript{35} This number is sufficient to bring the treaty into force, but it is hardly a ringing endorsement of its principles. The Treaty Convention provides a variety of general rules, such as that in Article 11 providing that succession "does not as such affect" boundary treaties.\textsuperscript{36} The most relevant provision in the context of secession and partition is Article 34, stating that successor states are presumptively bound by treaties to which their parent or predecessor state was a party.\textsuperscript{37} Whenever the Treaty Convention does apply, its rules are immutable. Even if parties agree to the creation of a new state and wish to make alternative allocations of treaty rights and responsibilities, the Treaty Convention at least purports to prevent them from doing so. There may be good reasons for making some rules for treaty succession immutable, but this need not be the case with respect to all classes of treaties.\textsuperscript{38}

\textsuperscript{33} See generally, for example, Robert McCorquodale, ed, *Self-Determination in International Law* (Dartmouth 2000); Margaret Moore, ed, *National Self-Determination and Secession* (Oxford 1998); Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale 1978).

\textsuperscript{34} Vienna Convention on State Succession in Respect of Treaties (1978), 17 ILM 1488 (1978).


\textsuperscript{36} Vienna Convention on State Succession in Respect of Treaties, art 11.

\textsuperscript{37} Id, art 34.

\textsuperscript{38} The advantages of various forms of rules in the treaty succession context are discussed in more detail in Section IV.C.1.c below.
Another set of immutable rules would be created by proposed agreements on state succession with respect to issues of nationality. Such agreements have been drafted, but have not yet come into force. For example, the International Law Commission in 1999 adopted Draft Articles on Nationality of Natural Persons in Relation to the Succession of States ("Draft Articles"). These largely focus on imposing standards and obligations on succeeding states in order to prevent the creation of stateless persons. Like the Treaty Convention, the Draft Articles create immutable rules. This is understandable to the extent that the human rights of individuals and burdens of statelessness on other states are implicated. Nevertheless, there is significant room for negotiation on these issues that the Draft Articles would either block or permit only due to their vagueness and generality. Furthermore, since the Draft Articles are not yet codified into a treaty, much less one that has entered into force, they have little relevance to the creation of new states in the near future.

2. The Property Convention and Semi-Immutable Rules

Not all agreements related to the creation of new states are made up of immutable rules; some allow room for parties to contract around their terms by casting them as semi-immutable rules. One example is the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts ("Property Convention"), which provides a rough set of rules for succession of debts and property. Like the Treaty Convention, only a relatively small number of states (seven) have ratified the Property Convention. As a result, it is not yet in force. Alone among international law instruments governing state succession, the Property Convention explicitly provides for deviation from its mandates by agreement between the states in question. Article 14, in fact, states that succession of property should generally be based

41 See Report of the International Law Commission, art 14(1) (cited in note 39) (stating that "[t]he status of persons concerned as habitual residents shall not be affected by the succession of States").
44 See Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, arts 14–15.
on agreement—perhaps the most emphatic existing endorsement of a contract model of new-state creation. Article 17 goes on to provide a limited set of rules in succession cases. Many of the provisions in the Property Convention are vague standards, rather than rules—for example, property that does not fall into the set categories in Article 17 described above is divided in "equitable proportion." The Property Convention makes frequent reference to this "equitable proportion" standard, but gives little guidance as to how equitable proportions should be determined, or who should determine them.

In one critical respect, the Property Convention would operate in a gap-filling manner similar to that of default rules in private contract law. Parties could interpret agreements that create new states but do not include terms for the division of property using the Property Convention rules as gap-fillers. The Property Convention, if it entered into effect, would also govern the allocation of debts and property between states that had not agreed to split. In the private-contract context, contractual default rules do not bind parties who have failed to reach an agreement (and therefore have not created a contractual relationship). The purpose of such rules is to aid in construction and interpretation of contracts, not to govern the relations of strangers. In the absence of a basic agreement, therefore, the Property Convention functions exactly like the immutable rules in the Treaty Convention. In this sense, the rules in the Property Convention are "semi-immutable.'

3. Customary International Law of New-State Creation

In light of the limited degree to which treaties provide international law relevant in cases of partition or secession, parties in such cases may look to customary international law for guidance. Customary law is helpful to some extent, but does not provide a general framework for cases of new-state creation. The rules of customary law that do exist function either as immutable or semi-immutable rules.

a) The law of state succession to international organizations—an immutable rule. One example of a customary norm applying to new states is that successor states, including those arising from partition or secession, must (re)apply for membership in international organizations, unless they can claim to "continue the international legal personality of said State." Much like the immutable

\[45\] Id, art 14.
\[46\] Id, art 17.
\[47\] Id.
\[48\] See id, arts 17(1)(c), 18(1)(b), 18(1)(d), 31(2), 37(2), 40(1), 42.
\[49\] Semi-immutable rules are defined in more detail in Section 1.B.2 above.
\[50\] Zimmermann, Secessio and the Law of State Succession at 220 (cited in note 40).
provisions of the Treaty Convention, this rule offers no room for negotiating an alternative arrangement, but lacks the benefit of settled, clear rules offered by codification in a treaty.

b) Utì possidetis—the customary law of territory. Perhaps the most significant customary legal principle in cases of partition or secession is that of utì possidetis, which generally indicates that new states must be created according to previous boundaries. In cases of partition or secession, these boundaries are the internal administrative boundaries of the predecessor state. The ICJ has held that utì possidetis is not limited to cases of decolonization or any other specific scenario:

Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.

Utì possidetis may therefore operate as a restrictive principle that forbids renegotiation of borders during the creation of new states. The principle generally blocked such realignment during the decolonization of Latin America and Africa.

The principle may not be an absolute, immutable rule, however. It does not fix borders for eternity—states clearly can and do negotiate new borders by treaty. The rule might be interpreted in a narrow form, preventing only forceful alteration of pre-existing borders while allowing parties that so choose to negotiate other borders. If this interpretation is correct, utì possidetis operates as a gap-filling rule that parties can contract around. This interpretation was endorsed by the Badinter Commission considering the breakup of Yugoslavia in its Opinion #2, which stated that “whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence ... except where the States concerned agree otherwise.”

This interpretation of utì possidetis, stripped from its decolonization context, is probably the most relevant for future cases of partition or secession.

