REMEDIAL SECESSION: WHAT THE LAW SHOULD HAVE DONE, FROM KATANGA TO KOSOVO

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> At present, there are about 26 ongoing armed self-determination conflicts. Some are simmering at a lower level of irregular or terrorist violence; others amount to more regular internal armed conflicts, with secessionist groups maintaining control over significant swathes of territory to the exclusion of the central government. In addition to these active conflicts, it is estimated that there are another 55 or so campaigns for self-determination, which may turn violent if left unaddressed, with another 15 conflicts considered provisionally settled but at risk of reignition.[1]

I. INTRODUCTION

Imagine a world that includes the following independent countries: Biafra, Chechnya, Katanga, Kosovo, Quebec, and South Ossetia. All of these territories have made bids to become independent states. All but one of these failed in their quests, and the status of the one exception, Kosovo, remains controversial. Understandably, states oppose groups that attempt to break away from their parent state. International law reflects this negative stance on secession movements. Colonialism provides a legally recognized exception to maintaining territorial integrity. International law has come to recognize the right of colonial peoples to create independent states, that is, a right to external self-determination. Only recently have courts even entertained secessionist claims.

While courts such as the International Court of Justice and the Supreme Court of Canada have only recently (and reluctantly) entertained the legality of secession, jurists and other scholars have put forth a number of secession models for courts to adopt. Some jurists use functionality as a criterion for secession: If a territory can function as an independent state, then international law should recognize the seceding state.[2] Other jurists emphasize cultural preservation: If a territory has a culture distinct from its parent state, then international law should recognize the right of a seceding territory to preserve its culture.[3] Still other jurists focus on the economic gulf between territorial units of a state: If one province basically subsidizes

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[1] Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. 111, 112 (2009).

[2] *See infra* Part III.*B*.

[3] *See infra* Part III.*C*.

the rest of a state, then international law should recognize the right of that province to secede.[4]

The final model, which has recently received the greatest attention from courts and jurists, treats secession as a remedy for injustices. If a parent state has thwarted attempts at internal self-determination and inflicted grave harms on a group residing in a distinct territory within its borders, then international law should recognize a right to secede. This Article proposes and defends this Remedial Model of secession.[5]

Kosovo's recent unilateral declaration of independence (UDL)[6] provides an excellent opportunity to reconsider grounds for secession and to test the Remedial Model. The International Court of Justice (ICJ), however, fell back on the rather unimpressive conclusion that Kosovo's declaration did not violate international law.[7] What follows is not a doctrinal analysis of the ICJ's decision. Rather, the analysis consists of making a normative proposal of what the ICJ should have said. The power of this approach will become more evident through comparisons of Kosovo's claims to those of other secessionist movements, historical and current.

Part II describes background information on Kosovo before presenting the elements of a Remedial Model. Throughout this Part, the Model is tested against actual secessionist claims, past and current. Part III, then, compares the Remedial Model to other ones found in the literature, including previous versions of the Remedial Model. Part IV takes on the challenge of how to implement the Remedial Model, other than through the ICJ. This Article concludes with a case for elevating the role of human rights treaty bodies, particularly the Committee for the Elimination of Racial Discrimination (CERD), regarding secession claims.

II. INTERNATIONAL LAW, SECESSION, AND KOSOVO

A. Background on the Kosovo Decision

On February 17, 2008, Kosovo's parliament took the bold step of declaring Kosovo's independence.[8] Serbia submitted a request to the United

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[4] *See infra* Part III.*D*.

[5] *See infra* Part III.*A*.

[6] DECLARATION OF INDEPENDENCE (Kos. 2008).

[7] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, para. 84 (July 22) [hereafter Kosovo Advisory Opinion].

[8] DECLARATION OF INDEPENDENCE (Kos. 2008).

Nations General Assembly to have the ICJ issue an advisory opinion, and the General Assembly obliged, asking the following question: "Is the [UDL] by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[9] The ICJ answered that "general international law contains no applicable prohibition of declarations of independence."[10] The ICJ explicitly dodged the question as to whether international law sanctions a remedial right to secession.[11] Indeed, as Judge Bruno Simma bemoaned in his dissent, the ICJ missed a rare opportunity to present a much more sweeping analysis.[12] While some have called the ICJ decision judicious, if not momentous, many jurists have found it disappointing.[13] Effectively, and somewhat facetiously, the ICJ's decision means that the decision by the City Council of Killington, Vermont in 2005 and 2006 to secede from Vermont and join New Hampshire did not violate international law.[14] More charitably, Curtis Doebbler, a law professor, wrote one of the first academic reactions to the decision, predicting that "it is unlikely to be remembered as one of the Court's better attempts to articulate and clarify the law."[15] Another failing of the opinion is that the ICJ examined the factual circumstances only going back to 1999.[16] The analysis developed below fills in the gaps and directly addresses these important issues.[17]

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[9] G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008).

[10] Kosovo Advisory Opinion, *supra* note 7, para. 84.

[11] *Id.* para. 83.

[12] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, paras. 6–7 (July 22) (separate opinion of Judge Simma).

[13] Curtis Doebbler, Op-Ed., *The ICJ Kosovo Independence Opinion: Uncertain Precedent*, JURIST (July 23, 2010), http://jurist.org/forum/2010/07/the-icj-kosovo-independence-ruling-an-uncertain-precedent.php. For an overview, see, e.g., Roland Tricot & Barrie Sander, *Recent Developments: The Broader Consequences of the International Court of Justice's Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo*, 49 COLUM. J. TRANSNAT'L L. 321, 336–45 (2011) (contrasting the narrow court opinion with the broader consequences of the case).

[14] *See* Brian M. Lusignan, One of These Things Is Not Like the Others?: A Comparative Analysis of Secessionist Movements in Vermont, Quebec, Hawai'i and Kosovo 36–37 (Jan. 2009) (unpublished comment), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=brian_lusignan (placing Vermont's independence movement within larger international secession debate).

[15] Doebbler, *supra* note 13.

[16] Kosovo Advisory Opinion, *supra* note 7, paras. 57–77.

[17] *See infra* Part II.*C*.

B. Legal Analysis

The following is an outline of how a court or some international decision maker (such as the human rights treaty bodies, especially CERD[18] or the Human Rights Committee (HRC)) should have and should approach secession claims.[19] A court should engage in a three-step inquiry. In the first stage, it should evaluate the relationship between the two parties—the claimant entity and the parent state. That finding is a prerequisite to all subsequent analyses because the court must first establish that a secessionist relationship exists between the parties before it. The next two stages of the analysis assess the harms perpetrated by the parent state against the seceding territory and its people. In these stages, the inquiry should focus first on the removal of self-determination and second on gross human rights violations.

When considering a secessionist claim, a court should address the following three questions:

1. Is the claimant a state-like territory that represents its people and seeks independence from a parent state, which itself has a lawful claim on the claimant entity? (Relational Factors)[20]
2. Has the claimant attempted to exercise internal self-determination, and has the parent state seriously thwarted those efforts? (Internal Self-Determination)[21]
3. Has the claimant suffered or been threatened with harms that rise to the level of peremptory prohibitions? (Group Harm)[22]

This Article addresses each question separately below.

C. Relational Factors

The first question assesses the relationship between the claimant entity and the parent state. Basically, if a state is claiming to secede, then the court

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[18] *See infra* Part IV.*B*.

[19] For the sake of brevity, the term "court" will be used hereafter as shorthand for "court or international decision maker."

[20] *See infra* Part II.*C*.

[21] *See infra* Part II.*D*.

[22] *See infra* Part II.*E*.

should ask this question: What is seceding from what? A claim to secession presupposes that one political entity or territory is a legitimate part of another political territory. The court, therefore, needs a preliminary assessment of the nature of the parent state's relation to the claimant, as well as the nature of the claimant entity. The latter investigation is not a determination per se of whether the claimant constitutes a state under international law. Rather, it is a determination of whether the claimant is state-*like*—that is, whether it has the indices of a state.[23] If it does not, then there is no reason for the court to go any further. Take a more extreme case: If an ethnic group scattered throughout its parent state and not concentrated in any specific territory claims independence, then the court should immediately dismiss the claim. Biafra's secession claim, as shown below, brought this issue into bold relief.[24]

The history of the Former Yugoslavia illustrates the importance of these relational factors. The relational status of Slovenia, Croatia, and Bosnia-Herzegovina within the Socialist Federal Republic of Yugoslavia (SFRY) proved critical in assessing the legal viability of their independence claims. The Badinter Arbitration Commission deemed it important that these political entities were lawfully recognized republics within the SFRY.[25] This put their independence claims within a dissolution context rather than within a secession context. Since by July 1992 the SFRY did not exist, then there was nothing for these republics to secede from.[26] Unsurprisingly, these republics did not secede. Instead, the parent state dissolved. However, this convenient analysis creates problems. Perhaps the cases of Slovenia and Macedonia qualify as dissolutions, since the SFRY eventually acquiesced in their declarations of independence;[27] but the same cannot be said of the independence moves by Croatia and, of course, Bosnia-Herzegovina because the SFRY did not exist at the time of their declarations.[28]

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[23] The Montevideo Convention on the Rights and Duties of States sets out the criteria for statehood: "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states." Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

[24] *See infra* Part II.*C.1.c*.

[25] Conference on Yugoslavia, Arbitration Commission, Opinion No. 1, 92 I.L.R. 162, 164–46 (1991) [hereinafter Badinter Opinion].

[26] *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 400 (2d ed. 2006) (noting that the Badinter Opinion found that the SFRY no longer existed).

[27] Badinter Opinion, *supra* note 25, at 165.

[28] *See* John Dugard & David Raič, *The Role of Recognition in the Law and Practice of Secession*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 94, 123–32 (Marcelo G. Kohen ed., 2006) (discussing Croatia's and Bosnia-Herzegovina's secessionist claims).

How does Kosovo fit into the Badinter Commission's analysis? James Crawford, a leading international law jurist, and many other commentators give an incomplete account of Kosovo when they describe it only as having been "an autonomous region within the Republic of Serbia."[29] More accurately, Kosovo was an autonomous region existing not only within Serbia, but also, crucially, within the SFRY.[30] In other words, the critical fact of Kosovo's status was that it was a part of the entire SFRY, not simply that Serbia had some legal and administrative control over it.[31] Crawford omits the crucial fact that Kosovo was an autonomous region within the SFRY. In fact, Kosovo was in many respects independent of Serbia. It participated in the federal governance of the SFRY and had considerable autonomy to administer its own affairs.[32] Recognizing Kosovo's critical relationship to the SFRY should have given Kosovo a strong case for separation at the time of the Badinter Opinion. Kosovo's legal status was continuously determined within the framework of the SFRY.[33] Kosovo's declaration of independence must relate to an entity from which it is seeking independence. The fewer political and legal ties it has to the parent state, the better its claim to independence.

What claims of sovereignty does the alleged parent state (Serbia) have over the claimant (Kosovo)? According to some, the answer is "none." For example, legal analysts Jennifer Ober and Paul R. Williams, claim that

> [f]rom 1963 to date, the only country that has had a legitimate rule over Kosovo has been the Socialist Federal Republic of Yugoslavia (SFRY) . . . . In light of the fact that Kosovo has never been legally incorporated into the Republic of Serbia,

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[29] CRAWFORD, *supra* note 26, at 408.

[30] HEIKE KRIEGER, THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 1974–1999, at xxxi (2001).

[31] Andreas Zimmermann & Carsten Stahn, *Yugoslavia Territory, United Nations Trusteeship or Sovereign State—Reflections on the Current and Future Status of Kosovo*, 70 NORDIC J. INT'L L. 423, 425 (2001) ("Until the dismemberment of the Socialist Federal Republic of Yugoslavia (SFRY) in 1992, Kosovo was technically an autonomous province within the province of Serbia.").

[32] *See generally* TIM JUDAH, KOSOVO: WHAT EVERYONE NEEDS TO KNOW 42–54 (2008) (discussing Kosovo in Yugoslavia).

[33] Serbia's legal status was amorphous from 1992 to 2000. However, what was clear was that Serbia could not claim rights on behalf of the SFRY. Legality of Use of Force (Serb. and Montenegro v. U.K.), Summary, 2004 I.C.J. 26 (Dec. 15) ("[The Federal Republic of Yugoslavia's] admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared.").

> Serbia may make no claim to sovereignty over Kosovo, and can make no claim of territorial integrity.[34]

However, a brief look at the history of the formation of the SFRY shows that this also is not an entirely accurate portrayal.

During World War II, the communist leadership already had decided the basic structure of Yugoslavia as a federation of six republics.[35] It thought that the two smaller regions, Kosovo and Vojvodina (an enclave within the territory of Serbia with a significant minority population of Hungarians[36]), were not ready to become republics.[37] Kosovo and Vojvodina are different than the other regions because each had a significant ethnic population connected to another nation-state—Albania and Hungary, respectively. The leaders even contemplated returning Kosovo to Albania.[38] Montenegro and Macedonia both made bids for Kosovo, but Serbia seemed like the natural choice.[39] In 1945, "the 'People's Assembly' of Serbia . . . establish[ed] the 'Autonomous Region of Kosovo-Metohija', and declar[ed] that it was a 'constituent part' of Serbia."[40] In 1963, a new constitution made moderate concessions to Kosovo's autonomy, but Kosovo still remained under the authority of Serbia.[41] In fact, some commentators argue that, "[f]or the first time, Kosovo's constitutional status seemed to have been completely eliminated at the federal level and made a mere function of the internal arrangements of the republic of Serbia."[42]

In 1974, all of that changed for Kosovo when Yugoslavia constitutionalized the political gains that Kosovo made in its quest for autonomy.[43] The new federal constitution gave Kosovo considerable autonomy, wherein it, along with Vojvodina, "became constituent components of the SFRY, with direct representation and voting rights on the major federal bodies, and were no longer subject to the legal jurisdiction of

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[34] Jennifer Ober & Paul R. Williams, *Is It True That There Is No Right of Self-Determination for Kosova?*, *in* THE CASE FOR KOSOVA: PASSAGE TO INDEPENDENCE 109, 116 (Anna Di Lellio ed., 2006).

[35] JOHN R. LAMPE, YUGOSLAVIA AS HISTORY 226 (1996).

[36] *Id.* at 227.

[37] *Id.* at 226.

[38] JUDAH, *supra* note 32, at 31.

[39] See NOEL MALCOLM, KOSOVO: A SHORT HISTORY 315 (1998) for a controversial but lucid and scholarly account of Kosovo's complex history.

[40] *Id.* at 316.

[41] See MARC WELLER, THE CRISIS IN KOSOVO 1989–1999, at 52–53 (1999) for an account of Kosovo's troubled years by a minority rights expert.

[42] MALCOLM, *supra* note 39, at 324.

[43] WELLER, *supra* note 41, at 54.

the Republic of Serbia within which they were still nominally located."[44] Thus, the important issue is not, as thought by Crawford and similar commentators, over Kosovo's failure to achieve complete autonomy as a republic; it is over the considerable degree of autonomy that Kosovo managed to achieve.

What prevented Kosovo from achieving full status of a republic? "In March 1989, with Kosova under emergency rule, both the Serbian parliament and Kosova's intimidated provincial assembly passed constitutional amendments which restored Kosova to Serbian legal, political and economic control."[45] In 1990, Serb authorities dissolved Kosovo's government and passed a new constitution that annulled Kosovo's autonomous status.[46] The legality of Serbia's actions should have been questioned. If the action of reducing or revoking Kosovo's autonomy is tantamount to changing borders, then Milosovic's moves violated Article 5 of the 1974 Constitution, requiring consent of all constituent parts of the SFRY.[47] Serbia's legal authority to revoke Kosovo's autonomy is dubious, based on Article 301 of its Constitution, which states: "enacting legislation for the entire territory of the Serbian republic (i.e., including Vojvodina and Kosovo) [should be] on the basis of mutual agreement of the assemblies of all three units."[48] However, it is one thing to enact legislation and quite another to preempt the federal constitution by completely revamping the political status of a region, whose status depended on the federal grant. Even if we make the highly questionable assumption that Serbia had the legal authority to revoke's Kosovo's autonomy, that move violated Serbia's constitutional amendment XLVII section 2, adopted in 1989, which stated unequivocally that "the 'position, rights and duties' of the autonomous provinces regulated by the federal constitution must not be altered by the Serbian Constitution."[49] Even more importantly, the denial of previously granted internal self-

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[44] ROBERT BIDELEUX & IAN JEFFRIES, THE BALKANS: A POST-COMMUNIST HISTORY 529 (2007).

[45] *Id.* at 532.

[46] WELLER, *supra* note 41, at 59–64.

[47] Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. UNIV. L. REV. 50, 66 (2000) ("A border of the SFRY cannot be altered without the concurrence of all republics and autonomous provinces." (quoting CONST. (1974), art. 5, sec. 3 (Yugoslavia))).

[48] PEDRO RAMET, NATIONALISM AND FEDERALISM IN YUGOSLAVIA, 1963–1983, at 82 (1984).

[49] Joseph Marko, *Kosovo—A Gordian Knot?*, *in* GORDISCHER KNOTEN KOSOVO/A: DURCHSCHLAGEN ODER ENTWIRREN? 261, 265 (Joseph Marko ed., 1999), *quoted in* Carsten Stahn, *Constitution without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government,* 14 LEIDEN J. INT'L L. 531, 533 n.10 (2001).

determination within a state should have been and should be a matter of international legal concern.[50]

In 1989, Slobodan Milosevic, then-President of the Socialist Republic of Serbia, stripped Kosovo of the autonomy status it attained under Josip Broz Tito, Yugoslavia's first president, from 1953 to 1974.[51] Two organizations, the Association of Philosophers and Sociologists of Kosovo and the Writers Association of Kosovo, took the lead in establishing an underground civil society for Albanian Kosovars.[52] Dr. Ibrahim Rugova, an aesthetician and literary historian, president of the Writers Association, became the leader of the Democratic League of Kosovo (LDK).[53] Beginning in 1991, the LDK led a pacifist movement for an independent and sovereign Kosovo.[54] No one listened to the peaceful pleas of Kosovo's leaders, and the 1995 Dayton Peace Accords also ignored Kosovo.[55] In 1995 and 1996, sporadic terrorist acts took place.[56] In 1997, the Kosovo Liberation Army, impatient with Rugova's non-violent secessionist pleas, appeared again.[57] Unfortunately for law and morality, the rest is history. In 1999, NATO began a three month bombing campaign against the Former Republic of Yugoslavia.

Given these historical developments, then, any claims that Serbia had on Kosovo were dependent on the respective parties' relationships within the SFRY. Once the SFRY dissolved, then the juridical relationship between Serbia and Kosovo dissolved or, minimally, it should have brought that relationship into question. After all, Serbia, despite its protestations to the contrary, did not qualify as the successor state to the SFRY.[58] Serbia did not have a right to give autonomy to Kosovo nor did it have a right to take it away.

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[50] *See infra* Part II.*D*.

[51] BIDELEUX & JEFFRIES, *supra* note 44, at 532.

[52] HOWARD CLARK, CIVIL RESISTANCE IN KOSOVO 54–55 (2000).

[53] JUDAH, *supra* note 32, at 72.

[54] *Id.* at 70–71.

[55] *See generally* General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75, 89; Fionnuala Ni Aolain, Essay, *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, 19 MICH. J. INT'L L. 957 (1998) (attempting to understand the shortcomings of the Dayton Peace Agreement); David L. Phillips, *Comprehensive Peace in the Balkans: The Kosovo Question*, 18 HUM. RTS. Q. 821, 821 (1996) (criticizing the omission of Kosovo from the Dayton Peace Agreement).

[56] *See* BIDELEUX & JEFFRIES, *supra* note 44, at 537.

[57] *Id.*

[58] The UN Security Council and the General Assembly rejected the Former Republic of Yugoslavia's claim that it was identical with the former SFRY. S.C. Res. 777, para. 1, U.N. Doc. S/RES/777 (Sept. 19, 1992); G.A. Res. 47/1, para. 1, U.N. Doc. A/RES/47/1 (Sept. 19, 1992).

There are advantages in beginning the inquiry with questions about the territorial status of the seceding claimant, for this may be the easiest issue for the court to assess since it only needs to examine the political history of the claimant. Underlying the court's analysis should be an assessment as to how state-like the claimant is. Kosovo has little trouble getting over this threshold. While Kosovo has experienced considerable growing pains over the past decade, it certainly now looks and acts like a state. For example, except for some disputed boundaries, it has effective control over specifiable territory.[59] As shown in the analysis below, the nature of the claimant might prove negatively determinative, as was the case of Biafra's unsuccessful secessionist claims beginning in 1966.[60] Further, the analysis focuses on the Kosovo territory and not on the Kosovo people. In many analyses, "people" trumps "territory."[61] The approach below, in contrast, avoids the nearly impossible task and entanglement of figuring out what kind of people there are in the territory in question. Are Kosovars colonial peoples? Are Kosovar Albanians an ethnic group? Fortunately, those questions can and should remain unanswered.

Despite not having to determine what kind of people exist in Kosovo, one difficulty remains. Whatever the legitimacy of Kosovo's claim to independence in the early 1990s, that is no longer the issue. Kosovo's status as a political entity remains in legal limbo—the characterization of Kosovo's juridical status between 1990 and the present remains unsettled.[62] Unfortunately, Kosovo accepted what should have been seen as its questionable relationship to Serbia. Still, it is worth thinking about what could and should have been done.

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[59] *See* Andreas Ernst, *Fuzzy Governance: State-Building in Kosovo Since 1999 as Interaction Between International and Local Actors*, 7 DEMOCRACY & SECURITY 123, 125–26 (2011) (claiming that fuzzy governance resulted from the internationals and locals having different goals in state-building in Kosovo).

[60] *See infra* Part II.*C.1.c*.

[61] *See, e.g.*, ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 109–25 (1995) (tracing the history of the principle of self-determination as applied to colonial peoples).

[62] *See* Richard Falk, *The Kosovo Advisory Opinion: Conflict Resolution and Precedent*, 105 AM. J. INT'L L. 50, 55–56 (2011) ("[Serbia] had clearly lost the advisory opinion battle, although not completely, as the majority never affirmed the independence of Kosovo or the current suitability of Kosovo for membership in the United Nations and other international institutions, or even whether Kosovo was entitled to diplomatic relations owing to its claimed status as a sovereign state.").

1. Case Studies

Comparisons of Kosovo to other related cases, namely the Baltic States, Chechnya, and Biafra, bring together various strands of the analysis thus far. The case studies below will show just how the Kosovo case stands out. First, the case of the Baltic States is one of unjust annexation, not secession. Second, the relationship between Russia and Chechnya is clearer than that between Serbia and Kosovo in that Russia was a successor state to the Union of Soviet Socialist Republics (USSR), whereas Serbia was not a successor state to the SFRY. Finally, unlike Biafra, Kosovo has the indices of statehood.

a. Baltic States

The establishment of the Baltic States (Estonia, Latvia, and Lithuania) as independent states when the USSR collapsed constituted a case of a restoration of states. The USSR unjustly denied their previous independent status when it annexed them in 1940.[63] Although the Baltic States experienced some positive changes as parts of the USSR, those changes could not "alter the fact that the Baltic people have historically been, and continue to be, subjugated, dominated, and exploited."[64] For example, from the middle to the late 1940s, the USSR deported roughly 600,000 Balts (out of a total population of 6 million) to Siberia and elsewhere.[65] Overt oppression allegedly ended in 1952.[66]

In the 1990s, did the Baltic States, have what international law should recognize as a right to secession?[67] No. These were cases of unjust annexation, which must not be confused with secession. An unjust annexation is a ground for a previously independent state to seek independence from its annexing state.[68] Annexation is a restorative right, not

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[63] The USSR illegally annexed the Baltic States—all independent before the 1940 annexure. CRAWFORD, *supra* note 26, at 393.

[64] William C. Allison V, Comment, *Self-Determination and Recent Developments in the Baltic States*, 19 DENV. J. INT'L L. & POL'Y 625, 629 (1990–1991).

[65] ALEXANDER R. ALEXIEV, DISSENT AND NATIONALISM IN THE SOVIET BALTIC 3–6 (1983); *see also* Susan E. Himmer, *The Achievement of Independence in the Baltic States and Its Justifications*, 6 EMORY INT'L L. REV. 253, 265 (1992) (describing the "[t]housands" of deportations).

[66] ALEXIEV, *supra* note 65, at 6.

[67] According to Article 72 of the 1977 Constitution of the USSR, "[e]ach Union Republic shall retain the right freely to secede from the USSR." KONSTITUTSIIA SSSR art. 72 (1977) [KONST. SSSR] [USSR CONSTITUTION].

[68] CRAWFORD, *supra* note 26, at 394.

a remedial one;[69] it restores the status quo ante. The Baltic States' unjust annexation is different from the events in Kosovo; Serbia's takeover of Kosovo did not constitute an unjust annexation, since Kosovo was not an independent state before Serbia's effective occupation of Kosovo.

b. Chechnya

Chechnya poses a case closer to that of Kosovo, but there are also critical differences. While Kosovo's status became questionable with the dissolution of the SFRY, the same cannot be said of Chechnya with the dissolution of the USSR. The international community recognized Russia as a successor state to the USSR, which, in turn, was a successor to the Russian Empire.[70] So, whatever the concerns over the treatment of Chechnya by Russia (and the USSR), Chechnya's juridical status is not contested, certainly not to the degree that Kosovo's status became problematic with the dissolution of the parent state, the SFRY.[71] At this stage of the inquiry, the problem of Russia's abrogation of its 1996 treaty that envisaged an independent Chechnya need not be addressed.[72]

c. Biafra

A territory needs the basic characteristics of a state in order to make a successful case for secession.[73] The secession attempt by Biafra will serve as a case study throughout this Article to provide continuity. For many reasons, Biafra did not have these indices of a state. "Although Biafra had a government,"[74] Biafra neither had, nor did it make any attempts to establish, an effective government. Oversimplifying the events that preceded Biafra's

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[69] But see ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 11 (1991), mistakenly treating annexation as a restorative right not as a remedial one. He should decouple unjust annexation from secession; they are two entirely different matters.

[70] CRAWFORD, *supra* note 26, at 395.

[71] *See* Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 VA. J. INT'L L. 115, 117 (1999) ("[N]o state to date has recognized Chechnya.").

[72] Khasavyourt Joint Declaration and Principles for Mutual Relations, Russ.-Chechnya, Aug. 31, 1996, *available at* http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/rus6.pdf (referring to "the universally recognised right of peoples to self-determination" and providing for a mutual agreement to be reached by December 31, 2001).

[73] *See supra* note 23 (setting out the criteria for statehood).

[74] David A. Ijalaye, Note and Comment, *Was "Biafra" at Any Time a State in International Law?*, 65 AM. J. INT'L L. 551, 553 (1971).

ill-fated attempt at secession, there were electoral irregularities, followed by a national coup led by a military faction largely of Eastern Ibo origin, and a counter-coup, staged by Northern military officers.[75] During that critical period, Biafra hardly had a history as a territory that sought some form of democratic autonomy.[76]

More controversial—and perhaps less telling but nonetheless relevant—is the absence of other key characteristics of a nascent state, namely, a permanent population and a defined territory.[77] While it had a permanent population, many of Biafra's population group most relevant to the secessionist claim—the Ibo—resided in areas outside Biafra.[78] In fact, "[i]t was not all that clear whether the Biafrans sought independence from Nigeria for the former Eastern Region or for the Ibos . . . who were scattered in other regions of Nigeria."[79]

D. Internal Self-Determination

The second stage of the inquiry proves most crucial when examining Kosovo's claims. At this stage, the court should make substantive assessments of the claimant's status, including its relation to the parent state. The assessment has two distinct phases. First, the court should examine the status of the claimant with regards to internal self-determination. Second, the court should probe for harms perpetrated against the claimant by the parent state. The next section sets forth the legal grounds for internal self-determination—its basis in treaties, customary law, and judicial opinions. The subsequent sections establish a basis in international law for addressing certain kinds of harms, specifically those that violate peremptory norms.

1. International Law and Internal Self-Determination

Hurst Hannum claimed that "the internal aspect of the right of self-determination is the most important aspect of the right in the late twentieth

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[75] M.G. Kaladharan Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L L.J. 321, 322–23 (1975); *see also* LARRY DIAMOND, CLASS, ETHNICITY AND DEMOCRACY IN NIGERIA: THE FAILURE OF THE FIRST REPUBLIC 266–72 (1988) (using Nigeria as a case study to establish the general conditions for a stable democracy among developing countries).

[76] Ijalaye, *supra* note 74, at 553.

[77] *Id.*

[78] M. Rafiqul Islam, *Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh*, 22 J. PEACE RES. 211, 214 (1985).

[79] *Id.*

century."[80] The same is true in the twenty-first century as well. For example, Article 2(4) of the U.N. Charter provides, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[81] However, self-determination, at first, took a legal backseat to the right to territorial integrity because states successfully promoted the idea that sovereignty constituted the linchpin of the international legal order.[82] That is no longer the case because human rights and the rule of law no longer lie solely within the jurisdiction of states. Indeed, as the following survey of various sources of international law demonstrates, international law supports internal self-determination.

a. Treaties

The U.N. Charter contains two references to self-determination: Articles 1(2) and 55.[83] More explicitly, Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights state:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The State Parties to the present Covenant, including those having responsibility for the administration of

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[80] Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 34 (1993).

[81] U.N. Charter art. 2, para. 4.

[82] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 580 (7th ed. 2008).

[83] According to Article 1(2), a purpose of the United Nations is the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U.N. Charter art. 1, para. 2; *see id.* art. 55 ("With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . .").

> Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[84]

Jurists often either reject or indicate skepticism toward external self-determination and either support or speak favorably about internal self-determination.[85] Crawford, one of the foremost experts on these issues, interprets self-determination to refer to "the right of the people of a State to choose its own form of government without external intervention."[86] He infers that self-determination in the U.N. Charter could also mean the right of a people within a territory "to choose their own form of government irrespective of the wishes of the rest of the State of which that territory is a part."[87] Given a choice, Crawford opts for the former meaning and finds little or no support for the latter one;[88] yet, he presents a false choice. He conveniently ignores the language of Common Article 1, which clearly refers to right of people to choose their own government within their State—a right to internal self-determination. This right is not so much concerned with external interference as with internal interference from a people's own government. How else can peoples "freely determine their political status"[89] if not within a state? Crawford, however, does admit that the principle of self-determination could apply to a territory like Kosovo.[90] He coined the term *carence de souveraineté*, meaning "entities part of a metropolitan State

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[84] International Covenant on Civil and Political Rights art. 1, para.1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1, para. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[85] *See, e.g.*, Johan D. van der Vyver, *Self-Determination of the Peoples of Quebec Under International Law*, 10 J. TRANSNAT'L L. & POL'Y 1, 12 (2000) ("The concept of external *self-determination* to denote secession, or depicting secession as 'an offensive exercise of self-determination,' is therefore a contradiction in terms." (footnote omitted)); Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 126 (Can.) [hereinafter Quebec Secession] ("The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination . . . ."); Tamara Jaber, *A Case for Kosovo? Self-Determination and Secession in the 21st Century*, 15 INT'L J. HUM. RTS. 926 (2011) (concluding that "Kosovo cannot base its claim to statehood in a right to self-determination" because of the difficulties of defining "peoples").

[86] *See* CRAWFORD, *supra* note 26, at 114 (noting that internal self-determination is only implicitly referenced in the U.N. Charter).

[87] *Id.*

[88] *Id.*

[89] ICCPR, *supra* note 84, art. 1, para. 1; ICESCR, *supra* note 84, art. 1, para. 1.

[90] CRAWFORD, *supra* note 26, at 126.

but that have been governed in such a way as to make them in effect non-self-governing territories."[91] For Crawford, this is, at best, a principle and not a right.[92] The subjects of rights are clearly defined in law, whereas those of principles are still an admixture of law and politics.[93]

Self-determination became embedded in international law in 1960 with the passage of the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples.[94] According to the declaration, all peoples under colonial rule have the right to "freely determine their political status."[95] This right, however, has been interpreted narrowly in its application to colonial peoples.[96] Documents, such as the 1970 U.N. General Assembly Resolution entitled "Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations" (Declaration on Friendly Relations),[97] indicate a willingness of the international community to extend the idea of peoples beyond the colonial context.[98] The Declaration on Friendly Relations has been found to reflect customary international law.[99] The so-called safeguard clause in the Declaration on Friendly Relations provides one legal argument for a remedial right of secession. The argument is that although the Declaration on Friendly Relations does not explicitly grant a right to secession, it does infer such a right. The Declaration on Friendly Relations states that "[t]he establishment of a sovereign and independent State . . . or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."[100] This language clearly suggests a right to

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[91] *Id.*

[92] *Id.* at 126–27.

[93] *Id.*

[94] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/4684 (Dec. 14, 1960).

[95] *Id.* para. 2.

[96] G.A. Res. 1541 (XV), Annex, princ. 1, U.N. Doc. A/RES/1541(XV) (Dec. 15, 1960) ("Chapter XI [of the U.N. Charter, Declaration Regarding Non-Self-Governing Territories] should be applicable to territories which were then known to be of the colonial type.").