Even if it can be contracted around, the utì possidetis principle operates as a semi-immutable rule, much like those in the Property Convention. If parties so agree, they can set new international borders that vary from pre-existing, internal

51 See Case Concerning the Frontier Dispute (Burkina Faso v Mali), 1986 ICJ Lexis 3, 23 (Dec 22, 1986).
52 Id at 24.
54 See Tancredi, A Normative 'Due Process' at 192 (cited in note 31).
ones. In the absence of agreement, however, *uti possidetis* still governs their relationship—borders will be set under international law according to the principle. There are substantial advantages to this approach, of course. Chief among them is a balance between stability and administrability of the rule on the one hand, and the right to peaceful renegotiation of borders on the other.

However, these conflicting interpretations of the principle may raise serious doubts among parties negotiating partition or secession about how international bodies (perhaps the ICJ) will interpret agreements to deviate from existing borders in future disputes. In fact, some scholars have argued that the Badinter Commission misinterpreted the ICJ’s position in *Burkina Faso v Mali*,\(^5\) and further that *uti possidetis* has no application outside of the decolonization context at all.\(^5\) Even if the Badinter Commission’s ruling in Opinion #2 is an accurate statement of the law, it is applicable only to Europe.\(^5\) In short, the implications of *uti possidetis* for new-state creation remain unclear; depending on how various precedents are interpreted, the rule could have different effects. This uncertainty alone is a significant barrier to negotiation of border issues when new states are created.

Whether the customary rule is immutable or semi-immutable, in practice the internal administrative boundaries of colonial powers provide a basis for the current boundaries of most existing states.\(^5\) The breakup of both the USSR and Yugoslavia has occurred along the lines of previous internal boundaries, though this does not necessarily mean that the newly created states would not have agreed on other borders had they been able to do so. Preexisting borders may have been broadly acceptable in the case of the USSR, and while they clearly were not in the case of Yugoslavia,\(^6\) the resulting war was in part a result of an inability to agree on borders (to vastly oversimplify the causes of the conflict), not an immutable interpretation of *uti possidetis* that would forbid any such agreement.

c) *Customary international law as semi-immutable rules.* Much of customary international law in fact operates as semi-immutable rules—the form should be familiar to scholars of international law. Once a rule of customary law has been

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*See note 51 and accompanying text.*


*Conference on Yugoslavia Arbitration Commission at 1498 (cited in note 55).*

*See Castellino, *International Law* at 109 (cited in note 7) (stating that *uti possidetis* is the “biggest contributor” to the definition of borders of 80 percent of current states).*

*Compare Crawford, *The Creation of States* at 395 (cited in note 4) (discussing the relatively smooth dissolution of the USSR), with id at 395–401 (discussing conflict associated with the dissolution of Yugoslavia).*
created by state practice and opinio juris, it governs the relationship between states except in cases where states agree otherwise.61 Where states make an incomplete agreement, customary law in the relevant area can fill gaps by providing an independent source of law—as discussed above, uti possidetis may play this role when agreements to create new states leave territorial issues undecided. But where states make no agreement at all, they continue to be bound by customary-law rules (unless one of the states has objected to the rule).62 The exceptions, of course, are jus cogens norms, which operate as immutable rules—states cannot legally agree to violate them.63

4. The State of the Law of Partition and Secession

As the preceding discussion shows, parties involved in the creation of new states, whether they are existing states, secessionist groups, or occupying powers considering partition, have little guidance from international law. There is virtually no law on the procedure of new-state creation by secession or partition, other than the general ban on the use of force in the UN Charter.64 Some substantive law does exist, with the details of state succession with respect to treaties fixed in many respects by the Treaty Convention, and territorial boundary issues in part resolved by the customary principle of uti possidetis. There is some prospect of further development of law if the Property Convention and Draft Articles enter into force, but there is little evidence that this is likely.

In a sense, there is both too little and too much law in this area. For many issues, there is either no proposed law at all or no law that has entered into effect. For others, such as treaty succession and, possibly, borders, international law implements a single solution from which deviation is difficult or impossible. This may benefit some states by settling expectations and minimizing the externality impact of shifts in treaty commitments or borders, but at the cost of making secession or partition negotiations more difficult than they would otherwise be and thereby increasing the risk of negotiation breakdown and conflict.

62 See International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law, 69 Intl L Assn Rep Conf 712, 719–38 (2000) (stating that “[w]here a rule of general customary international law exists, for any particular State to be bound by that rule it is not necessary to prove... that State’s consent to it or its belief in the rule’s obligatory... character” and that “if whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it”).
63 Restatement of the Foreign Relations Law of the United States at § 102 cmt k (cited in note 61) (stating that “some rules of international law are recognized by the international community of states as peremptory, permitting no derogation” and that “[t]hese rules prevail over and invalidate international agreements... in conflict with them”).
The existence of such gaps and limitations in the international law of partition and secession is not surprising. The key issues in each such event are inherently political and differ greatly from case to case. Aside from these practical difficulties, some existing states may further feel that creation of secession-related rules will encourage secession movements, something they particularly fear. Whatever the root cause, the best evidence that development of law in this area is paralyzed is the failure of proposed treaties to enter into force. The US has yet to sign the Treaty Convention, though adoption by other states has been relatively widespread. Twenty-five years after the creation of the Property Convention, it has yet to enter into force and only a few states have ratified it. The Draft Articles remain just that.

Furthermore, the dramatic increase in the creation of new states since the end of the Cold War has not led to significant developments in procedural or substantive law. The breakup of Yugoslavia and the resulting Badinter Commission rulings may have shed some light on the question of whether and/or when there is a right to secede, but did little to resolve issues of how it might legally take place. There appears to be no evidence that frequent secession has led to creation of customary norms, as one might expect—with the possible exception of a reinterpretation of uti possidetis in a postcolonial context. If the great increase in the rate of new-state creation over the past twenty years has not generated a significant volume of relevant international law, it seems unlikely that such law will be generated in the foreseeable future, at least in the immutable and semi-immutable forms exemplified by the Treaty and Property Conventions. It is therefore worthwhile to consider an alternate form of legal rule—default rules—both as a fall-back position, given the political difficulty of implementing broader rules, and as a possibly superior legal response to the problems presented by partition or secession.

III. DEFAULT RULES IN THEORY AND PRACTICE

A. WHAT ARE DEFAULT RULES?

Although principles guiding the interpretation of agreements are probably as old as law itself (or at least contract law), scholarship has relatively recently

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65 Vienna Convention on State Succession in Respect of Treaties (1978), Multilateral Treaties Deposited with the Secretary General.
66 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983), Multilateral Treaties Deposited with the Secretary General.
68 Uti possidetis is discussed in detail above in Section II.C.3.b.
analyzed such principles more deeply, giving them the name “default rules” and, generally, praising their usefulness and influence.\textsuperscript{69} Scholars both inside and outside the law-and-economics school have written extensively about default rules.\textsuperscript{70} In private contract law, default rules exist to solve problems similar to those faced by parties negotiating the creation of new states by partition or secession. They do this by simultaneously resolving two issues.

First, due to limited resources and knowledge, parties are unable to create “complete” contracts that provide for every contingency.\textsuperscript{71} In the absence of default rules, parties might expend unnecessary resources attempting to create a complete contract, or fail to even attempt agreement because they believe that such an agreement is so costly as to be impractical. The consequence of such a failure in private negotiations is an inability to reach an otherwise mutually beneficial agreement. In negotiations concerning the possible creation of new states, the stakes are even higher—not simply because more people or greater interests are usually implicated, but because negotiation breakdown often leads to armed conflict. In both contexts, therefore, default rules lower transaction costs and increase the range of possible agreements—and therefore, in theory, social welfare.\textsuperscript{72}

Second, default rules are easier to implement politically. In a sense, default rules are the basic gap-fillers in contract law.\textsuperscript{73} In some cases, when protection of either parties to the contract or those outside the contract can be justified (on paternalist grounds in the former case, and on grounds of uncompensated externalities in the latter), immutable rules that bind the contracting parties regardless of their desires, may be preferred.\textsuperscript{74} Where such externalities are absent, default rules are the traditionally preferred means of filling gaps in contracts, in part because they are less likely to be controversial. Parties that oppose the default rule, or simply wish to keep their options open in future situations, need not oppose its creation, as they would be compelled to do in the case of an immutable rule and, likely, a semi-immutable rule with similar

\textsuperscript{69} See, for example, Frank H. Easterbrook and Daniel R. Fischel, \textit{The Corporate Contract}, 89 Colum L Rev 1416, 1428 (1989).

\textsuperscript{70} See id. See also Sunstein and Thaler, \textit{Nudge} (cited in note 3) (praising changes in default rules as mechanisms for overcoming costs associated with bounded rationality behavior). Note, however, that as discussed in Section I.B, Sunstein and Thaler use the term slightly differently than it is used here.


\textsuperscript{74} Id at 89.
substantive content. These parties can simply explicitly contract around the
default rule in the future. This may not even involve an additional cost, since
parties would be likely to expend resources negotiating any issue significant
enough to deviate from the default rule anyway.

In the context of secession and partition, where stakes are high and political
differences likely large, the relative ease with which default rules can be
implemented is particularly valuable. The difficulty of establishing international
law in this context illustrates this point vividly. Where it may be impossible or
extraordinarily difficult to implement immutable rules, default rules may remain
a viable option. This fact, combined with their ability to increase the range of
possible agreements, makes them very attractive in the context of the creation of
new states.

B. WHAT SHOULD THE CONTENT OF DEFAULT RULES BE?

Before discussing how default rules might be implemented internationally, it
is important to consider briefly the specific goals those rules should try to
achieve. Frank Easterbrook and Daniel Fischel, among others, have persuasively
argued that default rules should replicate the hypothetical agreement that the
contracting parties would have made, given perfect information and zero
negotiating costs. Ian Ayres and Robert Gertner further distinguish between
"tailored" default rules, or those that seek to provide contracting parties with
"precisely what they would have contracted for," and "untailored" default rules,
or "single, off-the-rack standard[s] that in some sense represent[ ] what the
majority of contracting parties would want." The default rules proposed for
situations of new-state creation in the next section are untailored default rules.

The substance of these rules matters; rules should not be set randomly,
forcing parties to contract around them frequently. Untailored default rules

75 The limitations of current international law of new-state creation are discussed above in Section
II.C.

76 See Easterbrook and Fischel, 89 Colum L Rev at 1433 (cited in note 69). But see generally Ayres
and Gertner, 99 Yale L J 87 (cited in note 73) (arguing that not all default rules can or should take
this form). Penalty default rules are the most notable exception to this rule.

77 Ayres and Gertner, 99 Yale L J at 91 (cited in note 73). See also Charles J. Goetz and Robert E.
(1983).

78 This is for two reasons. First, untailored rules are easier to create since they apply to all situations
and therefore need to be drawn up only once. Second, and more importantly, tailored rules are
difficult or impossible to implement internationally since there is no court with general
jurisdiction to interpret agreements. For a discussion of how inclusion of default rules in
individual agreements might provide a mechanism for introducing tailored default rules into the
context of creation of new states, see Section IV.B.4 below.
operate as penalty defaults for any parties that would prefer a rule set at a
different position. Untailored rules are therefore advantageous only when a
majority of potential contracting parties would favor the rule, which becomes
more likely when there are the fewer alternative contractual forms, and therefore
fewer possible default rule forms. While it may be difficult to determine which
default rules would be generally preferred by a majority of parties to potential
future negotiations over the creation of new states, it is at least likely that the
number of possible rules is relatively small. In fact, the choices are likely binary
in most cases. For example, in the absence of agreement to the contrary, should
preexisting internal borders determine the border of new states, or not? Even
for issues that are not so easily broken down into binary choices, it seems likely
that the number of possible choices is low. Further, implementation of
untailored default rules through treaties gives some assurance that they will
reflect the form favored by a majority of potential future contracting parties.

IV. A PARTIAL SOLUTION: DEFAULT RULES FOR THE
CREATION OF NEW STATES

A. THE VALUE OF DEFAULT RULES FOR THE CREATION OF
NEW STATES

In a world in which there are large gaps in the international law of new-state
creation, and in which the law that does exist is made up entirely of immutable
and semi-immutable rules, there are insufficient legal incentives to negotiate the
terms of partition or secession. This problem does not necessarily mean that
states will respond by supporting the creation of default rules. Even though the
costs of creating them are low, states might not perceive default rules to be
worth the benefits. What might a state that is not currently undergoing breakup
get out of the creation of default rules? There are at least two reasons to believe
that states will generally support default rules.