[97] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations].

[98] CRAWFORD, *supra* note 26, at 118–21.

[99] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, paras. 191, 193 (June 27) (applying the principles of the Declaration on Friendly Relations).

[100] Declaration on Friendly Relations, *supra* note 97, at 124.

internal self-determination. Similarly, the Helsinki Final Act states that "all peoples always have the right, in full freedom, to determine . . . their internal and external political status."[101] Moreover, the saving clause in the Declaration on Friendly Relations reaffirms the principle of territorial integrity:

> 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 without distinction as to race, creed or colour.[102]

Thus, presumably, territorial integrity remains intact as long as the State does not oppress a segment of its peoples. If the State does violate the rights of some of its peoples, then those people would have a claim to impair territorial integrity by secession. However, "the language of the saving clause seems to limit any possible entitlement to secede to racial and religious groups."[103] Finally, commentaries to CERD[104] and to the ICCPR[105] confirm the right to internal self-determination. In addition, there are the 1975 Helsinki Final Act,[106] the 1981 African Charter on Human Rights,[107] and the 1993 Vienna Declaration and Programme for Action.[108]

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[101] Conference on Security and Cooperation in Europe Final Act art. 1(a)(VIII), Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter Helsinki Final Act].

[102] Declaration on Friendly Relations, *supra* note 97, at 124.

[103] Daniel Fierstein, Note, *Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, 26 B.U. INT'L L.J. 417, 429 n.87 (2008).

[104] Comm. on the Elimination of Racial Discrimination, General Recommendation No. 21, Right of Self-Determination, para. 4, U.N. Doc. CERD/48/Misc.7/Rev.3 (Aug. 23, 1996). The Committee forged a link between the right to self-determination and "the right of every citizen to take part in the conduct of public affairs at any level." *Id.*

[105] Human Rights Comm., General Comment No. 12, Article 1 (Right to Self-Determination), paras. 1–3, U.N. Doc. HRI/GEN/1/Rev.1 (Mar. 13, 1994). By virtue of the right to self-determination, peoples have the right to "freely determine their political status" and to enjoy the right to choose the form of their constitution or government. The HRC found the right of citizens to participate directly in public affairs, guaranteed by Article 25 of the ICCPR, distinct but closely linked to the right to self-determination. *Id.* para. 2.

[106] Helsinki Final Act, *supra* note 101, art. 1(a)(VIII). The Helsinki Final Act placed "additional constitutional judicial obligations" on the Soviet Union. Boris Meissner, *The Right of Self-Determination After Helsinki and Its Significance for the Baltic Nations*, 13 CASE

b. Customary Law

The exact nature of internal self-determination remains controversial, and whether there is a positive right in international law to internal self-determination may be disputed. However, there are an increasing number of international documents making direct or indirect reference to democracy, which seems to lie at the heart of internal self-determination.[109] More importantly for this Article's argument, international law clearly condemns the taking away of internal self-determination after it has been granted. The U.N. has condemned regimes that blatantly deny a significant portion of its population internal self-determination.[110] By examining the U.N. resolutions and legal opinions in the following cases, as well as the treaty and declaration provisions cited above,[111] it is clear that the principle of internal self-determination has become customary law not only in decolonialization cases,[112] but also in other cases—those concerning Rhodesia, South Africa, East Timor, Sierra Leone, and Haiti.

W. RES. J. INT'L L. 375, 383 (1981).

[107] African Charter on Human and Peoples' Rights art. 20, June 27, 1981, 1520 U.N.T.S. 217. Perhaps, the African Charter extends, on a regional level, the right of political self-determination to the right of economic self-determination. *See* Richard N. Kiwanuka, Note and Comment, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L L. 80, 95–99 (1988) (attempting to clarify the meaning of "peoples" in the African Charter).

[108] Vienna Declaration and Programme of Action, para. 2, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter Vienna Declaration]. The Vienna Declaration extended the Declaration on Friendly Relations' from application to "a government representing the whole people belonging to the territory without distinction *as to race, creed or colour*" to application to "a Government representing the whole people belonging to the territory without distinction *of any kind*." Declaration on Friendly Relations, *supra* note 97, at 124 (emphasis added); Vienna Declaration, *supra*, para. 2 (emphasis added); *see also* Frederic L. Kirgis, Jr., Comment, *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 306 (1994) ("Thus, the disclaimer referred to a government representing the whole people belonging to the territory without distinction as to race, creed or color.").

[109] For example, 166 countries are parties to the ICCPR, *supra* note 84, with its Article 25 that guarantees a right to free elections and participation in public affairs. Status of the International Covenant on Civil and Political Rights, U.N. TREATY COLLECTION (Nov. 28, 2011, 07:05:56 EDT), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[110] *See, e.g.*, *infra* note 114 and accompanying text.

[111] *See supra* Part II.*D.1.a*.

[112] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 121 (Oct. 16) (separate opinion of Judge Dillard) ("The pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations.").

In 1965, Rhodesian Prime Minister Ian Smith, leading the whites that made up only 6% of the population, unilaterally declared Rhodesia independent from the United Kingdom.[113] Later that year, the U.N. General Assembly passed a resolution that condemned the perpetuation of minority rule as "incompatible with the principle of equal rights and self-determination."[114] This was followed by a Security Council resolution, which was "the most recent expression of a general community concern to preserve that right [of self-determination] for [the people of Rhodesia]."[115] The Security Council condemned the government of Rhodesia and called upon the United Kingdom to restore internal self-determination.[116] It then adopted sanctions against the regime.[117]

The disenfranchisement of colored voters has a long, ignoble history in South Africa.[118] The British colonial rulers severely limited the black franchise.[119] However, after independent South Africa's 1948 elections, apartheid became fully entrenched and institutionalized.[120] It was only after the Sharpeville massacre in 1966 that the Security Council began to take action against the apartheid regime—for example, by imposing sanctions on it.[121] For purposes of this analysis, the most important thing to note is that the U.N.'s condemnation of South Africa's racism tied integrally to the South African government's denial of internal self-determination.[122]

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[113] Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 3 (1968).

[114] G.A. Res. 2012 (XX), para. 2, U.N. Doc. A/2012(XX) (Oct. 12, 1965).

[115] McDougal & Reisman, *supra* note 113, at 19.

[116] S.C. Res. 217, paras. 1, 7, U.N. Doc. S/RES/217 (Nov. 20, 1965). S.C. Resolution 217 called upon the United Kingdom "to take immediate measures in order to allow the people of Southern Rhodesia to determine their own future." *Id.* para. 7. S.C Resolution 232 reaffirmed "the inalienable rights of the people of Southern Rhodesia to freedom and independence [from minority rule]." S.C. Res. 232, para. 4, U.N. Doc. S/RES/232 (Dec. 16, 1966).

[117] S.C. Res. 253, paras. 3–7, U.N. Doc. S/RES/253 (May 29, 1968).

[118] *See, e.g.*, NIGEL WORDEN, THE MAKING OF MODERN SOUTH AFRICA 55–57 (3d ed. 2000) (discussing voting rights in South Africa and the connection to land ownership).

[119] *See* LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 102 (1995) (describing the means by which the British oppressed the Blacks of South Africa throughout its colonial rule).

[120] *See* Martin Legassick, *Legislation, Ideology and Economy in Post-1948 South Africa*, 1 J. S. AFR. STUD. 5, 5–6 (1974) (discussing the 1948 election and the victory of the nationalist Party, which was the turning point for apartheid legislation and the "separate development" ideology).

[121] S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

[122] "The issues of racism and self-determination are related. . . . The South African system is particularly obnoxious . . . because the majority of South Africa's people are denied any effective role in running the society in which they live. That is, they are denied the right of self-determination." United Kingdom Materials on International Law 1984, 1984 BRIT. Y.B. INT'L L. 405, 431 (Geoffrey Marston ed.) (quoting U.K. representative R. Fursland, Statement

The U.N. Security Council's condemnation of the denial of internal self-determination has been extended to other cases as well. For example, Roland Rich, a political scientist, talks about a developing "limited doctrine of intervention in support of democratic entitlement."[123] He cites the interventions in East Timor, Sierra Leone, and Haiti—all endorsed by Security Council resolutions—in support of this claim.[124] Haiti was the first case where the Security Council authorized force to restore democracy.[125] Other cases were different. For example, the U.N. General Assembly and the Security Council reaffirmed East Timor's right to self-determination.[126] These examples show that, while it may be difficult to make a case for a right to internal self-determination in international law, an entirely different situation arises when a state grants and then takes away internal self-determination from either its entire population or a part thereof.

c. Judicial Opinions

Opinions of the ICJ provide further support for this proposition. In the *Namibia Advisory Opinion*, the ICJ held that "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [nations]."[127] At the time, South Africa administered

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before the Third Committee of the General Assembly of the U.N. (Oct. 12, 1984)).

[123] Roland Rich, *Bringing Democracy into International Law*, 12 J. DEMOCRACY, no. 3, 2001 at 20, 31; *see also* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 85–91 (1992) (arguing that the international community can only invoke collective enforcement measures against governments that oppress their peoples in limited circumstances); James Crawford, *Democracy and International Law* 1993 BRIT. Y.B INT'L L. 113, 126–28 (discussing the problem with the idea that "democracy can be installed by the unilateral assertion of external force" and how external forces must be careful when attempting to intervene in order to establish a democracy because of the difficulties of establishing legitimacy).

[124] Rich, *supra* note 123, at 31. In the East Timor case, Resolution 1272 gave the U.N. Transitional Administration the mandate to develop local democratic institutions. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999). In the Sierra Leone case, Resolution 1132 demanded that the military junta "make way for the restoration of the democratically-elected Government." S.C. Res. 1132, para. 1, U.N. Doc. S/RES/1132 (Oct. 8, 1997). Finally, in the Haitian case, Resolution 940 explicitly stated that the goal of the international community was "the restoration of democracy." S.C. Res. 940, pmbl., U.N. Doc. S/RES/940 (July 31, 1994).

[125] S.C. Res. 940, *supra* note 124.

[126] G.A. Res. 3485 (XXX), U.N. Doc. A/ 3485(XXX) (Dec. 12, 1975); S.C. Res. 384, U.N. Doc. S/RES/384 (Dec. 22, 1975).

[127] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, para. 52 (June 21).

Namibia (former German South West Africa) by a mandate from the League of Nations following World War I.[128] Namibia's white minority had sole representation in South Africa's whites-only Parliament.[129] After World War II, South Africa refused to place Namibia under a trusteeship, which would have made it subject to closer international monitoring.[130] This, of course, is the same South Africa that institutionalized the racist system of apartheid after World War II.[131] The ICJ declared South Africa's role in Namibia illegal.[132]

The ICJ reaffirmed the principle of self-determination in the Western Sahara Case.[133] Judge Dillard's separate opinion most strongly affirmed internal self-determination: "It is for the people to determine the destiny of the territory and not the territory the destiny of the people."[134] In fact, in the Judge Castro's separate opinion, he found the principles of self-determination as a peremptory norm in international law based on a series of U.N. General Assembly resolutions and state practice of decolonization.[135]

At stake in all of these cases is not so much the right to internal self-determination as it is a right not to have internal self-determination obliterated or unjustly denied once it has been granted.[136] The ICJ in the Kosovo Advisory Opinion could have found a right not to be denied internal self-determination in international law within treaties, customary law, and judicial opinions.[137] It did, at least, find that Resolution 1244[138] was to establish institutions of self-government—"to establish, organize and oversee

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[128] Treaty of Versailles art. 119, June 28, 1919, 1919 U.S.T. Lexis 7, 2 Bevans 43.

[129] THE SOUTH WEST AFRICA/NAMIBIA DISPUTE 83 (John Dugard ed., 1973).

[130] G.A. Res. 65(I), U.N. Doc. A/65(I) (Dec. 14, 1946); G.A. Res. 9(I), U.N. Doc. A/9(I) (Feb. 9, 1946); THE SOUTH WEST AFRICA/NAMIBIA DISPUTE, *supra* note 129, at 111–19 (describing the objectives of the trusteeship system).

[131] JOHN ALLEN, APARTHEID SOUTH AFRICA 106–07 (2005).

[132] International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 144 (July 11).

[133] The Court found that there were no valid claims by either Morocco or Mauritania of territorial sovereignty over Western Sahara that would affect the self-determination of the peoples of Western Sahara. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

[134] *Id.* at 122 (separate opinion of Judge Dillard).

[135] *Id.* at 131–33 (separate opinion of Judge Castro).

[136] MARC WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE 10 (2009) ("[F]or it is often taken as axiomatic that autonomy cannot be unilaterally revoked by the central government once it has been constitutionally established.").

[137] *See* Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, T.S. No. 993 (listing the sources of international law the ICJ may use in settling disputes).

[138] S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

the development of local institutions of self-government in Kosovo under the aegis of the interim international presence."[139]

Most importantly, the focus on internal self-determination places the incentives exactly where they should be placed. Full legal recognition of the value and primacy of internal self-determination within the context of debates and disputes over secession would serve as an incentive for potential claimants to pursue all avenues of internal self-determination before making any secessionist claims. In the same vein, it would be in the best interest of the parent state to make as many concessions as feasible to demands for internal self-determination in order to undermine any secessionist claims.

Jurists typically propose a final requirement on secession, namely, that secession represents the last resort, when no other alternatives are available.[140] The Remedial Model's requirement regarding internal self-determination incorporates the spirit of the exhaustion-of-remedies formulations without accepting the pitfalls of adopting the letter of those formulations. William Slomanson, a leading jurist, correctly points out the lost opportunities to settle the conflict amicably between Serbia and Kosovo.[141] He bemoans Kosovo's failure to cede some territory in northern Kosovo in return for Serb territories to Kosovo.[142] However, there will always be room for pursuing more alternatives before taking a secession route. The exhaustion of legal remedies is not the same as the exhaustion of political remedies. What courts demand claimants do before pursuing a claim further differs from what claimants can do themselves to resolve disputes outside of the law. For example, Serbia can continue to hold out the lure of autonomy measures for Kosovo. The issue is: at what point those autonomy offers cease to be given legal effect. One answer is that they are no longer legally binding when they have been offset by gross human rights violations committed by the parent state against the claimant.[143]

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[139] Kosovo Advisory Opinion, *supra* note 7, para. 98.

[140] ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION 355 (2004); CONTEXTUALIZING SECESSION 7 (Bruno Coppieters & Richard Sakwa eds., 2003); Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 381 (2003).

[141] William R. Slomanson, *Legitimacy of the Kosovo, South Ossetia, and Abkhazia Secessions: Violations in Search of a Rule*, 6 MISKOLC J. INT'L L. 1, 20–22 (2009).

[142] *Id.* at 20.

[143] *See infra* Part II.*E*.

2. Case Studies

A great deal of the opposition to Kosovo's UDL has come from those who fear that legally acknowledging Kosovo's right to secession would set a bad precedent.[144] However, the internal self-determination factor actually distinguishes Kosovo from a number of other cases.

a. Bosnian Serbs

The most relevant case to the situation in Kosovo is the Republika Srpska, now a political entity within Bosnia-Herzegovina. The ICJ has cited three situations in which the Security Council resolutions condemned unilateral declarations of independence.[145] The ICJ dismissed these as not being determinative to the Kosovo Advisory Opinion because they apply only to specific situations.[146] However, a common concern can be gleaned from these resolutions. The Security Council did not want unilateral declarations of independence unduly and unjustifiably interfering with the development of internal self-determination.[147] Consider the cases concerning the Bosnian Serbs and the Turkish Cypriots.[148] With Resolution 787, the Security Council condemned any threat of unilateral secession by any party in Bosnia and Herzegovina while drafting an outline of a constitutional structure to govern the region.[149] Similarly, Security Council Resolution 541 condemned the attempt to establish the Turkish Republic of Northern Cyprus even before the international community had had a chance to broker a peace deal that would include internal self-determination.[150] These cases indicate

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[144] For example, a later case that may be affected by that type of acknowledgment is Russia's support for secession efforts by South Ossetia. *See infra* Part II.*E*.*2*.*b*.

[145] Kosovo Advisory Opinion, *supra* note 7, para. 81 (noting "Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska").

[146] *Id.*

[147] *Id.*

[148] For a discussion of similar Security Council Resolutions regarding Southern Rhodesia, see text accompanying *supra* notes 115–16.

[149] S.C. Res. 787, U.N. Doc. S/RES/787 (Nov. 16, 1992).