1. Secession and Partition Viewed from Behind the Veil

First, lack of information makes states more, not less, likely to consider legal
measures—including default rules—that are generally beneficial when new states
are created. If the expected benefits of default rules are analyzed by states ex
ante, it may be very difficult to determine over the long term which current

79 See Ayres and Gertner, 99 Yale L J at 117 (cited in note 73).
80 Id at 116–17.
81 See Section IV.B.2 below for further discussion of the advantages of implementation by treaty.
states will undergo partition or experience secession. To be sure, short-term predictions can be made with some accuracy—Iraq is certainly more likely to be partitioned than Japan, and parts of Indonesia more likely to attempt to secede than parts of, say, Denmark. Nevertheless, international observers did not (and likely could not have) predicted many of the secessions and partitions that occurred in the postwar era very far in advance. Further, a great many states have secessionist movements of varying levels of support. To the extent that an agreement creating default rules would reduce the chances of conflict, many states stand to benefit. More importantly, it will be very difficult for states to determine whether they will benefit directly from this reduced risk. In this sense, states considering the creation of default rules or any legal measure dealing with new-state creation are operating behind a veil of ignorance. As Rawls originally illustrated, rules made from such a position are more likely to generate widespread benefits and less likely to be self-serving.

2. Positive Externalities

Second, even states that are relatively confident that they will not undergo partition or secession in the near future might support creation of default rules because of the positive externalities they generate. For example, even if the US feels there is no risk of secessionist movements in its territory, it might be very interested in reducing the risk of conflict arising from secession or partition in other states—particularly its neighbors, trading partners, and allies. America’s expenditures on state building, support for existing regimes, and, indeed, its expenditures on state building, support for existing regimes, and, indeed, its

82 The largely unanticipated and abrupt end to the Cold War—and associated creation of new states out of the former Czechoslovakia, USSR, and Yugoslavia—is perhaps the best example of this difficulty.

83 For discussion of the likelihood of partition of Iraq, see text accompanying note 28.

84 See generally Duane Ruth-Heffelbower, Indonesia: Out of One, Many?, 26 Fletcher F World Aff 223 (Fall 2002) (discussing the threats to Indonesian national unity presented by ethnic and regional movements). See also Li-Ann Thio, International Law and Secession in the Asia and Pacific Regions, in Kohen, ed, Secession 297, 299 (cited in note 31) (discussing the "spate of ethno-religious separatist movements" in Indonesia). There appears to be no evidence of Schleswig-Holsteiner irredentist movements.

85 Again, dissolution of states after the end of the Cold War presents the best example of this difficulty. Furthermore, the longer the time period in question, the likelier it is that division of any given state will be considered.

86 See notes 17–19 and accompanying text for a few examples of recent or possible near-future secession attempts. These movements exist across regions, levels of development, and degrees of national stability.


88 Such a belief might be unwise. Puerto Rico, for example, has an active independence movement. See Abby Goodnough, Letter from San Juan: A Moribund Independence Movement Stirs Anew, NY Times A25 (Nov 6, 2005).
continuing investment in Iraq and Afghanistan are evidence of the lengths to which the US is willing to go to maintain stability and prevent states from falling apart or descending into conflict. If the creation of legal default rules can reduce this risk, even in small part, the US and any state with similar interests in stability would probably find the creation of such rules a wise investment of diplomatic resources.

B. IMPLEMENTING RULES FOR NEW-STATE CREATION

Existing states have a variety of legal methods available for implementing rules governing the creation of new states. This section analyzes those methods.

1. Implementation Through Customary International Law

Default rules could in theory be implemented through customary international law, with associated advantages and disadvantages. Just as *uti possidetis* has been established through state practice as an immutable or semi-immutable rule, state practice and *opinio juris* could establish a default rule in another substantive area. Customary international law has problems and limitations, however. Above all, and as the previous discussion of *uti possidetis* illustrates, it can be difficult to determine what the rules of customary international law are, and whether they will be enforced in practice. If parties negotiating the creation of a new state find it difficult to determine what any default rules are, their value is limited. Further, customary international law takes time to develop. Given the rate at which secession and partition events are occurring, the benefits of default rules can be significant in the near future. We may be at a unique period in history, experiencing an unprecedented rate of new-state creation. This trend clearly cannot last forever, unless one envisions a future of city-states. The sooner the international community implements default rules (or any international-law rules governing the creation of new states), the more effective they will be.

89 See above in Section II.C.3.b.


91 *Uti possidetis* is discussed in detail above in Section II.C.3.b.


93 This trend is discussed above in Section II.A.
2. Advantages and Limitations of Implementation by Treaty

Implementation by treaty addresses some of the limitations of customary international law. Default rules are most effective when as many potential parties as possible favor the content of the rule,\(^4\) and treaties confirm that signatory states support or at least accept the default rules contained within. The fact that signatories to a treaty consent to its terms ensures that the signatories support any default rules included in the treaty. Treaties can also become law much more quickly than customary international law, since there is no need to wait for state practice to develop.\(^5\) Treaties further provide clarity and settle expectations, directly contributing to the positive externality value of default rules.

Treaties that implement default rules are not without significant problems of their own, however. First, treaties leave out the interests of secessionist or partitionist groups, which might differ from those of current states. There is probably no way to include such groups in the negotiation of a treaty. Such groups may not be identifiable or even exist yet, whatever their future goals. They further have no traditional role in treaty negotiation (outside negotiations to create the new states they advocate) and are unlikely to find a seat at the table beside current states. To a great extent, this problem is addressed by the two reasons, discussed above, for states to enter into a default rules agreement at all—limited information and positive externalities. Since states do not know whether they will face a threat of partition or secession, and want to benefit from the externalities generated by reduction in the risk of conflict, they are less likely to create default rules that systematically disfavor secessionist groups. Further, a treaty that did so would be a waste of resources, as it would fail to give secessionist groups any incentive to negotiate.

A deeper problem with implementation by treaty is best illustrated by the failure of the Property Convention to acquire enough support to enter into force. Despite the advantages mentioned and its clear list of rules, the Property Convention has been left to wither, having been adopted by only a few states. There are a variety of possible reasons for this failure to gain acceptance. It may be that many states simply disliked the rules contained in the Property Convention. More likely is that states fear that creation of rules will actually increase the likelihood of secession, inspiring movements that would not otherwise seek to create a new state. This interpretation of the Property Convention arises from the fact that its rules are semi-immutable. As noted above, they apply in all cases in which there is no agreement to the contrary,

\(^4\) See text accompanying note 80.

\(^5\) If treaty negotiations are sufficiently drawn out, however, this benefit could disappear. The increased likelihood of political acceptability of default rules over other forms of rules, discussed in Section IV.B.3 below, reduces this risk.
including cases in which there is no agreement at all. A secession movement, if successful, could rely on the Property Convention (if it were in force) to provide international law support for efforts to divide property according to its terms. Potential secession movements, if they knew in advance such legal rules existed and could be applied against their former parent states in the event of success, might be more likely to attempt secession. Fear of this result may be the source of most states' opposition to the Property Convention and, presumably, to any similar treaty.