[150] S.C. Res. 541, U.N. Doc. S/RES/541 (Nov. 18, 1983). The third periodic report of Cyprus to the U.N. Human Rights Committee on Jan. 20, 1995 on the implementation of ICCPR Article 1 (on the right of peoples to self-determination) states: "In Cyprus democratic elections are held enabling its people to determine their political status and to pursue in a free manner their economic, social and cultural development." Human Rights Comm., Consideration of Reps. Submitted by States Parties Under Art. 40 of the Covenant, para. 42, U.N. Doc. CCPR/C94/Add.1 (Jan. 20, 1995). It discusses in some detail with presidential,

that the international community would look very unfavorably on any attempts by the Republika Srpska to follow Kosovo's lead at declaring its own independence because now it has a working constitutional structure within which to operate and address its grievances. The Republika Srpska, therefore, has a rather weak secessionist claim, in part, because it already has considerable internal self-determination.

b. Biafra

Biafra poses interesting challenges to using the doctrine of internal self-determination as a factor in assessing secessionist claims. Was Biafra's self-determination violated by the central government prior to its secessionist claims? A brief foray into the history of Nigeria helps to answer that question. In 1954, the British divided Nigeria into three somewhat autonomous regions—Western Nigeria (dominated by the Yoruba), Eastern Nigeria (dominated by the Ibo), and Northern Nigeria (dominated by the Hausa/Fulani).[151] The attempt of the Eastern Region to secede was not a classical case of a thwarted attempt to attain internal self-determination.[152] First, the situation was one of successive military coups at the federal and regional levels.[153] The war began with ethnic rivalry within the armed forces[154]—hardly the makings of a democratic movement. Second, the secessionist war was, in part, a conflict over different visions of the state.[155] One vision held to the colonial construct of division into regions, whereas a competing vision had Nigeria divided up into states.[156] In other words, it is difficult to see how efforts to achieve internal self-determination played a pivotal role in the conflict. The secessionist movement of the Eastern Region was not so much an attempt of one region to remove itself from the whole but rather a competing vision of the nature of the whole. One response to the continuing ethnic conflicts was to divide Nigeria into twelve states; another, taken by the Eastern Region, was to secede.[157]

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parliamentary and local elections.

[151] *See* Tunga Lergo, *Deconstructing Ethnic Politics: The Emergence of a Fourth Force in Nigeria*, 1 INT'L J. HUMAN. & SOC. SCI. 87, 89 (2011).

[152] *See* Charles R. Nixon, *Self-Determination: The Nigeria/Biafra Case*, 24 WORLD POL. 473, 491 (1972) (arguing for the relevance of the concept of self-determination to Nigeria/Biafra case).

[153] *Id.* at 475.

[154] *Id.* at 481.

[155] *Id.* at 486.

[156] *Id.* at 484.

[157] *Id.* at 487.

As demonstrated in this section, treaties, customary law, and judicial opinions can be used to show that it is against international law to deny a legitimate political entity the right to internal self-determination once it has been granted. Thus, Serbia violated international law when it denied Kosovo the right to internal self-determination granted to it by the SFRY.

E. Group Harms

The other aspect of the status inquiry that should be undertaken by the court pertains to assessing the harms perpetrated against the claimant and its people by the purported parent state. What harms would trigger a secessionist claim? International law proscribes a set of harms as peremptory norms (*jus cogens*)[158] that are universally prohibited; even sovereignty does not immunize any state from them.[159] These harms generally include genocide, slavery, grave breaches, torture, and (perhaps) ethnic cleansing.[160] Jurists have differed over the exact inventory of *jus cogens* provisions. Oscar Schacther listed slavery, genocide, torture, mass murder, prolonged arbitrary imprisonment, systematic racial discrimination, and any other "gross violations of internationally recognized human rights."[161] The commentary of the International Law Commission (ILC) notes that some members suggested "trade in slaves, piracy or genocide" as examples of *jus cogens*.[162] The ILC gave illustrations rather than specific examples so as not to impose its own interpretation. Other candidates include the prohibition of " 'crimes against humanity,' the non-refoulement of refugees, [and] the illegality of unequal (or 'leonine') treaties."[163]

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[158] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S 331 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.").

[159] Mary Ellen Turpel & Philippe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 365 (1987–1988).

[160] BROWNLIE, *supra* note 82, at 511.

[161] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 211 (1991).

[162] Rep. of the Int'l Law Comm'n, at 248, Jan. 3–28, 1966, U.N. Doc. A/6309/Rev.1; GAOR, 21st Sess., Supp. No. 9 (1966). Except for the prohibition against force as contrary to the U.N. Charter, the prohibition against genocide received the most votes (13 out of 26 delegates) as an example of *jus cogens* at the meetings of the Vienna Conference. *Id.* at 302; *see also* JERZY SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES 119–20 (1974) (tracing the theoretical history of *jus cogens* in international law). The ILC gave illustrations rather than specific examples so as not to impose its own interpretation. *See* RAFAEL NIETO-NAVIA, INTERNATIONAL PEREMPTORY NORMS (*JUS COGENS*) AND INTERNATIONAL HUMANITARIAN LAW 15–16, *available at* http://www.iccnow.org/documents/WritingColumbiaEng.pdf.

[163] Christopher A. Ford, Essay, *Adjudicating Jus Cogens*, 13 WIS. INT'L L.J. 145, 164–65

Despite the disagreement over what to include on the list, few disagree over the inclusion of genocide and slavery.[164] The international community already has made moral and legal progress by acknowledging the universal status of these prohibitions. Genocide did not become a codified international crime until the ratification of the Genocide Convention.[165] Today, two ad hoc international war crimes tribunals and a subsequently established permanent one apply the preemptory prohibition against genocide.[166] Genocide qualifies as the worst group harm because there are no viable justifications for it within any plausible moral system. Under some carefully limited set of circumstances, there may be justification for other types of mass killings, such as civilian war deaths, in some plausible—in the sense that rational individuals may disagree about it—moral systems. Killing individuals because of their perceived group affiliation, however, is never morally defensible.[167] Indeed, genocide qualifies as among the worst, if not *the* worst, universally proscribed harms.

Within international law, the prohibition of derogation serves as a critical test for a peremptory norm, and genocide easily passes the test. If states cannot find any justifiable excuse for derogating from a norm, then the norm qualifies as peremptory. Hannikainen analyzes derogation grounds that do not serve as excuses for violating peremptory norms: "[d]erogation from peremptory norms on the ground of *necessity*, *emergency*, *reprisal*, or *self-defense*, all of them being situations which allow deliberation before the action is taken, is *not permitted*."[168] None of these would qualify as an excuse for violating the prohibition against genocide. If state officials have the slightest time for reflection, that state has no excuse for choosing genocide. Citing an emergency would not suffice as an excuse for committing genocide.

(1994) (citation omitted).

[164] Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 39 (1995).

[165] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 102 Stat. 3045.

[166] Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 8, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute for the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 9, U.N. Doc. S/RES/827 (May 25, 1993); Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

[167] *See* THOMAS W. SIMON, THE LAWS OF GENOCIDE: PRESCRIPTIONS FOR A JUST WORLD (2007) (claiming that the crime of genocide is never justifiable or excusable).

[168] LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 265 (1988).

It may seem that concerns about genocide have little to do with secession issues. After all, the genocides that took place in Armenia, Germany, and Rwanda did not involve any secessionist claims.[169] Yet, other harms connect to genocide. Some other harms qualify as peremptory prohibitions, in part, due to their connection to genocide in that they have a probability of leading to genocide. Ethnic cleansing, generally, is the "attempt[ ] to eliminate or greatly reduce the size of an ethnic or national group in order to achieve greater homogeneity within a territory."[170] Not all instances of ethnic cleansing constitute genocide. However, forcibly moving mass numbers of people from their homes often serves as a prelude to genocide, that is, to killing of individuals because of their group affiliation. It follows that the list of peremptory prohibitions relevant to the secessionist issue should include ethnic cleansing since it has a genocidal form and has the potential of leading to genocide.

The connection of group harms to genocide is twofold. First, lesser forms of group harm can, and do, lead to genocide. Second, group harms have a definitional element common to genocide: the infliction of harm on individuals because of their perceived or actual group affiliation. Secession claims made on the basis of group harm become matters of international concern, in part, because of their actual and potential connections to a universal prohibition against genocide. All of the harms cited thus far contain a common ingredient: severe harms directed at individuals because of their perceived or actual group affiliation. These prohibitions reflect an international recognition that severe forms of pain and suffering inflicted upon members of a group have a universal dimension and should not be tolerated. To kill, enslave, torture, and uproot people because of their group membership undermines any sense of international morality. The *raison d'être* of a moral international order is to protect people from the worst crimes.

One further category of harm is needed to complete the analysis: group discriminatory harms. These include deprivations of basic needs—such as food, clothing, housing, education, and employment—because of an individual's group affiliation.[171] Discriminatory harms often link to the harms prescribed in the peremptory norms of international law, but they form

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[169] *See generally* BENJAMIN A. VALENTINO, FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE TWENTIETH CENTURY 152–95 (2004) (offering perspectives on ethnic killings in Turkish Armenia, Nazi Germany, and Rwanda).

[170] James W. Nickel, *What's Wrong with Ethnic Cleansing*, J. SOC. PHIL., Mar. 1995, at 5, 6 (1995).

[171] Thomas W. Simon, *Group Harm*, J. SOC. PHIL., Dec. 1995, at 123 (1995).

a class distinct from genocide, ethnic cleansing, and the like. For the most part, international law does not treat most discriminatory harms as peremptory primarily because it does not regard discriminatory harms as severe enough to warrant breaching the wall of sovereignty.[172] A Remedial Model for secession must attend to discriminatory harms, not because their presence alone would justify secession, but because of the likelihood that widespread and severe occurrences of discriminatory harms would lead to the more severe forms of harm. The combination of actual, severe discriminatory harms and the potential of genocide and its kin form a basis for justifying secession within international law and global morality.

"Group harms" form a more specific category than "violations of human rights." Group harms make up those violations of human rights targeted against members of a group because of their group affiliation.[173] For instance, China has widespread human rights violations directed at dissidents,[174] however, these violations do not constitute group harms since they are not directed at a group primarily because of their group status,[175] rather, they are, largely unjustly, aimed at individuals' alleged actions or statements.[176] State power unleashed against dissidents does not—although, under certain circumstances, it might—constitute status harms.[177] Secession constitutes a remedy for group, not individual, harm. However, secession rights are remedial rights, invoked by a group under limited conditions to rectify harms sustained by that group, not all citizens in general.[178]

The right to secession itself is not a peremptory norm but rather a remedy of last resort.[179] Peremptory norms, such as the universal prohibition against

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[172] Hilary Charlesworth & Christine Chinkin, *The Gender of* Jus Cogens, 15 HUM. RTS. Q. 63, 68 (1993) (noting that *jus cogens* often includes systematic racial, but not gender, discrimination).

[173] *See generally* THOMAS W. SIMON, ETHNIC IDENTITY AND MINORITY PROTECTION (2012) (showing the primacy of group harm for minority protection).

[174] *See generally* Ann Kent, *China's Human Rights in 'the Asian Century,' in* HUMAN RIGHTS IN ASIA 187 (Thomas W.D. Davis & Brian Galligan eds., 2011) (examining whether China has moved from an Asian to an international perspective on human rights).

[175] To put it another way, dissidents do not constitute a disadvantaged group. For a fuller development of this, see THOMAS W. SIMON, DEMOCRACY AND SOCIAL INJUSTICE 71–108 (1995).

[176] NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 31 (2d ed. 2003).

[177] *Id.*

[178] Allen Buchanan, Democracy and Secession (June 16, 1997) (unpublished manuscript) (on file with author).

[179] While jurists disagree over whether self-determination constitutes a peremptory norm, no one to date has proposed that secession is a peremptory norm.

genocide, transcend state boundaries.[180] States do not have justifiable grounds for violating these preemptory norms, but they have many justifiable grounds for refusing secession. A state places itself on a moral high ground when it resists the secession overtures of a group intent on creating a state that would violate a high level peremptory norm, such as the prohibition against genocide. Whether the right to self-determination is peremptory proves more complicated.[181] If it includes an unseverable right of secession, then the arguments above would disqualify it as a peremptory norm. If we can separate a right to self-determination from a right of secession, then the analysis becomes more complicated.

If we apply this analysis to Kosovo, we find that answers to questions about Kosovo's status provide ample grounds for why the ICJ should not have taken Resolution 1244 as determinative. If Serbia's claim over Kosovo is questionable, if Serbia has been responsible for the denial of Kosovo's internal self-determination, and if Serbia has been responsible for harms perpetrated against Kosovo that border on peremptory prohibitions, then it is difficult to interpret Resolution 1244 as in any way mandating the eventual return of Kosovo to Serbia's control.[182] Finally, it was not simply Serbia's revocation of Kosovo's autonomy that made the case for secession; it was also the repeated harms perpetrated by Serbia on the people of Kosovo. Once this harm element is factored in, the burden is shifted from the claimant on having attempted to effect internal self-determination. This would then excuse Kosovo's refusals to take up Serbia's autonomy offers, assuming that they were made in good faith, after Kosovo effectively became a U.N. protectorate.

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[180] M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 71 (1996) (noting "that the prohibition against genocide is a *jus cogens* norm that cannot be reserved or derogated from").

[181] *See* A. Mark Weisburd, *The Emptiness of the Concept of* Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 24 (1995) ("[T]here is authority both for and against the proposition that the list of jus cogens norms includes the right of self-determination.").

[182] Resolution 1244 uses the following language: "*Reaffirming* the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia . . . ." S.C. Res. 1244, *supra* note 138. However, the reference to territorial integrity is found only in the preamble of the resolution and not in the its operative body. *Id.* Further, the resolution and annexes seem to envision an interim, and not a final settlement. *See* Weller, *supra* note 1, at 140 ("[T]hey are not focused on final status negotiations, but instead establish a limitation for an interim settlement in advance of a determination of final status . . . .").

1. Case Studies

a. Quebec

In 1998, the Supreme Court of Canada issued an important decision concerning the right of Quebec to secede.[183] The court stated:

> In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.[184]

The court found that none of these conditions applied to the Quebec people.[185] The people of Quebec do not qualify as colonial peoples.[186] Moreover, Quebec had not been denied internal self-determination, and the people of Quebec had not suffered oppression.[187]

The court's formulation comes close to the Remedial Model, but the latter condition offers greater clarity on a number of points. The court seemed to see the forces of oppression as external and not internal.[188] The court characterized the second condition as "where a people is subject to *alien* subjugation, domination or exploitation outside a colonial context."[189] However, in its summary, the court used alien or foreign subjugation as an example and not as a defining characteristic.[190] More importantly, the court glossed over a critical ingredient in most secession cases: internal oppression, particularly where the people are "the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights."[191] Given that the court used this internal oppression standard to evaluate whether the people of Quebec are oppressed, it stands to reason that the failure to include internal oppression was an unfortunate oversight.

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[183] Quebec Secession, *supra* note 85.
[184] *Id.* para. 138.
[185] *Id.* para. 154.
[186] *Id.*
[187] *Id.*
[188] *Id.* para. 131.
[189] *Id.* para. 133 (emphasis added).
[190] *Id.* para. 154.
[191] *Id.* para. 135.

Finally, while the court duly acknowledged the importance to a secession claim of denying internal self-determination,[192] it failed to link that factor to oppression.

The ICJ considered the question addressed in the Quebec Secession case to be significantly different from the one posed in the Kosovo case.[193] The question faced by the Supreme Court of Canada was the following:

> Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?[194]

If the issue was whether international law conferred an entitlement on entities situated within a state unilaterally to break away from it, then not only was the ICJ right to differentiate the question from the one it addressed, but also to answer in the negative. A better formulation is to ask whether international law prohibits the denial of internal self-determination. This section has argued that it does. However, if that denial is not a peremptory norm, then the claimant only has a weak case for secession, unless that denial has been egregious and nearly absolute. On the other hand, if the denial of internal self-determination combines with serious group harms, then the claimant has a strong secessionist case.

b. Biafra

The Biafra case demonstrates the need for an international appraisal of group harm. In May 1967, Biafra proclaimed secession from Nigeria,[195] initiating a thirty-month civil war that cost many lives.[196] Severe harms directed at the Ibo preceded the secession demand. In July 1966, hundreds of Ibo military officers and enlisted men were assassinated in retaliation for the

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[192] *Id.* para. 139.
[193] Kosovo Advisory Opinion, *supra* note 7, paras. 55–56.
[194] Quebec Secession, *supra* note 85, para. 2.
[195] Proclamation of the Republic of Biafra, May 30, 1967, 6 I.L.M. 665 (1967).
[196] G.W. Odling-Smee, *Ibo Civilian Casualties in the Nigerian Civil War*, 2 BRIT. MED. J. 592, 593 (1970); *see also* K.W.J. Post, *Is There a Case for Biafra?*, 44 INT'L AFF. 26, 29–30 (1968).