3. Possible Treaty Forms

A treaty need not take the same form as the Property Convention, however, and a treaty in a different form might be able to address the problems that have prevented it from gaining support while retaining the general advantages of implementation by treaty. At least four types of treaties, in fact, could provide rules for the creation of new states. From strongest to weakest, those forms are as follows:

a) Treaty with immutable rules. The strongest treaty supplying rules for new-state creation would create immutable rules and would force all parent and successor states to follow those rules as a matter of international law. Even agreement of both parties to alternative terms would be insufficient to overcome this legal obligation. In some circumstances, most notably where third parties are affected, such rules may be the preferred option. This is probably the reason for the Treaty Convention's imposition of immutable rules. Immutable rules are not a good general solution, though. Default rules have significant advantages over immutable rules in reducing negotiation costs and widening the scope of possible agreement. Individual parties involved in creation of a new state are better placed to determine the substantive details of that creation, at least so long as their decisions do not impose negative externalities on other states. It also seems unlikely that sets of immutable rules will find sufficient international support to be implemented—if such support existed, immutable-rules treaties would already exist. In reality, only the Treaty Convention has been implemented, and treaty succession may be the situation presenting the strongest case for immutable rules. If the Treaty Convention can attract only twenty-one

96 See Ayres and Gertner, 99 Yale L J at 88 (cited in note 73) (noting that immutable rules are generally preferred in cases where agreed terms impose uncompensated externalities on third parties).
97 See Section II.C.1 above for a discussion of the Treaty Convention. See also Section IV.C.1.c below for a discussion of the form of rules most appropriate to the treaty context.
98 See Section III.A above for a discussion of the general advantages of default rules.
99 See Section III.A above.
ratifying states parties, the existence of support for immutable-rules treaties in other substantive areas is implausible in the foreseeable future.

b) Treaty with semi-immutable rules. A treaty could also create semi-immutable rules—again, rules that apply in all cases except those where parties affirmatively agree to other terms. As discussed above, the Property Convention takes this form. The great advantage of such a treaty is that its rules have great influence and applicability (surpassed only by immutable rules), presumably leading to the greatest benefits both in terms of easier negotiations for the parties themselves and settled expectations for the international community as a whole. The disadvantage of such a treaty is that it may not be politically feasible, possibly, as discussed in Section IV.B.2 above, because states believe that enactment would increase incentives to secede. The Property Convention vividly illustrates this problem.

There is certainly value in rules that apply in cases of resisted secession or partition where no agreement exists. Indeed, these cases are arguably in desperate need of legal rules to help prevent conflict. Nevertheless, the political reality that such rules have been impossible to implement cannot be ignored. It is possible, though unlikely, that in the future a different political consensus will emerge among states that the benefits of semi-immutable rules exceed their costs. If this were to occur, there is no apparent reason to oppose their implementation, and, in fact, they should be welcomed. Taking current political realities as a given, however, advocating the adoption of new semi-immutable-rules treaties is not likely to be fruitful.

c) Treaty with true default rules. A treaty might provide a set of default rules and provide that as a matter of international law, those rules would govern interpretation of agreements creating new states. Note, however, that such rules would only govern interpretation of agreements—at a minimum, an agreement on the basic question of whether a new state will be created. Such rules in international law would be the closest analog to default rules in private contract law. This kind of default-rules treaty would have all the advantages previously discussed: providing a starting point for negotiations, reducing negotiating costs, and reducing the risks of breakdown. It would have no influence over secessions or partitions where the parties never reach or never seek agreement, reducing fears some states may have that it would create incentives for secession. Parent states would retain control over whether the default rules in the treaty will apply, since they can always refuse to agree to secession.

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100 Vienna Convention on State Succession in Respect of Treaties (1978), Multilateral Treaties Deposited with the Secretary General.

101 See Section II.C.2 above for a detailed discussion of the Property Convention.

102 See Section III.A above for a discussion of the general advantages of default rules.
d) "Boilerplate" treaty. The weakest possible agreement would create a list of default rules that have no legal force of their own, but could be adopted into an agreement creating a new state, then later used to interpret that agreement or to fill gaps. In a sense, such an agreement would simplify negotiations by providing “boilerplate” or “best-practices” text and principles which parties could use without having to create them from scratch. Parties would be free to adopt some or all of the listed rules, or to modify them as they see fit. An agreement creating such principles would be a treaty in only the loosest sense, since it would impose no obligations or even any rules at all. A boilerplate “treaty” might therefore be better understood as a generally accepted set of building blocks for implementation in individual agreements.\(^{103}\) States parties do not even need to create it; the International Law Commission or any similar body could create such rules for adoption into future agreements. In fact, the Commission has developed “model rules” for other substantive issues that function in essentially the same way as a boilerplate agreement.\(^{104}\) To the extent that the principles embodied in the set of rules would have legal force, that force would arise not from an agreement creating the rules, but from the inclusion of the rules in the agreement between the parent and successor state (or portions of a partitioning state) itself.

4. Implementation in Individual Agreements

Even if the international community were unable to agree on the creation of default rules, states could implement them in limited fashion through bilateral agreements. Implementation in this manner would allow the use of “tailored” default rules. Such tailored rules in private contract law are made by a court that constructs a hypothetical ex ante bargain between the parties, and then creates a default rule that, as much as possible, accurately reflects that bargain.\(^{105}\) Since there is often no judicial review of international agreements, and no method comparable to civil suit for one party to unilaterally seek such review, tailored default rules are generally unavailable internationally. If parties commit interpretation of an agreement creating a new state to international court or arbitral review in advance, however, the reviewing body could create tailored

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\(^{103}\) See Section IV.B.4 below for a discussion of implementation of default rules in individual agreements.

\(^{104}\) See generally International Law Commission, Model Rules on Arbitral Procedure with a General Commentary, 2 YB Int'l L Commun 83 (1958).

\(^{105}\) See Ayres and Gertner, 99 Yale L.J at 91–92 (cited in note 73).
rules in the same way that a national court considering a private contract dispute might.\textsuperscript{106}

In its most extreme and unlikely form, parties might throw the entire process onto a court or other international body for resolution. Even if this scenario is unrealistic, a more modest approach seems feasible. Parties could negotiate all important and foreseeable issues, and then insert a clause into the agreement providing explicitly that gaps will be filled by a chosen body along tailored-default-rule lines. Parties could submit interpretation of the agreement in advance to the ICJ, to regional courts, or to any other mutually agreeable body. There is ICJ precedent for interpretation of agreements to create new states,\textsuperscript{107} and there is no apparent reason why the court could not interpret such agreements based on default rules specified within them. Such a submission would not require modification of the ICJ Statute, which limits the right to appear before the court to states.\textsuperscript{108} Even though at least one of the parties making the agreement would not yet be a state, by the time a later dispute requiring interpretation of the agreement were to arise, all parties would be states and therefore eligible to be a party to an ICJ case.