January 1966 coup of Ibo majors. September to October 1966 marked the period of pogroms in northern Nigerian cities,[197] resulting in the deaths of 5,000 to 50,000 Ibos and the displacement of between 700,000 and 2 million Ibos.[198]

The Biafra leadership engaged in a concerted effort to convince the international community that Biafrans were, and would continue to be, victims of genocide at the hands of the Nigerians.[199] Did Biafrans experience severe group harms, actual and threatened, that mark a threshold where secession becomes a justified demand? The multinational observer team, invited by the Federal Government of Nigeria, found no evidence of genocide,[200] while the International Committee on the Investigation of Crimes of Genocide in Paris brought forth dramatic depositions describing mass killings of civilians.[201] Although scholars generally agree with the conclusion that the charge of genocide remains unsubstantiated, the Biafra case illustrates the centrality of the issue of group harm in secession claims.[202]

2. Cases Before and After Kosovo

Two cases loom large over the Kosovo case. Bangladesh is the first of these because, of all the cases before the Kosovo case, it most clearly meets the standards of remedial secession.[203] Bangladesh does not stand as a legal precedent for Kosovo since it clearly was not presented as a case of secession at the time.[204] However, it demonstrates a factual precedent—a kind of situation where the international community should have recognized a legal

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[197] DAN JACOBS, THE BRUTALITY OF NATIONS 25 (1987).

[198] JOHN J. STREMLAU, THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967–1970, at 38 (1977).

[199] *Id.* at 113.

[200] JACOBS, *supra* note 197, at 127.

[201] Philip C. Aka, *Prospects for Igbo Human Rights in Nigeria in the New Century*, 48 HOW. L.J. 165, 201 (2004) ("The Committee interviewed 1,082 people representing all of the actors from the two sides to the civil war. Its finding, in the words of its principal investigator, Dr. Mensah of Ghana, read: 'Finally I am of the opinion that in many of the cases cited to me hatred of the Biafrans (mainly Igbos) and a wish to exterminate them was a foremost motivational factor.' " (citation omitted)).

[202] This Article has not addressed the many who died of starvation due to the politics of relief efforts. *See* JACOBS, *supra* note 197, at 108–10 (discussing starvation and relief efforts).

[203] *See* Scharf, *supra* note 140, at 383 ("As for actual State practice, the existence of a right to remedial secession is supported by the 1971 secession of Bangladesh from Pakistan . . . .").

[204] *See* CRAWFORD, *supra* note 26, at 415 (noting that only Bangladesh stands out as a clear-cut historical example of a successful secession).

right to secession. The second case, involving South Ossetia and Abkhazia, does the opposite; it highlights a case very different from Kosovo's claims.[205] This is important because, politically, it is the case that might have proven the most troublesome if Kosovo had been granted a remedial right to secession. However, as discussed below, Kosovo's case would not set a worrisome precedent for South Ossetia or for similar claims.[206]

a. Bangladesh

The East Pakistan or Bangladesh case demonstrates a model case for what a remedial right to secession should have looked like. The harms unfolded, beginning with discrimination and ending with mass displacement of people.[207] After achieving independence from India in 1947 alongside West Pakistan, the Bengali majority in East Pakistan experienced a wave of internal colonialization at the hands of the non-Bengali-speaking West Pakistanis.[208] For example, Pakistani elite launched a campaign to impose Urdu, on the East Pakistanis.[209] Bengalis were poorly represented in the military and the civil service.[210] Also, even though the East received more money for economic development than the West between 1965 and 1970, the West retained centralized control of the projects.[211] Secession demands grew in 1970 when West Pakistan helped to annul an election, in which the Awami League received massive support for its autonomy proposals.[212] As 80,000 Pakistani troops amassed to quell the secession movement, "[t]en million refugees streamed across the Indian borders, the largest such movement in a single time and place in history."[213] The Pakistani army

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[205] *See generally* Rein Müllerson, *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia*, 8 CHINESE J. INT'L L. 2 (2009) (discussing the similarities and differences between the cases).

[206] *See infra* Part II.*E.2.b*.

[207] Michael J. Toole, *Displaced Persons and War*, *in* WAR AND PUBLIC HEALTH 197, 197 (Barry S. Levy & Victor W. Sidel eds., 1997) (noting that "dramatic refugee emergencies took place in South Asia . . . when Bangladesh seceded from Pakistan").

[208] Mitra Das, *Internal Colonialism and the Movement for Bangladesh*, 12 CONTRIBUTIONS TO ASIAN STUD. 93, 96 (1978).

[209] Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321, 329 (1972).

[210] *Id.* at 328.

[211] *Id.* at 330.

[212] Niall MacDermot, *Crimes Against Humanity in Bangladesh*, 7 INT'L LAW. 476, 476 n.2 (1973).

[213] CRAWFORD YOUNG, THE POLITICS OF CULTURAL PLURALISM 488 (1976).

reportedly killed millions of Bengalis, including many civilians.[214] The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, meeting in 1971, hastily rejected requests from twenty-two NGOs and the International Commission of Jurists to examine the situation.[215] The intervention of India in December 1971 led to the formation of the new nation of Bangladesh.[216] Perhaps if the East Pakistanis had an international means of addressing discriminatory claims and autonomy demands, the mass killings and displacements of individuals because of their group status could have been abated.

East Pakistan clearly met the three conditions we have set forth for a remedial right to secession. First, no one disputes the political division of Pakistan into West and East and the relationship between these parts, thereby passing[217] the first test: Was East Pakistan a state-like territory that represented its people and sought independence from a parent state, which itself has a lawful claim on the claimant entity? Indeed, East Pakistan was a recognized and legitimate part of West Pakistan.[218] Second, did the claimant attempt to exercise internal self-determination and did the parent state seriously thwart those efforts? West Pakistan clearly denied East Pakistan's attempts to establish internal self-determination by annulling elections. Third, did the claimant suffer or was it threatened with harms that rose to the level of peremptory prohibitions? West Pakistan committed crimes against East Pakistan that constituted violations of peremptory norms.[219] While there are dangers in using one factual situation as a model, overall the more a situation resembles the plight of East Pakistan, the stronger its case for secession.

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[214] SARMILA BOSE, DEAD RECKONING: MEMORIES OF THE 1971 BANGLADESH WAR 176 (2011) (" 'Between one and three million people were reportedly killed . . . .' " (citation omitted)).

[215] U.N. Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, July 23, 1971, 24th Sess., U.N. Doc. E/CN.4/Sub.2/NGO.46; Ved P. Nanda, *A Critique of the United Nations Inaction in the Bangladesh Crisis*, 49 DENV. L.J. 53, 57–58 (1972–1973).

[216] M. Rashiduzzaman, *Changing Political Patterns in Bangladesh: Internal Constraints and External Fears*, 17 ASIAN SURVEY 793, 794 (1977).

[217] *Background Note: Pakistan*, U.S. DEP'T STATE, http://www.state.gov/r/pa/ei/bgn/3453.htm (last visited Dec. 27, 2011).

[218] *Id.*

[219] A 1972 report concluded that the "killing 'was done on a scale which was difficult to comprehend.' " NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 57 (2000) (citing Secretariat of the International Commission of Jurists, *The Events in East Pakistan: A Legal Study*, *in* REVIEW OF THE INTERNATIONAL COMMISSION OF JURISTS 8, 26 (1972)).

b. South Ossetia and Abkhazia

Both South Ossetia and Abkhazia were autonomous regions within the USSR and semi-autonomous within the former Soviet Republic of Georgia.[220] This political geography mirrors the status of Kosovo with the SFRY and Serbia. After the breakup of the USSR, both regions experienced civil wars with their parent state of Georgia, as well as periodic interventions and current occupations by Russia, which saw itself as a peacemaker in the region.[221] Both regions have become "effectively separated from the rest of Georgia."[222] The following three questions need to be posed to determine the legitimacy of the secessionist claims of South Ossetia and Abkhazia:

1. Did Georgia have legitimate legal authority over South Ossetia and Abkhazia?
2. Has Georgia seriously stifled autonomy measures and other attempts at internal self-determination by South Ossetia and Abkhazia?
3. Has Georgia committed crimes that violate peremptory norms against South Ossetia and Abkhazia?

Unlike Serbia's current claim over Kosovo, Georgia has legitimate legal authority over South Ossetia and Abkhazia. South Ossetia is an autonomous administrative district, and Abkhazia is an autonomous republic within Georgia.[223] While everyone thinks that atrocities have been committed on all sides, most analysts agree that Georgia's actions have not risen to the level of committing violation of peremptory norms.[224] However, the most critical

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[220] Edward Ozhiganov, *The Republic of Georgia: Conflict in Abkhazia and South Ossetia*, *in* MANAGING CONFLICT IN THE FORMER SOVIET UNION 341, 347, 350 (Alexei Arbatov et al. eds., 1997).

[221] Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 5 (2009).

[222] *Id.*

[223] Gerard Toal, *Russia's Kosovo: A Critical Geopolitics of the August 2008 War over South Ossetia*, 49 EURASIAN GEOGRAPHY & ECON. 670, 670 (2008).

[224] The parties have all charged each other with these grave violations. *See* Noelle M. Shanahan Cutts, Note, *Enemies Through the Gates: Russian Violations of International Law in the Georgia/Abkhazia Conflict*, 40 CASE W. RES. J. INT'L L. 281, 292 (2007–2008) (noting Abkhazia did engage in ethnic cleansing of Georgians; that Georgians made up over 50% of the Abkhazia's population before 1992, while few remain today; and that tens of thousands of South Ossetians have fled from Georgia's incursions into its territory); Gregory Dubinsky,

issue is autonomy.[225] Georgia cannot have violated internal self-determination when there have been few attempts to implement it. Admittedly, Georgia has stifled South Ossetia's and Abkhazia's attempts at external self-determination. For example, Georgia withdrew South Ossetia's autonomy status when, in 1990, South Ossetia declared independence.[226] However, the focus should be on internal self-determination. In this case, South Ossetia, Abkhazia, and Georgia need to have demonstrated good faith efforts at internal self-determination. This places the incentives exactly where they should be: on the parties to attempt to broker autonomy arrangements before any full-fledged secessionist claims are entertained.

If the party or parties want secession sanctioned by international law, they must undertake good faith efforts to exert their internal rights to self-determination. If those efforts are suppressed and the parent state perpetrates further grave harms on the claimant, then international law should recognize their right to secede. If the violations of the rights to internal self-determination become so egregious that they amount to violations of peremptory norms, then they should have a legitimate appeal within international law. In short, by adopting the Remedial Model, international law could actually play a role in averting conflicts.

III. COMPETING MODELS OF SECESSION

Territories should not be permitted to secede merely because they have the wherewithal to do so. Politically, a territory that is able to function like a state may successfully secede, but functionality should not lie at the heart of an internationally recognized legal right to secession (Functional Model).[227] Further, while cultures may be a good thing to preserve, cultural preservation should not be grounds for secession (Cultural Preservation Model).[228] Finally, economic disparity among regions of a state should not warrant secession (Economic Harms Model).[229] The Remedial Model offers distinct

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The Exceptions That Disprove the Rule? The Impact of Abkhazia and South Ossetia on Exceptions to the Sovereignty Principle, 34 YALE J. INT'L L. 241, 243–44 (2009) (noting that Russian President Medvedev has gone so far as to accuse Georgia of genocide in South Ossetia and of threatening the same in Abkhazia). *But see generally* Nicolai N. Petro, *The Legal Case for Russian Intervention in Georgia*, 32 FORDHAM INT'L L.J. 1524 (2009) (presenting the legal case for Russia's intervention).

[225] Borgen, *supra* note 221, at 4–5.

[226] Toal, *supra* note 223, at 676–77.

[227] *See infra* Part III.*B*.

[228] *See infra* Part III.*C*.

[229] *See infra* Part III.*D*.

advantages over these competitors. Basically, the Remedial Model focuses on two more fundamental values than these other models, namely, the right to internal self-determination and prohibitions against violations of peremptory norms. Before examining each of these competing models in turn, this Part begins with showing how the Remedial Model constructed here fits into an overall rights framework.

A. Remedial Model

Analyses of secession models fit into various categories.[230] The one proposed in this Article is a remedial moral claim—right to secede. The Remedial Model goes beyond proposing merely a liberty right to secede, which focuses on whether the right should be permitted.[231] Instead, the Remedial Model invokes a stronger, moral right to secede, which, unlike a liberty right, places obligations on others not to interfere with the secession process.[232] However, it goes one step further in proposing the right to secede as a claim-right.[233] A claim-right creates not only a moral obligation not to interfere but also a legal obligation to establish the right to secede in two ways. First, the international community needs to overcome the default presumption against secession. Second, it needs to establish a means to assess and recognize secession claims within an international law framework. Not all secessionist claims should be legitimized by international law, but some should be. Most importantly, secession should be thought of as a remedial, as contrasted with a primary right. Under the remedial view, "secession is justified only as a remedy of last resort for persistent and serious injustices."[234] Primary right theorists, in contrast, argue that a right to secession does not depend upon a finding of injustices.[235] They claim either that a right to secede can be made on ascriptive grounds, such as the nationality of the peoples claiming the right; on democratic, plebiscitary bases that reflect the preferences of peoples living within a territory; or on administrative grounds that simply assess the capability to function as an independent state.[236]

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[230] Allen Buchanan, *Secession*, STAN. ENCYCLOPEDIA PHIL. (2008), http://plato.stanford.edu/entries/secession/.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *See* Harry Beran, *A Liberal Theory of Secession*, 32 POL. STUD. 21, 26 (1984) (showing that liberalism requires that secession be permitted); David Gauthier, *Breaking Up: An Essay*

The Remedial Model contrasts most sharply with the ascriptive primary rights view.[237] A group can be ascribed or determined according to certain characteristics such as age, nationality, race, and ethnicity.[238] The type of group at stake in the secession debate cannot be a neutral, civic quality associated with membership *in* a state because the group claiming a right to secede makes that claim *against* a state—a claim to separate *from* a state. For example, Chechnya's claim to a right to secede from Russia is not based on their membership in the Russian state; it is based on grounds of the group identity as Chechens.[239] The same holds true of those who identify themselves as Quebecois within Canada. However, as the Canadian Supreme Court recently found, ascriptive rights to group identity are insufficient grounds for a secession claim.[240] It was not enough for the Quebecois to claim that they were a distinct group within Canada; the group also had to prove that it has been harmed.[241]

Secession rights are remedial rights invoked by a group under limited conditions to rectify harms; they are not rights that apply to all citizens in general. Philosopher Allen Buchanan has provided what is now regarded as the classic formulation of the remedial-rights justification for secession.[242]

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on Secession, 24 CAN. J. PHIL. 357, 357–58, 371 (1994) (proposing a permissive view of secession as applied to legitimate political orders); Daniel Philpott, *In Defense of Self-Determination*, 105 ETHICS 352, 352–84 (1995) (endorsing a plebiscitary rationale for secession); Christopher H. Wellman, *A Defense of Secession and Political Self-Determination*, 24 PHIL. & PUB. AFF. 142, 142–43 (1995) (analyzing when any individual or group has a moral right to secede that is grounded in political self-determination); CHRISTOPHER HEATH WELLMAN, A THEORY OF SECESSION: THE CASE FOR POLITICAL SELF-DETERMINATION 34–35 (2005) (supporting application of an administrative model to secession issues).

[237] *See* CHAIM GANS, THE LIMITS OF NATIONALISM (2003) (discussing justifications and limits of cultural nationalism from a liberal perspective); DAVID MILLER, CITIZENSHIP AND NATIONAL IDENTITY (2000) (defending active citizenship and the principle of nationality as compatible with minority rights); MARGARET MOORE, THE ETHICS OF NATIONALISM (2001) (examining the ethics of secession); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990) (discussing ways in which law and morality should interact over issues of national self-determination).

[238] *See* Margalit & Raz, *supra* note 237, at 442–47 (explaining that there are many possible ways to define a group that could qualify to exercise secession rights).

[239] *See* Mike Bowker, *Russia and Chechnya: The Issue of Secession*, 10 NATIONS & NATIONALISM 461, 463 (2004) ("In such cases [as the Chechens], living in one's own authoritarian nation-state may be perceived as preferable to being an ethnic minority in a multicultural liberal democracy.").

[240] Quebec Secession, *supra* note 85, para. 154.

[241] *See supra* Part II.*E*.*1*.*a*.