Negotiation of default rules in such agreements, however, probably offers only small benefits, if any, over negotiating the more detailed terms default rules seek to avoid. Precommitment by some or all states to general rules governing the creation of new states would have significant advantages in terms of administrability and settled expectations, as well as lowered negotiation costs.

5. Implementation by a Default Rules Treaty Is Most Likely to Succeed

As the preceding discussion makes clear, states are most likely to accept implementation of default rules by treaty, as this form provides significant benefits to parties negotiating an agreement to create a new state while remaining politically palatable. Immutable rules, while useful to some extent in the treaty-succession context, are both generally less efficient than default rules and almost surely politically unacceptable. Semi-immutable-rules treaties, whatever their advantages, face similar political problems, as the Property Convention shows. Boilerplate agreements may have some value—they are probably an improvement over the current state of affairs, in that they provide at

\textsuperscript{106} The ICJ has taken cases that deal with interpretation of agreements creating new states, with the Burkina Faso–Mali case as perhaps the best example. See generally Case Concerning the Frontier Dispute (Burkina Faso v Mali), 1986 ICJ Lexis 3.

\textsuperscript{107} See, for example, id.

\textsuperscript{108} Statute of the International Court of Justice (June 26, 1945), art 34 \textsuperscript{1}, 59 Stat 1031, 1059.
least some guidance and a starting point for negotiations—but their influence is likely to be limited, not least because they lack any force of law on their own.

Default rules, however, grant benefits where they are most needed or at least most useful—cases where broad agreement is possible but difficulties arise in specific terms. At the same time, such rules provide parties, including the future parent states that today must agree on a treaty, with a veto over their applicability which can be exercised simply by refusing to make any agreement on secession or partition at all. They therefore avoid the problems that seem to have led states to reject semi-immutable-rules treaties like the Property Convention.

C. POSSIBLE DEFAULT RULES FOR THE CREATION OF NEW STATES

Ultimately, answering the question of whether default rules in international law would make a positive contribution to the process of creating new states depends on what those rules are. While determining a complete structure of such rules is beyond the scope of this Comment, the following section considers a few modest proposals for specific rules.

1. Recasting Law as Default Rules

Generally, it is possible to divide issues that arise regarding the creation of new states into three categories. In one category are rights, obligations, and property whose distribution between a parent and successor state (or between the successors of a partitioned state) affects only those parties; territory and state property are the best examples. In another category are things whose distribution between the parties has significant effects on other states; that is, externalities. The best examples of these are probably state debts and treaties involving other states. There is also an immediate category of things whose distribution primarily affects the immediate parties, but which might impose negative externalities on other states in extreme circumstances. For example, nationality of citizens is generally a matter affecting only the parties creating a new state, but if former citizens were to become stateless refugees, this would impact other states.

Default rules could be a valuable legal tool in all three categories, though to varying degrees. Default rules are most applicable to those issues in the first category. In the absence of externalities, little reason exists to impose immutable or semi-immutable rules. For those issues in the second category, immutable or semi-immutable rules may be preferable—though if such rules prove politically impossible to create, default rules are better than no law at all. It may also be possible to look carefully at cases where there generally appear to be externalities involved and to identify areas within them where a prevailing immutable or
semi-immutable rule could be replaced with a default rule without risking
damage to third parties. Finally, the last, overlapping category presents a weak
case for immutable or semi-immutable rules. It is highly likely that creation of
such rules will be politically difficult in these areas, and that default rules will be
a suboptimal but feasible fallback position.

The sections that follow detail how this framework could be applied to three
substantive areas: territory, property, and treaties.

a) Territory. The role of uti possidetis in international law should be clarified
and possibly recast entirely as a default rule. The principle putatively governs the
allocation of territory to newly created states,109 but its implications are not clear
in practice—it may function as an immutable or semi-immutable rule.110 If it
operates as an immutable rule and, to a lesser extent, if it is a semi-immutable
rule, uti possidetis might not give sufficient incentives to parties to negotiate a
mutually agreeable secession or partition. As the example of Kosovo illustrates, a
secessionist movement to whose advantage uti possidetis works has relatively little
incentive to negotiate with its parent over territory.111

With that said, the advantages of a settled semi-immutable uti possidetis rule
should not be discounted. Such a rule would provide all the benefits of
administrability and settled expectations associated with such rules, benefits that
seem particularly valuable when the issue at hand is so likely to engender
conflict. Indeed, if uti possidetis currently operates as a semi-immutable rule, the
best course of action would almost certainly be to leave it alone.

Since the rule is ambiguous, however, it would be beneficial to clarify or to
codify it. Clarifying or codifying a rule as semi-immutable might be politically
difficult, however. If so, it should at least be clarified as a default rule.
Specifically, the rule should be that new states created by agreement with the
former parent (or other successor states in the case of a partition) have borders
determined under international law by preexisting internal administrative
boundaries, unless the parties agree otherwise.

b) Property. The Property Convention has done little to resolve issues of
state succession with respect to property. First, as discussed above, it is not in
force. This has not prevented parties from making agreements on succession of
state property in recent cases of partition or secession, for example in
Czechoslovakia, the USSR, and even Yugoslavia.112 Still, such agreements might
have been easier had the Property Convention or some other codification of

109 See Section II.C.3.b above for a detailed discussion of uti possidetis.
110 See text accompanying notes 54–59.
111 See Section II.B above for a discussion of the role of uti possidetis in the Kosovar secession.
rules for succession of property been in force. Further, agreement on issues related to division of property in future secessions or partitions might be more difficult. Second, the semi-immutable rules in the Property Convention provide insufficient incentives to seek agreement on these issues.

In short, the international community should discard the Property Convention as it stands, and its semi-immutable provisions should be recast as default rules, at least with respect to those rules that deal with internal allocation of property as opposed to allocation of responsibility for external debts. The substance of the provisions for allocation of property in the current Property Convention can and probably should be left as they are. These provisions are sensible and at least some number of states negotiated them, even if they were later unable to ratify the agreement as a whole. The necessary change in the Property Convention is not in the substance of these provisions, but in the scope of the agreement itself. It should be redrafted in default-rule terms, so that it applies only to situations in which a basic agreement on the creation of a new state has been made; unless the parties to such an agreement specify otherwise, the convention’s provisions would apply. Absent such a basic agreement, the convention would have no effect.

c) Treaty Obligations. Succession of treaty obligations is perhaps the most difficult area of law for the creation of default rules. The reason is simple—immutable rules are favored when agreements impose externalities on parties outside the agreement. Since treaties involve an interconnecting web of mutual obligations between parties, when one party (the parent state in the case of secession or disintegrating state in the case of partition) alters the obligations, that action affects all other parties as well. Take, for example, an arms-control treaty. Imagine that State A and State B agree to limit themselves to a fixed number of nuclear warheads. If State B peacefully divides, creating new State C, allowing B and C to agree to free C from its obligations under the treaty and to maintain an unlimited nuclear arsenal would clearly impact the interests and rights of A under the treaty. Similar externalities arise in many other types of treaties, such as those limiting pollution, governing external boundaries, and the like. In fact, the majority of treaties probably fall into this category.

Not all treaties necessarily impose such externalities if their obligations apply differently to newly created states, however. Take, for example, a treaty that involves some form of payment—such as war reparations or a purchase of military equipment. In the above scenario, new State C need not be bound by the treaty to pay any amount, pro-rated by population, GDP, or otherwise. The

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113 For example, agreement on division of oil resources in a prospective partition of Iraq, discussed above in Section II.B, would likely be particularly difficult.

114 See Ayres and Gertner, 99 Yale L.J at 88–89 (cited in note 73).
parties may prevent damage to the interests of A, since B and C could choose any of a variety of agreements with respect to the division of obligations under the treaty, so long as the total payment to A is unchanged. Treaty obligations might therefore become an item for negotiation in the secession process, increasing the range of agreement. Where treaty obligations are in this sense divisible, the externality argument for an immutable rule no longer applies. Even pollution or arms-control treaties might be conceptualized in this way: if a treaty restricts a parent state to a given level of emissions or given quantity of weapons, and that state divides, no externality is imposed so long as the total level of emissions or quantity of weapons over the original territory does not change.

In such cases, there is a window for the operation of default rules with respect to succession of treaty obligations. The Treaty Convention should be recast to reflect this window, with its basic principle of universal succession of treaty obligation restated as a default rule. Deviation from this rule would be possible by agreement of the immediate parties to the secession or partition, so long as the interests of other parties to the treaty were not affected or all other parties also agreed to the reallocation of rights or responsibilities under the treaty.

Another solution might be to adopt default succession rules in individual treaties. Where a treaty imposes externalities by deviating from the general rule of succession, no modification is necessary, since the immutable rule in the Treaty Convention guarantees succession of obligations. Where such externalities are unlikely, or can be evaded by reallocation of obligations among the new states, provisions in the treaty should recast the Treaty Convention’s immutable rule as a default rule.

2. Setting Default Rules in Practice

Ultimately, states will determine the substantive content of such rules, either by custom or by the treaties they create. Generally, the content of the rules will be such that they are considered favorable or at least not unfavorable to the greatest number of states possible, operating as penalty defaults to the smallest number possible. It is further likely that states will package the rules in groups, as was done with the immutable and semi-immutable rules in the Treaty and Property Conventions, rather than attempt to set them individually. Grouping proposed rules in this way allows implementation of the entire set of rules, which are likely beneficial as a whole to all states, without obstruction of individual rules by states that may disfavor them.

It is likely that default rules for new-state creation will be similar in substance if not in form to those rules that have already been drafted, such as the Property Convention, but that unlike those rules they will actually enter into force and be adopted by significant numbers of states. It is certainly possible, however, that states will decide to set default rules at a different point than existing immutable
and semi-immutable rules. It is also possible that the default-rule form will make agreement on rules for new-state creation possible in areas that have not yet been considered, addressing the significant gaps in the law governing the creation of new states. To take one minor issue, what would the rules be for allocation of top-level domain names in the event of secession or partition? For example, if Belgium were to split, which state would get rights to the *.be domain?\(^{115}\) A rule governing this issue, along with a web of rules governing other substantive issues, would, in a small way, make general agreement on creation of a new state more likely.

### D. Limitations of Default Rules

While default rules for partition and secession can have a powerful positive influence, they are not a panacea for preventing all secessionist conflict. On the contrary, their benefits are incremental and limited to situations in which there is some underlying possibility of agreement. Furthermore, there are some arguments that default rules would have relatively little impact or might even be counterproductive. This section will consider and attempt to refute a few of these arguments before briefly addressing issues for further study.

1. **Is Law Irrelevant in Cases of Partition or Secession?**

One criticism of the significance of default rules might be that they would have little, if any, effect on the underlying political issues that ultimately determine whether and in what form secession or partition will take place. In other words, the critic might say, it does not matter whether there is “too little” or “too much” law in this area—the parties will agree on the terms of secession or, more likely, fail to agree, regardless of the background law.\(^{116}\)

Secession and partition are and will always remain fundamentally political issues, in which factors other than background law are likely to play the pivotal role. Default rules do a better job of reflecting and adapting to this reality than do immutable or semi-immutable rules, however. If political issues completely trump the law of secession and partition, immutable rules are meaningless. To the extent that marginal cases do exist, in which agreement is possible but only if negotiation costs are minimized, default rules can make a difference. Before agreements are made, there may be some class of situations, however small, for

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\(^{115}\) At least one scholar has written on states' possible intellectual property interests in their top-level domains. See generally A. Michael Froomkin, *When We Say U5r m We Mean It*, 41 Hous L Rev 839 (2004).

\(^{116}\) This argument is related to the general proposition that international law has no role to play in this process—that the creation of new states is a factual, not legal, issue. See Crawford, *The Creation of States* at 4 (cited in note 4).
which agreement is possible with default rules but impossible without them. After agreements are made, default rules provide a ready means of interpretation with benefits that extend into the future.

A strong argument can be made that the benefits of default rules, or any international law rules in cases of partition or secession, are small. This does not mean that these benefits are zero. Since the costs of creating new default rules, which impose no new obligations, are extremely low, and the costs of conflict so high, even small marginal benefits make them a good investment.

2. Would Default Rules Fail to Resolve Underlying Questions of Legality?

Some might claim that the international law of partition and secession is in fact too weak, and that default rules do nothing to correct this weakness. Judging from the volume of scholarly work, the question of whether and when international law permits secession is of great interest, and many scholars would certainly like international law to provide a clear answer. Default rules do not serve this function—in fact, they say nothing at all about the legality of any given new state's creation.