[242] The relevant works are the following: BUCHANAN, *supra* note 69; Allen Buchanan, *Liberalism and Group Rights*, *in* IN HARM'S WAY: ESSAYS IN HONOUR OF JOEL FEINBERG 1 (1994); Allen Buchanan, *What's So Special about Nations?*, *in* RETHINKING NATIONALISM 283

His approach certainly represents an improvement over many attempts by philosophers to enter the fray of international law. However, his proposal, as will be shown, proves woefully inadequate. He proposes three grounds for a remedial right to secession: (1) "large-scale and persistent violation of basic human rights"; (2) unjust annexation; and (3) "in certain cases, the state's persisting violation of agreements to accord a minority group limited self-government within the states."[243] While the analysis offered here builds on Buchanan's proposal, it differs from it in significant ways. First, it provides a narrower interpretation of injustice[244] than Buchanan's proposal does (although his latter writings lean more favorably in the direction of this analysis than his previous ones). Second, contrary to Buchanan, unjust annexation has nothing to do with secession.[245] Third, Buchanan's inclusion of autonomy needs to be recast in terms of a more fundamental right to internal self-determination.[246] Fourth, an analysis of secessionist claims needs to flesh out a more exact idea of group harms that is critical in assessing secessionist claims.[247]

The Remedial Model improves upon not only previous philosophical analyses but also legal ones. It offers an elaboration and clarification of a position defended some time ago by Hurst Hannum, a law professor who authored a classic legal text on self-determination.[248] Accordingly, to Hannum, the international community should support secession "if

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(Jocelyne Couture et al. eds., 1996); Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 30 (1997); Allen Buchanan, *Self-Determination, Secession, and the Rule of Law*, *in* THE MORALITY OF NATIONALISM 301 (Robert McKim & Jeff McMahan eds., 1997) [hereinafter Buchanan, *Self-Determination, Secession, and the Rule of Law*]; Allen Buchanan, *The International Institutional Dimension of Secession*, *in* THEORIES OF SECESSION 227 (P.B. Lehning ed., 1997); Allen Buchanan, *Democracy and Secession*, SECESSION AND NATIONAL SELF-DETERMINATION 14 (Margaret Moore ed., 1998); Buchanan, *supra* note 230; Allen Buchanan, *The Quebec Secession Issue: Democracy, Minority Rights, and the Rule of Law*, *in* SECESSION AND SELF-DETERMINATION 238–71 (Stephen Macedo & Allen Buchanan eds., 2003); ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR AN INTERNATIONAL LAW (2007).

[243] Buchanan, *supra* note 230.

[244] *See supra* Part II.*E*.

[245] *See supra* Part II.*C.1.a*.

[246] *See supra* Part II.*D*.

[247] *See supra* Part II.*E*.

[248] HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1996). Hannum seems to have recently retreated from his defense of a right to remedial secession in his most recent comments on the ICJ's Kosovo Advisory Opinion, *The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?*, 24 LEIDEN J. INT'L L. 155 (2011), wherein he never mentions remedial secession.

reasonable demands for local self-government or minority rights have been arbitrarily rejected by a central government," and when there have been "massive, discriminatory human rights violations, approaching the scale of genocide."[249] This Article has already spelled out what denials of internal self-determination and what human rights violations justify a right to secession.[250] Indeed, internal self-determination has not played the role that it should in secessionist claims. However, not every violation of human rights should be a basis for a secession claim; only grave ones (violations of peremptory norms) should be.

Overall, an injustice theory, which focuses on the wrongs in the world, provides the framework for making sense and justifying secessionist claims.[251] A classical justice approach guides us to achieving the good. In contrast, an injustice focus centers the analysis on rectifying wrongs.[252] There may be disagreements over what types of groups deserve entitlements. However, greater agreements can be forged over what harms should not befall any group. The Remedial Model focuses on injustices inflicted upon some peoples within a state.

B. Functional Model

The following section outlines the justifications for adopting a Functional Model. If a majority group occupying a definitive territory can administer itself efficiently, that alone should suffice as grounds for secession. "[A]nyone who properly values self-determination should defend the right to secede whenever both the separatist group and the remainder state would be able and willing to perform the requisite political functions."[253] A territorial group could demand secession on grounds that it can govern itself satisfactorily. Good governance would include being able to protect citizens from foreign threats. Secession under the Functional Model would not result in an unwieldy proliferation of states since only functionally efficient states would be able to secede. At best, proliferation of secession-related harms is a potential worry, and, at worst, it has no basis in reality. If a few smaller states result from secession movements amidst a sea of larger states, then that

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[249] Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, 77 FOREIGN AFF. 13, 16 (1998).

[250] *See supra* Part II.*D*.

[251] *See generally* SIMON, *supra* note 175, at 29–70 (setting forth the elements of a theory of injustice).

[252] *Id.* at 1–28 (differentiating theories of justice from theories of injustice).

[253] WELLMAN, *supra* note 236, at 34–35.

should not provide overwhelming cause for concern. Small states, such as Liechtenstein and Andorra, have fared well in Europe. Alternatively, if secessionist movements proliferate and create a world community of small states, we have little past experience upon which to base our worries. A world of small states may, for all we know, be more just than the current nation-state system.

On the surface, the Functional Model does not create problems. Territory B, which has the capability of performing efficiently as an independent state, wants to secede from State A, which brokers little opposition to the break-up. It sounds so simple. The seemingly simple, however, can be horrifyingly complex, to which the case of the former Yugoslavia attests. While the richness of the Remedial Model has been demonstrated in Part II by applying it to the complicated case of Kosovo's secessionist claims, a less complicated example—the Slovak Republic—may help here.

1. Slovakia

The case of the Slovaks illustrates a complicated relationship between the Functional and Remedial Models. First of all, critics provide incomplete and misleading pictures of the Slovak case.[254] Slovakia may have had justifiable grounds under the Functional Model for seceding from Czechoslovakia, but it did not have any strong group-harm grounds for seceding. Nevertheless, the Slovak leaders put their case for secession largely in terms of group harms.[255] Regarding group harm, the Slovaks justifiably could have claimed unfair treatment at the hands of the Czechs during the early 1920s.[256] During that period, Czechoslovakia, forced by economic conditions, curtailed production by shutting down over two hundred Slovakian plants.[257]

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[254] Wellman claims that "secessionist groups couch their appeals in these [injustice] terms in recognition that the international community is open to political reorganization only in cases of extreme injustice, and this is evidence that the [Remedial Model] leaves no room for secession grounded in self-determination." Wellman, *supra* note 236, at 147 n.7. The Remedial Model applies to questions of international intervention and does not preclude alternative grounds for secession. Without an institutional mooring, Wellman's right to secede hovers in the inapplicable philosophical air.

[255] *See* Robert Henry Cox & Erich G. Frankland, *The Federal State and the Breakup of Czechoslovakia: An Institutional Analysis*, 25 PUBLIUS 71, 84 (1995) ("Slovaks had come to identify Prague as the 'oppressor' and the federation 'as almost a Czech invention and a Czech con game, aimed at limiting Slovak autonomy.' ").

[256] *See* Katarína Mathernová, *Federalism That Failed: Reflections on the Disintegration of Czechoslovakia*, 1 NEW EUR. L. REV. 477, 479 (1993) ("[The Czechs] continued to feel unequal and were arguably often treated as second-class citizens.").

[257] Claudia Saladin, Note, *Self-Determination, Minority Rights, and Constitutional*

Subsequently, however, the Slovaks fared well in comparison to the Czechs under the communist regime.[258] For example, the Slovaks obtained "a roughly proportional share of the country's production."[259] Although the Slovaks had a more agricultural economy in comparison to the more industrialized Czechs,[260] the differences in the economies had not produced the kind of harms that would qualify the Slovaks as disadvantaged, and economic disparity between regions is not tantamount to discrimination against minorities. The Slovaks demanded recognition within the Czech and Slovak Federal Republic (CSFR) as a disadvantaged, harmed group. Yet, the Slovaks had a weak case for secession based on claims of group harm within the CSFR.

In fact, the Slovaks were a powerful and privileged minority within the CSFR. The CSFR had a population divided roughly among ten million Czechs and five million Slovaks.[261] Within the CSFR, the Slovaks had gained a great deal of power despite their numerically minority status.[262] The Slovaks demanded parity in all legislative and executive decision-making bodies on grounds of their minority status.[263] The 1968 Constitution gave the Slovaks considerable protection.[264] The bicameral legislature consisted of two houses: the Chamber of People, based strictly on population; and the Chamber of Nations, divided equally between seventy-five Czechs and seventy-five Slovaks.[265] Constitutional amendments required a three-fifths absolute majority in the lower chamber plus three-fifths of each national group in the Chamber of Nations, giving veto power to the Slovaks.[266] A minority vote of thirty-one could defeat constitutional amendments and other major legislative acts requiring a three-fifths majority,

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Accommodation: The Example of the Czech and Slovak Federal Republic, 13 MICH. J. INT'L L. 172, 200 (1991).

[258] *Id.* at 210.

[259] *Id.*

[260] Radoslav Selucky, *The Economic Equalization of Slovakia with the Czech Lands*, 3 CZECHOSLOVAK ECON. PAPERS 42, 42 (1964).

[261] "The Czechs have always outnumbered the Slovaks by more than two to one." Lloyd N. Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia:* E Duobus Unum?, 58 U. CHI. L. REV. 511, 517 (1991).

[262] *Id.* at 517–18 ("The Czechs staffed most of the administration in both regions, and in general dominated the country.").

[263] Cox & Frankland, *supra* note 255, at 79.

[264] Cutler & Schwartz, *supra* note 261, at 519.

[265] *Id.*

[266] *Id.* Ironically, the Slovaks opposed increasing the federation membership to include Monrovia and Silesia. Katarina Mathernova, *Czecho?Slovakia: Constitutional Disappointments*, *in* CONSTITUTION MAKING IN EASTERN EUROPE 57, 67 n.49 (A.E. Dick Howard ed., 1993).

and thirty-eight votes of no confidence could (and did) bring down the federal government.[267]

The 1968 Federation Act also provided parity in office holding.[268] The Constitutional Court had to be half Czech (six) and half Slovak (six)[269] and the president and vice-president of the Court had to be from different republics.[270] These structures largely remained intact following the October 1989 Velvet Revolution, a nonviolent protest against the Soviet-backed communist rulers.[271] They provided the minority Slovaks with considerable power and protection. Herman Schwartz and Lloyd Cutler said that "[they] know of no democratic government anywhere in which comparable minorities of legislative bodies can have as much blocking power."[272] The only similar federal structure is Belgium's ethnic division between the Walloons and the Flemish, but Belgium's ethnic groups have enhanced political control only over matters of language and culture that directly affect them.[273] Given their considerable power, harm and powerlessness are not qualities easily ascribed to the Slovaks in the CSFR.

Historically, the main claim that Slovaks have for group harm is at the hands, not of the Czechs, but of the Hungarians, who severely curtailed the development of Slovak cultural and political life in the nineteenth and early twentieth centuries.[274] For example, the Hungarians closed Slovak secondary schools, sharply restricted the Slovak voting rights, and did not provide for universal male suffrage.[275] Comparatively, during the same period, the Czechs received somewhat benign treatment at the hands of the Austrians.[276] For instance, in 1907, the Czechs attained universal male suffrage.[277] The Czechs also had considerably more experience than did the Slovaks at civil service positions in the government, giving them a

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[267] Cutler & Schwartz, *supra* note 261, at 519.
[268] *History: The Origins of the Constitutional Judiciary*, ÚSTAVNÍ SOUD ČESKÉ REPUBLIKY, http://www.usoud.cz/view/history (last visited Dec. 27, 2011).
[269] *Id.*
[270] Cutler & Schwartz, *supra* note 261, at 526 n.32.
[271] *See* Mathernová, *supra* note 256, at 482 (arguing that a myopic focus on the national friction between Czechs and Slovaks overshadowed more important issues).
[272] Cutler & Schwartz, *supra* note 261, at 549.
[273] *Id.* at 552 ("Each community has legislative power over ethnic issues such as education, the right to speak and address the authorities in one's own language, personal identity, and cooperation between and among communities.").
[274] Saladin, *supra* note 257, at 194.
[275] *Id.*
[276] *Id.*
[277] *Id.*

significant edge in governmental experience.[278] Overall, however, the Slovaks did not qualify as a harmed group within the CSFR.[279] As one writer stated, "[N]owhere in the history of the coexistence of these two 'nations' can one find a chapter similar to the Serb-Croatian scenario."[280] Nevertheless, the Slovaks had the wherewithal to secede and to carry out the functions of governing after secession.[281]

Does the Remedial Model presuppose the Functional Model? In other words, does the harm justification for secession depend upon an assurance that the claimant state can, in fact, perform the functions necessary for governance immediately following the secession? The answer to these questions is a hesitant "no." Functionality should not be used as a legal condition for secession, however, it should be a factor in a legal assessment. After all, international law should not be responsible for upholding the right of a claimant to secede when that claimant will in all likelihood fail as a newly independent state. The Remedial Model does integrate these concerns when it requires an assessment of the claimant's relationship to the parent state and, more pointedly, when it assesses the claimant's attempts at internal self-determination. These attempts are often thwarted when the parent state is in crisis. Potential failed states generally make little headway at internal self-determination.

Secessionist movements often involve minorities within minorities. For example, Slovakia has two significant minorities within its borders. The Slovak Republic has a sizable Hungarian minority. First, the Slovaks and Hungarians have a long history of bitterness toward one another. In the 1990s, the Slovak government's actions against its Hungarian minority caused a great deal of saber rattling between it and neighboring Hungary. The Hungarians complained of not being able to use their last names first, of the potential elimination of Hungarian-only schools, and of Slovakian road signs. The European Council, in response to the increased tension between Slovakia and Hungary, conditioned Slovakia's application for European Union membership on Slovak assurances of protections for its Hungarian minority.[282] However, the harms experienced by a second minority—the Roma—far exceed those claimed by the Hungarians.[283] The Roma suffer a

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[278] *Id.*
[279] SIMON, *supra* note 175, at 126.
[280] Mathernova, *supra* note 266, at 62 n.34.
[281] SIMON, *supra* note 175, at 127.
[282] Rachel Guglielmo & Timothy William Waters, *Migrating Towards Minority Status: Shifting European Policy Towards Roma*, 43 J. COMMON MKT. STUD. 763, 771 (2005).
[283] Margaret Brearley, *The Persecution of Gypsies in Europe*, 45 AM. BEHAV. SCI. 588

disproportionately higher rate of poverty, unemployment, hate crimes, and disease.[284] Both the Hungarians and the Roma, however, pose serious group harm issues for the Slovak Republic. Actual and potential group harm issues should trigger regional and international involvement in any secession claims. Even uncontested secession presents risks of group harm. Buchanan correctly notes that "[t]he greater the risk, the stronger the case for subjecting the secessionist efforts to the rule of international law."[285] However, he incorrectly associates an uncontested secession with a risk-free one, as the Slovak case illustrates.

There are obvious parallels between the Slovakia and Kosovo cases. The territory of Kosovo contains a sizeable and vulnerable minority population, namely, the Serbs. Kosovar Serbs have experienced considerable discrimination and violence while under the rule of Kosovar Albanians. Recently, Serbian churches, houses, and people have been attacked in sporadic incidents.[286] This creates a worry about their future treatment under an independent Kosovo, just as the European Council worried over the treatment of Hungarians in an independent Slovak Republic. This will always be a worry for anyone concerned with minority rights. However, it is important to understand what the problem with a Serb minority in Kosovo is *not*. The situation has not come to a point even approaching a case for secession of Northern Kosovo, where most Serbs reside.[287] Serbia's action against Kosovo clearly was state sponsored. While the government of Kosovo might have responsibility for not having prevented violence against its Serbian minority, there is no evidence to suggest that it directly sponsored the violence.[288] No doubt, Kosovo's de facto independence will result in more violence against Serbs, however, Kosovo must deal with that prospect directly since Kosovo contains pockets of significant Serb populations throughout its territories.

A far more vulnerable minority in Kosovo is a group that has received relatively little attention despite that their numbers almost equal those of Serbs. Some of the direst situations that Kosovo Roma find themselves in are under the auspices of the U.N. The U.N. sets and directs a housing

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passim (2001).

[284] *Id.*

[285] Buchanan, *Self-Determination, Secession, and the Rule of Law*, *supra* note 242, at 304.

[286] Mark A. Wolfgram, *When the Men with Guns Rule: Explaining Human Rights Failures in Kosovo Since 1999*, 123 POL. SCI. Q. 461, 476–77 (2008).

[287] Oisín Tansey, *Kosovo: Independence and Tutelage*, 20 J. DEMOCRACY 153 *passim* (2009).