This is not a problem so much as an intentional limitation. Default rules are not intended to answer the question of legality, but rather to provide a framework for negotiation and interpretation of agreements. International law may not be able to provide a meaningful answer to the question of legality of secession, at least not in a recognizable nation-state system. Even if it can, default rules are not likely to be part of that answer. This is a virtue of default rules, though, rather than a flaw. The difficulty of resolving the basic legality issue has largely paralyzed the development of the international law of partition or secession. By addressing practical problems with default rules, it may be possible to build a consensus for developing useful law while this issue remains unresolved. Both supporters of expansive rights of remedial secession and those of absolute territorial integrity of existing states can support new, clear default rules. Parties can avoid them, after all, simply by agreeing to an alternative—or by refusing to agree to secession or partition at all.

3. Would Default Rules Be Politically Impossible to Create?

With some states—China and Russia in particular—greatly concerned about any encouragement of secessionist groups and with great disagreement

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117 See note 33 above (listing a number of works focusing on right to secession and self-determination issues).

118 See Thio, International Law and Secession at 323 (cited in note 84) (discussing “China’s political resolve and military capacity to suppress separatist movements”).

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among states and scholars about the legality of secession, a critic might argue that creation of any law, even default rules, in this area will be politically impossible or at least costly. Such a critic might point, in particular, to the failure of the Property Convention to enter into force. It is certainly true that like any agreement concerning secession, agreements establishing default rules will be politically controversial.

The best defense is that default rules will be much easier to implement than immutable or even semi-immutable rules. If international agreements on the law of partition and secession can be stripped down to include only or primarily default rules, they are much more likely to be widely adopted than other agreements, particularly those containing immutable rules or purporting to govern rights of secession. Politically, default rules should be (accurately) presented as measures to increase stability and reduce the chances of conflict, not measures designed to facilitate secession.

4. Might Default Rules Sometimes Decrease the Likelihood of Agreement?

It is possible in some cases that a default rule considered unfavorable by one party might actually discourage negotiation and agreement. A party facing such a rule might be willing to forgo all default rules and refuse to enter into any agreement at all, relying on the strength of its position and eventual international acceptance of the de facto situation to achieve its aims.\(^1\)

The possibility of this event occurring cannot be ignored, but it can be limited. First, states creating default rules by treaty should not create rules that systematically or severely disadvantage secessionist groups. Such rules are wasteful: facing them, secessionist groups will simply secede without agreement. To the greatest extent possible, default rules should be calibrated ex ante to provide the greatest perceived benefit to the greatest number of potential parties. As Easterbrook and Fischel argue, they should be set at the point at which parties, taken in the aggregate, are most likely to agree, given unlimited time and resources.\(^2\) Any deviation from this goal reduces the rules' effectiveness. Second, the more default rules that are created, the less likely it is that this problem will discourage negotiation. Even if a party views one or more rules as disadvantageous, it will be less willing to abandon negotiations and "go

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\(^1\) See Pazartzi, *Secession and International Law* at 368–70 (cited in note 67) (discussing Russian military campaigns to block Chechen secession).

\(^2\) This argument is rooted in the insight that default rules set at a point unfavorable to a given party operate as penalty default rules from the point of view of that party. The party is forced either to contract around the rule, or to forgo agreement entirely to avoid it. See Ayres and Gertner, 99 *Yale L. J.* at 117 (cited in note 73).

\(^3\) See Easterbrook and Fischel, 89 *Colum L. Rev* at 1433 (cited in note 69).
it alone” if, in doing so, it would also sacrifice the benefits of a web of other rules. The more extensive and balanced the architecture of default rules governing new-state creation, the more incentives all parties have to operate within it, rather than outside it.

E. Issues for Further Study

Additional study can surely be done in this area. In particular, proposals for specific default rules might be made in areas not considered here. Alternatives or more detailed proposals for rules in the areas that have been addressed are also undoubtedly needed.

Another potentially interesting issue not addressed in this Comment is the possible value of penalty-default rules in the international law of partition and secession. Penalty defaults are intended to give at least one party an incentive to make an explicit agreement, rather than relying on the default rule. Cases in the international context might exist in which an explicit agreement, and the settled expectations it provides, would be so valuable that it is worth instituting a penalty default at the cost of increased likelihood of negotiation breakdown.

V. Conclusion

Creating and implementing default rules in international law for partition and secession has significant potential to reduce the risk of conflict at relatively low cost. Just as default rules in private contract or divorce law reduce the potential for high litigation costs, negotiation breakdown, and conflict, so too would default rules for “international divorce.” Furthermore, existing agreements such as the Property Convention and Treaty Convention supply basic substantive rules. At a minimum, therefore, all that is necessary in these spheres is a change in the form these rules take.

Implementing default rules for the creation of new states is therefore an incremental, not revolutionary, change. Semi-immutable rules including those in the Property Convention and, possibly, the customary principle of \textit{uti possidetis}, already enable parties to the creation of new states to shift their content by agreement. Recasting these and other rules in default-rule form is a small legal change, but is likely to have significant results in practice. Above all, default rules are much more likely than immutable and semi-immutable rules to be politically acceptable to existing states.

Increased prevalence of default rules is likely palatable to both critics and ardent supporters of the role of international law. Critics should see default rules as a modest, minimalist intervention into political issues that is much more likely

\footnote{Barnett, 78 Va L Rev at 887 (cited in note 71).}
to be effective and to preserve respect for international law than the sweeping yet often ineffectual measures they often criticize. Proponents of an increased role for international law may see default rules as a way to advance the reach of law into an area—secession and partition—where it has previously been weak or absent, and hopefully achieve the many benefits they associate with the rule of (international) law. This is not to imply that the proposal is above criticism—Section IV.D notes some criticisms, and there may be others. Despite these criticisms, implementation of default rules for partition and secession is both realistic and beneficial. Current international law is not doing the job because international politics is, understandably, paralyzing its development.

At the same time, the increase in the rate of new state creation has been so dramatic, and the costs of conflict so high, that even an incremental reduction in the risk of conflict is worth significant investment in measures to prevent it. The investment involved in the creation of default rules is low. States are much more likely to accept default rules than other, stronger forms of legal rules. Even if one is skeptical of the size of the benefits, the investment is a good one. Default rules for the creation of new states are, in a sense, soft law for hard times. This may seem counterintuitive, but it is the right solution—or at least a small part of one—to a critical international problem.