[288] U.N. Secretary-General, *Rep. of the Secretary-General on the United Nations Interim Administrative Mission in Kosovo*, U.N. Doc. S/2007/768 (Jan. 3, 2008).

project in northern Mitrovica, where Roma live atop lead-infected slag heaps from a defunct mine.[289] Kosovo at least has tried to address the plight of the Roma since its UDL.[290]

This case study raises some troublesome issues. Should the negative treatment of minorities by a seceding territory block its secession? Should secession be conditioned on guarantees to protect minorities? Perhaps, someday, international law will recognize minority protection as a peremptory norm. However, it would be a major progressive step if, minimally, international law would fully adopt the Remedial Model of secession. By doing so, the international community would at least go on record with a commitment to protect minorities from grave harms and to map out a secessionist road to alleviate those harms. The first way to approach group harm problems within a seceding state is through minority protection measures within the new state and not as a condition for forming a state.

C. Cultural Preservation Model

Should a territory have a right to secede to preserve its culture? In the Cultural Preservation Model, the following conditions must be met:

> (1) The culture in question must in fact be imperiled.[291] (2) Less disruptive ways of preserving the culture . . . must be unavailable or inadequate. (3) The culture in question must meet minimal standards of justice . . . . (4) The seceding cultural group must not be seeking independence in order to establish an illiberal state, that is, one which fails to uphold basic individual civil and political rights, *and* from which free exit is denied. (5) Neither the state nor any third party can have a valid claim to the seceding territory.[292]

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[289] LUNCHAKORN PRATHUMRATANA ET AL., INT'L ENVIRON. RES. CTR., HEAVY METAL CONTAMINATION OF THE MINING AND SMELTING DISTRICT IN MITROVICA, KOSOVO 480 (2008), *available at* http://www.geo.sc.chula.ac.th/Geology/Thai/News/Technique/GREAT_2008/PDF/138.pdf.

[290] OFFICE OF THE PRIME MINISTER OF KOS., STRATEGY FOR THE INTEGRATION OF ROMA, ASHKALI AND EGYPTIAN COMMUNITIES IN THE REPUBLIC OF KOSOVO (Dec. 2008), *available at* http://www.roma-kosovoinfo.com/index.php?option=com_docman&task=doc_download&gid=100&Itemid=.

[291] *Cf.* Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990) (arguing that a culture need not be imperiled and that any group with certain ascriptive characteristics should have a right to secession).

[292] BUCHANAN, *supra* note 69, at 61.

A prominent and still ongoing secession movement is found in the attempts to separate Quebec from Canada. Culture has played a key role in this dispute.

1. Quebec

According to some analysts, Quebec does not satisfy conditions (1), (2), and (5).[293] However, conditions (1) and (2) are too vague. If culture had a relatively clear-cut definition, then it would be easy to specify the imperiling factors needed to fulfill the first condition. However, cultural unity depends considerably on subjective elements. A great deal of what holds a culture together depends upon the collective mindset of the culture-bearers. Many Quebecois find their culture imperiled.[294] So, whether a state has taken sufficient measure to preserve a culture is not an empirical question, but rather is roughly measurable in objective terms. The situation becomes further complicated by the fact that imperiling forces often serve to strengthen cultures, or, at least, to bolster the way people think about their culture. With respect to condition (2), some Quebecois saw secession as the only alternative.[295] In 1995, Quebec narrowly defeated a referendum for Quebec' secession from Canada.[296] If culture preservation makes up the goal of secession, then subjective factors become telling.

However, cultural preservation alone does not justify secession. Many aspects of a culture (but not all) and many cultures (but not all) merit preservation. For example, a culture that engages in genocide would not be worthy of preservation. Many of us (but not all) cherish the opportunity to observe and participate in the diverse activities of other groups. However, the parenthetical qualifiers raise warning signals. Passing over those cultures designated as "illiberal"—ones that violate liberal values of individual freedoms—poses more problems than it solves.[297] How illiberal? Does a single practice, such as female genital mutilation, make a culture illiberal?

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[293] *See, e.g.*, *id.*

[294] Stephen Alvstad, Note and Comment, *The Quebec Secession Issue, with an Emphasis on the "Cultural" Side of the Equation*, 18 TEMP. INT'L & COMP. L.J. 89, 91–92 (2004).

[295] Emmanuelle Richez & Marc Andre Bodet, *Fear and Disappointment: Explaining the Persistence of Support for Quebec Secession*, 22 J. ELECTIONS, PUB. OPINIONS & PARTIES 1 (2012).

[296] Alvstad, *supra* note 294, at 96.

[297] *See* Gerald Doppelt, *Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka, Taylor, and Nussbaum*, 12 J. CONTEMP. LEGAL ISSUES 661, 662 (2002) (finding multicultural liberalism wanting in its position on illiberal groups).

Assuming we can fill in the details of conditions of illiberal cultures, further problems arise. Preserving a culture is not an entirely innocent activity. It involves a twofold homogenization process. First, campaigns to preserve culture promote single interpretations of the culture. Diversity within the culture becomes discouraged in the name of establishing or reestablishing the culture. Second, bringing one culture into ascendancy tends to lead to devaluing other cultures. The devaluation does not occur "by necessity." However, when preserving a culture comes to the forefront of political and social consciousness, a culture strengthens relative to its proponents setting themselves apart from other cultures.[298] Movements to preserve a culture do not always lead to more toleration of other cultures.[299]

However interesting and valuable any given culture might be, no culture, in absence of harm, is valuable enough to trigger international protection of it through state secession. To take an approach committed to the preservation of all cultures would place the international community in the unwelcome position of designating some cultures and their practices as worthy of protection and others as not as worthy. Further, the quest to protect one culture may adversely affect another culture, resulting in a domino effect of unintended consequences. For example, Quebec's quest for an independent state may come at the expense of its indigenous Cree population, a tribe of indigenous peoples located in northern Quebec.[300] This does not mean that, even in the absence of a strong showing of group harm, Quebec should be denied the possibility of secession. If a referendum succeeds in Quebec, then, *ceterus paribus*, international law should not serve as an impediment to consensual secession. Severe group harm should trigger international adjudicatory intervention and open the possibility of an internationally legally sanctioned remedy of secession following the steps outlined in the Remedial Model.

The discussion thus far has assumed that we understand the meaning of culture. What other grounds might demarcate one culture from another besides language? Except for aspects of language, the secessionist case for Western Canada resembles Quebec's.[301] With its frontier mystique, a

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[298] Thomas W. Simon, *Groups: Rights, Wrongs, and Culture*, *in* GROUPS AND GROUP RIGHTS 96, 107 (Christine Sistare et al. eds., 2001).

[299] *See* Introduction: Reasonable Tolerance, *in* THE CULTURE OF TOLERATION IN DIVERSE SOCIETIES (Catrionia McKinnon & Dario Castiglione eds., 2003) (noting the tension between liberal societies and their practices of toleration).

[300] *See generally* Douglas Sanders, *If Quebec Secedes from Canada Can the Cree Secede from Quebec?*, 29 U. BRIT. COLUM. L. REV. 143 (1995) (examining whether Quebec's secession from Canada would allow the indigenous peoples of Quebec to secede from Quebec).

[301] Greg Craven, *Of Federalism, Secession, Canada and Quebec*, 14 DALHOUSIE L.J. 231,

kaleidoscopic population (French and English groups constitute less than 50% of the population), stereotypic farm-hick-parochial-clod image, historical grievances (including, unlike other provinces, the denial of control over land and resources), and economic discrimination stemming from the National Policy of 1879, Western Canada has grounds to call itself a separate culture.[302]

The case for cultural preservation strengthens when tied to group harm. If Quebec could show that its culture became imperiled because of a discriminatory disparate impact experienced by its citizens in their capacity as Quebecois and that group harm continues to manifest itself, then Quebec would have a stronger case for justifying secession than if it based its claim primarily on grounds of cultural preservation. Whatever we might think about preserving a particular culture, the case for preservation becomes particularly acute when preservation is linked to systematic harm directed at the group. Not all threats to a culture constitute harms. For instance, Canada could refuse to provide enough funds for French films or could torture Quebecois because of their group affiliation. The first activity might threaten Quebec's culture; the second constitutes group harm. Absent a showing of severe group harm, neither Quebec nor Western Canada has a strong case for a legally cognizable right to secession. Surprisingly, the Crees do not have a particularly strong case of group harm vis-à-vis Quebec. The Crees have legitimate complaints against the Quebecois for past actions, but many of these have been rectified.[303] The primary charge by the Crees against Quebec is the denial of their right of self-determination and their right to stay within Canada if Quebec seceded.[304] The Crees have legitimate complaints. The indigenous status of the Crees further complicates the case since international law has come to analyze indigenous peoples differently than, for example, minorities. Nevertheless, the Crees would not have a strong group harm case.

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238 (1991–1992).

[302] *See generally* Don Ray & Ralph R. Premdas, *The Canadian West: A Case of Regional Separatism*, *in* SECESSIONIST MOVEMENTS IN COMPARATIVE PERSPECTIVE 196 (Ralph R. Premdas et al. eds., 1990) (detailing case studies of secession movements around the world).

[303] Matthew Coon Come, *The Status and Rights of the James Bay Crees in the Context of Québec Secession from Canada*, 6 CONST. F. 24, 27 (1994) ("[I]t is specifically recognized that the Parliament and the Government of Canada have a 'special responsibility' to the Crees.").

[304] *See* GRAND COUNCIL OF THE CREES, SOVEREIGN INJUSTICE: FORCIBLE INCLUSION OF THE JAMES BAY CREES AND CREE TERRITORY INTO A SOVEREIGN QUÉBEC 32–36 (1995) (exploring the case for the secession of indigenous peoples from Quebec).

Thus, the Remedial Model assimilates those aspects of cultural preservation that connect to harm and rejects claims that see culture as the sole or primary phenomenon in need of protection.

D. Economic Harms Model

Are there other kinds of harms, other than the discriminatory harms used in the Remedial Model, that justify secession? History has provided a number of secessionist claims based on alleged economic unfairness. In these cases, one region will claim that it produces a significant portion of a country's wealth without receiving back its rightful share from the central government. Buchanan defined this discriminatory redistribution as "implementing taxation schemes or regulatory policies or economic programs that *systematically work to the disadvantage of some groups, while benefiting others, in morally arbitrary ways*."[305] He found that

> there may well be cases in which it is justifiable for the better off to secede simply in order to pursue their prosperity more effectively, unimpeded by the constraints that being in the same state with the worse off has imposed on them, without basing their justification for secession on any charge that they, the better off, have suffered injustice.[306]

Buchanan cited two modern day examples where the Katangan and Biafran "haves" tried to sever ties from their respective "have-nots."[307]

1. Katanga

In 1960, the newly declared independent Republic of Congo immediately faced a secessionist movement by its southern-most province, Katanga.[308] With only 13% of the Congo's population, Katanga had most of the country's wealth.[309] Yet, it "contributed 50 percent of the Congo's total

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[305] BUCHANAN, *supra* note 69, at 40.
[306] *Id.* at 120.
[307] *Id.* at 114.
[308] *Id.* at 21–22 (characterizing the Katanga case as a state emerging out of anarchy and not secession); *see also* CATHERINE HOSKYNS, THE CONGO SINCE INDEPENDENCE, JANUARY 1960–DECEMBER 1961 (1965).
[309] René Lemarchand, *The Limits of Self-Determination: The Case of the Katanga Secession*, 56 AM. POL. SCI. REV. 404, 405 (1962).

revenues and received only 20 percent of total government expenditures."[310] Katanga's status as a wealthy region cannot be severed from past injustices, from its "unsavory associations with neocolonialism and mining interests."[311] Katanga asked the African Commission on Human and People's Rights to recognize its UDL.[312] The Commission ruled:

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government . . . the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[313]

In other words, in the absence of a showing of denial of internal self-determination and group harms, Katanga lost its secessionist bid. The U.N. became immersed in the controversy, ultimately helping to stifle Katanga's secessionist aspirations.[314]

2. Biafra

Biafrans clearly held the wealth, especially relative to the rest of Nigeria. With only "22 percent of the Nigerian population, [Biafra] contributed 38 percent of total revenues, and received back from the government only 14 percent of those revenues."[315] The U.N. and the international community carefully avoided direct action in the Biafran war.[316] However, upon closer inspection, the international community refused to aid directly the have-nots. For although the Biafrans held the wealth, the Ibo—the only Biafrans,

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[310] BUCHANAN, *supra* note 69, at 41.
[311] YOUNG, *supra* note 213, at 81.
[312] Afr. Comm'n on Human and Peoples' Rights, Eighth Annual Activity Rep. of the Comm'n on Human and Peoples' Rights: 75/92, Katangese Peoples' Congress v. Zaire, para. 6 (June 26–28, 1995), *available at* http://old.achpr.org/English/activity_reports/8th%20Activity%20Report.pdf; *see also* Onyeonoro S. Kamanu, *Secession and the Right of Self-Determination: An O.A.U. Dilemma*, 12 J. MOD. AFR. STUD. 355, 374 (1974); CRAWFORD YOUNG, POLITICS IN THE CONGO: DECOLONIALIZATION AND INDEPENDENCE 325–30 (1965).
[313] Afr. Comm'n on Human and Peoples' Rights, *supra* note 312.
[314] David N. Gibbs, *Dag Hammarskjöld, the United Nations, and the Congo Crisis of 1960–1: A Reinterpretation*, 31 J. MOD. AFR. STUD. 163, 167–69 (1993).
[315] BUCHANAN, *supra* note 69, at 41.
[316] Ijalaye, *supra* note 74, at 556.

arguably, to have experienced group harm, and the only strong supporters of secession—did not.[317]

Claims of economic misdistribution should not become legally enforceable grounds for secession. Secession should be a tool to help remedy the plight of the disadvantaged under certain circumstances—it should not become another means to advance the cause of the advantaged.

IV. LEGAL FORUMS FOR SECESSIONIST CLAIMS

As argued in the previous Part, none of the usual grounds for secession—state administrative capability, preservation of culture, or economic harm—successfully justifies a secessionist claim. Rather, any adjudicatory regime for addressing secession must first focus on the harms alleged by the seceding territory. What legal forums are there for adjudicating secessionist claims?

Questions of self-determination and secession often resolve themselves in the political or military arenas with force playing a major role in the resolution.[318] Do groups have any other way to resolve their disputes? If groups have opportunities to express their grievances in an adjudicatory forum, perhaps there would be a drop in the incidences of group violence. However utopian, it is important to propose theoretical justifications for and structures of an international adjudicatory system. Obviously, the world needs alternatives to violent group conflicts. Could some groups have avoided the hatred and the violence if they had other avenues of expressing their grievances? Perhaps those individuals who were discriminated against because of their perceived group affiliation could have found an international forum to hear their grievances when their state system failed them. Perhaps an adjudication that took place outside the bounds of the state could sanction greater autonomy for the group within a state. Perhaps an international judicial body could hear a case concerning secession before the grievances reached a breaking point.

Pie-in-the-sky legalism is contrary to a realist position, which rules out morality, that sees little or no role for law in questions of secession or, for that matter, in issues of self-determination.[319] Realists argue that states obey

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[317] I owe this point to Professor Crawford Young.

[318] *See, e.g.*, David A. Koplow, *Tangled Up in Khaki and Blue: Lethal and Non-Lethal Weapons in Recent Confrontations*, 36 GEO. J. INT'L L. 703, 769–70 (2005) (referring to the violent secessionist movement between Chechnya and Russia).

[319] *See, e.g.*, JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 126 (1986) (discussing legalism and noting realists' tendency to divorce morality from the law).

international law only out of self-interest.[320] Yet, appeals to law seem unavoidable, especially if "law" is defined broadly as a set of rules and mechanism for adjudicating disputes. Adjudicatory institutions are well suited to make decisions about harms. Thus, this Part explores the feasible judicial approaches to secessionist claims, other than the ICJ advisory opinion route that this Article has focused on so far. Secession claims primarily have employed the language of law.[321] Even if putting the claims in legal terms does not have a major impact on events, the resulting legal analyses should set the framework for evaluating the actions: Is a secessionist movement making legally and morally legitimate demands? Further, are those demands defensible within a justifiable theory of international law? What are the legally cognizable moral grounds for secession? What international institutions should adjudicate these claims?

The answers to these questions lie partially in which grounds fail as justifications for secession. Legal theorists were among the first to direct scholarly attention to the legal principles underlying secession.[322] Political philosophers have recently devoted considerable attention to moral justifications of secession.[323] Some have complained, however, that the current moral discussions have limited application.[324] The Remedial Model meets the challenge by constructing morally sound principles that could be realistically implemented into international law.[325] This pushes the discussion a step beyond where legal theorists and political philosophers have taken it thus far. Theorists, to date, have only hinted at how to operationalize, within current international institutional structures, the moral justifications for secession.[326] The relatively unknown Human Rights

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[320] JACK DONNELLY, REALISM AND INTERNATIONAL RELATIONS 44 (2000); *see also* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 91 (1979) ("International politics is more nearly a realm in which anything goes."). For a recent controversial realist work, see JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005). For a critique of realism, see BUCHANAN, *supra* note 140, at 30–31.

[321] *See supra* Part II.*C.1*.

[322] *See* SECESSION AS AN INTERNATIONAL PHENOMENON: FROM AMERICA'S CIVIL WAR TO CONTEMPORARY SEPARATIST MOVEMENTS 8 (Don H. Doyle ed., 2010) [hereinafter SECESSION AS PHENOMENON] (noting that philosophers were considering the ethical implications of secession in the 1990s while legal scholars and political theorists considered the legal aspects). For an extensive list of legal works that defend a remedial right to secession see Antonello Tancredi, *A Normative 'Due Process' in the Creation of States Through Secession*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES, *supra* note 28, at 171, 176 n.13.

[323] *See* SECESSION AS PHENOMENON, *supra* note 322.

[324] David Gauthier, *Breaking Up: An Essay on Secession*, 24 CAN. J. PHIL. 357, 357 (1994).

[325] *See infra* Part IV.*B*.

[326] Buchanan, despite his call for an institutional morality, has little to say about the

Committee (HRC) holds promise as an arbiter of secession disputes, but the Committee for CERD can make an even stronger case.

Before embarking on this ambitious project, there are concerns that the entire enterprise engages the issues too late (or too early), operates at a level too global and too unrealistic, and analyzes primarily historical rather than current cases. First, critics claim that questions about secession for outsiders come either too late or too soon.[327] Outsiders debate secession issues either after the fact (when it is too late to change) or before the fact (when it is too early for outside interference).[328] In response to this concern, the Remedial Model attempts to stake out a middle ground by paving the way for secessionists' claims to become part of a reasonable debate outside the confines of the state. The project may begin to make more sense and to be more worth undertaking if secession issues are seen as occupying a middle ground between discrimination and genocide. Although, however ineffective at present, some regional and international mechanisms already exist for addressing discrimination against a group outside the state where the discrimination takes place.[329] Taking the next step toward entertaining secessionist's claims just may prevent, lower the probability, or stave off the worst group harm—genocide. Second, critics argue that an international focus on secession claims bypasses more effective and more realistic local and regional approaches to addressing the issues.[330] However, the Remedial Model does not rule out similar or complementary approaches proposed at local, intrastate, or regional levels. Whatever progress unfolds at other

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institutional instantiation of his principles for secession. He hints at the role of the World Court (the ICJ) but ignores the problem of overcoming the fact that Article 34 of the Court's statute dictates that "[o]nly States may be parties in cases before the Court." Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993; *see generally* Buchanan, *Self-Determination, Secession, and the Rule of Law*, *supra* note 242.

[327] *See generally* Donald L. Horowitz, *The Cracked Foundations of the Right to Secede*, 14 J. DEMOCRACY 5 (2003) (arguing that secession is rarely a sound option, that having a specific secession remedy available may hinder parties' consideration of alternative resolutions, and that too limited a secession right may perpetuate oppression by allowing the majority's hostility to continue so long that the minority seeks vengeance).

[328] *Id.*

[329] *See* LERNER, *supra* note 176, at 30–31 (noting that examples include: "[t]he European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14), the American Declaration of the Rights and Duties of Man (Preamble, Article II), the American Convention on Human Rights (Articles 1 and 24), and the African Charter on Human and People's Rights (Articles 2, 3, and 19)").

[330] *See, e.g.*, Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 INT'L J. CONST. L. 553, 581 (2008) (advocating the use of procedural secession, which allowed for the "velvet divorce" of the Czechs and the Slovaks).

levels, the international one plays a crucial role. An international structure has the advantage of having less at stake in a secessionist issue by being the furthest removed from the conflict. Third, a critic might charge that the analysis provided here is too remote because it concentrates on ethical justifications and on historical cases. However, historical cases provide an opportunity to construct and defend a sound ethical and legal framework, providing the foundation for answers to current crises. There are two viable U.N. treaty bodies that are likely places to begin implementing the Remedial Model. While the HRC is more established, CERD has a stronger philosophical and legal basis for addressing secession and its attendant claims.

A judicial approach to secession should be substantive and not merely procedural. In a procedural model, a group need only meet specified procedure hurdles (for example, three quarters of the residents of the seceding territory must vote for secession after a designated waiting period) to invoke a right of secession.[331] In a substantive model, a group must prove substantive claims, such as harm to its members.[332] Contrary to the arguments of some commentators,[333] courts are not more likely to exhibit a bias under the substantive than under the procedural model since national courts are creatures of the state whose sovereignty is challenged by substantive claims challenge. Further, an external, regional, or international adjudication would more likely exhibit independence than an internal, state court since these would have less vested in the particular secession issue. An international tribunal should adjudicate substantive secession claims, particularly since, presumably, it would have the least amount of vested interest in the controversy. How could this take place within existing international structures? Between the two most viable candidates—the HRC and CERD—among the human rights treaty bodies, the latter has a stronger case.

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[331] *See id.* at 578 (noting the secession example of Serbia and Montenegro, which democratized secession and made it a legal, rather than political, issue).

[332] *Id.* at 579.

[333] For example, Buchanan sees the potential for biased referees as tipping the scales in favor of a procedural model of a constitutional right to secede over a substantive one. BUCHANAN, *supra* note 69, at 138–39. But the independent-international mechanism proposed here would counter the biased referee problem.

A. The Human Rights Committee

The HRC, formed in 1977,[334] has jurisdiction to hear complaints about the right to self-determination.[335] States do not have representatives on the HRC, rather, states elect HRC members from a list of qualified nominees.[336] This gives the HRC some measure of independence from its sponsoring states.[337] The HRC operates by consensus and issues opinions on complaints, although provisions exist for appending individual opinions to cases brought before the HRC.[338] Article 1 of both the ICCPR and the ICESCR states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[339]

Interpretations must operate within the confines of this language, and nothing precludes an expansive reading of "peoples," that would take it outside of the colonial context.[340] As developed thus far, self-determination has been developed in the context of decolonization, but that does not rule out a more expansive interpretation in the future.[341] If a minority constituted a "people," then it would qualify as a candidate for self-determination. Once minorities are recognized, then the remedial road to secession begins with harms to them established under Article 26, which protects persons from discrimination[342]—most pointedly, harms that undermine the minority's right to "freely determine their political status and freely pursue their economic, social and cultural development."[343] In other words, secession could remedy harms that undermined internal self-determination.[344] The structure of the

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[334] ICCPR, *supra* note 84, art. 28 ("There shall be established a Human Rights Committee . . . ."); see generally YOGESH TYAGI, THE UN HUMAN RIGHTS COMMITTEE: PRACTICE AND PROCEDURE (2011) for a comprehensive study of the Human Rights Committee's procedures and practices.

[335] Robert McCorquodale, *Human Rights and Self Determination*, *in* THE NEW WORLD ORDER: SOVEREIGNTY, HUMAN RIGHTS, AND THE SELF-DETERMINATION OF PEOPLES 9, 13 (Mortimer Sellers ed., 1996).

[336] ICCPR, *supra* note 84, arts. 28–32.

[337] Rep. of Human Rights Comm. at 89, 53d Sess., Sept. 15, 1998, U.N. Doc. A/53/40 (1998).

[338] Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302 [hereinafter Optional Protocol].

[339] ICCPR, *supra* note 84, art. 1, para. 1; ICESCR, *supra* note 84, art. 1, para. 1.

[340] MALCOLM N. SHAW, INTERNATIONAL LAW 257 (6th ed. 2008).

[341] *Id.*

[342] ICCPR, *supra* note 84, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. . . .").

[343] *Id.* art. 1, para. 2.

[344] *See supra* Part II.*D.*

HRC and the language of the ICCPR do not impede implementation of the Remedial Model.

1. Reporting

Article 40 of the ICCPR requires states to report to the HRC, and this is the only reporting obligation states adopt after ratifying the ICCPR.[345] State parties must describe measures taken to implement rights, including the right to self-determination, contained in Article 1 of the ICCPR.[346] The ensuing constructive dialogue between the HRC and the reporting state[347] could open a consideration of conditions for internal self-determination. The HRC has established a five-year cycle for submitting reports after the first report after ratification.[348] Supplemental reports could help to maintain the dialogue between a state and the HRC.[349] Because the HRC has no fact-finding powers itself, it should make more extensive use of other agencies and of NGOs. Although the HRC technically is not a part of the U.N., it does submit an annual report to the Economic and Social Council of the U.N. General Assembly.[350]

To date, few countries have even referred to Article 1 in their reports and when they do, they only address the issues in vague terms.[351] Specific recommendations need to be addressed to state parties. The HRC continues to miss opportunities by providing only definitions and guidelines in its commentaries on the reports. An indication of how a report could open a dialogue about potential secession issues came when Mrs. Higgins, during consideration of Senegal's report, " 'sought more specific information about demands for autonomy in Casamance, which the Senegal government seemed inclined to interpret as a demand for secession that must be opposed.' "[352] The report could open the doors to a discussion of a country's minority problem.

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[345] ICCPR, *supra* note 84, art. 40.
[346] *Id.* arts. 1, 40.
[347] *Id.* art. 40.
[348] U.N. HRC, *Decision on Periodicity*, para. 2(a), U.N. Doc. CCPR/C/19/Rev.1 (Aug. 26, 1983).
[349] The HRC can request supplemental information. Human Rights Comm., Rules of Procedure of the Human Rights Comm., r. 71(2), U.N. Doc. CCPR/C/3/Rev.9 (Jan. 13, 2011).
[350] *Id.* r. 63; ICCPR, *supra* note 84, art. 45.
[351] HANNUM, *supra* note 248, at 41.
[352] DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 268 n.115 (1991) (citation omitted).

2. Complaints

The Optional Protocol to the ICCPR, which provides an inquiry and a complaints procedure, allows the HRC to hear individual complaints.[353] The HRC has registered fewer than 600 communications in more than fifteen years of work.[354] NGOs have not been granted the right to petition the HRC.[355] While carrying considerable moral authority, the HRC issues nonbinding opinions ("views") on complaints.[356] An opinion includes "non-binding recommendations."[357] Individual complaints of discrimination take on critical importance, particularly if failure to address them might engender recourse to violence.

The HRC has rejected complaints by groups. It came close to allowing group representatives to make group harm claims under the Optional Protocol in *A.D. v. Canada*.[358] There, it denied the admissibility of the claim of the Grand Captain of the Mikmaq tribal society that the Mikmaq were denied the right of self-determination because of harmful policies inflicted upon them by the Canadian government.[359] The HRC found that he had not been authorized to serve as a representative of the Mikmaq and that he had not demonstrated that he was personally a victim of any right protected by the ICCPR.[360] The first part of the HRC's approach makes good sense. The HRC needs to determine whether someone truly represents the group. However, being a group representative does not entail personal injury. The issue is not individual harm to the group representative, it is harm to members of the group because of their group status. Unfortunately, in a subsequent case—*Lubicon Lake*—the HRC effectively severed the right of self-determination from the complaint process under the Optional Protocol.[361] The HRC has moved to an interpretation whereby it regards the Optional Protocol as covering complaints by individuals *qua* individuals,

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[353] Optional Protocol, *supra* note 338, art 1.

[354] Jack Donnelly, *The Past, The Present, and the Future Prospects*, *in* INTERNATIONAL ORGANIZATIONS AND ETHNIC CONFLICT 48, 55 (Milton J. Esman & Shibley Telhami eds., 1995).

[355] *Id.*

[356] TYAGI, *supra* note 334, at 587–88.

[357] *Id.* at 587.

[358] A.D. v. Can., Human Rights Comm. Decision on Inadmissibility, at 200, U.N. Doc. A/39/40 (Sept. 20, 1984).

[359] *Id.*

[360] *Id.*

[361] Lubicon Lake Band v. Can., Human Rights Comm. Views Under Article 5 Paragraph 4 of the Optimal Protocol, at 1, U.N. Doc. Supp. No. 40 A/45/40 (Mar. 26, 1990).

whereas Article 1 of the ICCPR deals with rights conferred upon people as such.[362] Again, nothing precludes the HRC from rescinding this position and entertaining claims of harm to group members brought by group representatives.

3. Arbitration and Advisory Opinions

The HRC can employ a two-step arbitration procedure. First, the HRC can exercise its "good offices," whereby the services of the HRC are offered to the parties in order to achieve a friendly solution to the dispute.[363] Second, an ad hoc Conciliation Commission, "consist[ing] of five persons acceptable to the State Parties concerned," can address the matter.[364] Obviously, arbitration has great potential for preventing disputes from escalating into violence. Unfortunately, the HRC does not have authority to issue advisory opinions.[365] If the U.N. General Assembly has so authorized, "organs of the United Nations and specialized agencies . . . may also request advisory opinions of the [ICJ]."[366] Provisional measures also can be sought from the ICJ.[367] For example, in 2008, to preserve its rights under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[368] the Republic of Georgia filed a request from the ICJ to take provisional measures under Article 41 to use force against the Russian Federation for the latter's role in ethnic discrimination and ethnic cleansing.[369] The ICJ granted the request for provisional measures.[370]

4. Remedies

The HRC does not have a sterling record of compliance with its decisions.[371] "Until 31 July 2009, eleven State parties (Botswana, the CAR,

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[362] *Id.*
[363] ICCPR, *supra* note 84, art. 42, para. 1(a).
[364] *Id.* para. 1(b).
[365] TYAGI, *supra* note 334, at 587–88.
[366] U.N. Charter art. 96.
[367] *Id.* art. 40.
[368] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].
[369] Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), 2008 I.C.J. 353, 355 (Oct. 15) [hereinafter Georgia ICJ Case].
[370] *Id.* para. 148.
[371] Thomas Buergenthal, *The U.N. Human Rights Committee*, 2001 MAX PLANCK Y.B. U.N. L. 341, 375 (Jochen A. Frowein & Rüdiger Wolfrum eds.) ("Roughly 30 per cent of the

the DRC, Equatorial Guinea, the Gambia, Namibia, Panama, the Sudan, the Former Yugoslav Republic of Macedonia, Yemen and Zambia) failed to submit the requisite information."[372] In contrast, Canada, Denmark, France, Jamaica, Mauritius, the Netherlands, and the Scandinavian countries have cooperated. The HRC has not adopted any supervisory or enforcement mechanisms. With this relatively dismal record, how can anyone expect the HRC to play an even greater role in international law, particularly with regard to a radical remedy like secession?

The study of international law and international organizations has been plagued by the failure to dream. The HRC receives little publicity, and its decisions have not stimulated many prescriptive discussions over what role it should play. Grand dreams should be encouraged within the confines of detailed institutional mechanisms. In this context, a secession remedy does not seem as far-fetched as it first looks. The forces directing a group toward secession do not operate in isolation. Lesser forms of discrimination often serve as early warning signs. The state, for example, takes action against individuals because of their minority status by refusing them public housing. Recognizing the possibility of secession puts debates over remedying group harms in a new light. It gives them a sense of importance and urgency. Secession comes as a remedy of last resort when other forms fail. Compliance with it depends upon the history of previous attempts to address the grounds for secession. The opinion of an independent adjudicatory body like the HRC would lend credence to or help undermine support for a secessionist claim.

B. Committee on the Eradication of Racial Discrimination

Human rights law seems like a hodgepodge of ad hoc measures cobbled together to make it look like the international community is responding to conflicts. However, there is supposed to be an underlying logic and order to international law. First, nations come together to agree on basic principles.[373] The principles set forth in these declarations are aspirational,

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replies received could be considered satisfactory in that they display the State party's willingness to implement the Committee's Views or to offer the applicant an appropriate remedy."). Follow-up procedures have improved since the HRC appointed one of its members as its Special Rapporteur for Follow-Up on Concluding Observations in 2002. TYAGI, *supra* note 334, at 264–68.

[372] TYAGI, *supra* note 334, at 265.

[373] U.N. General Assembly resolutions and declarations are not binding. U.N. Charter arts. 4, 10–12; *see also* GERHARD VON GLAHN & JAMES LARRY TAULBEE, LAW AMONG NATIONS 399 (9th ed. 2010) ("As a General Assembly Resolution, the UDHR stands as a statement of

expressing the hopes and expectations of the direction that international law will take.[374] Only when codified in the form of treaties, in the second stage, do these declarations of principles take on the force of law.[375] Creating institutions to implement the treaties marks the final stage when nations sign onto optional protocols within a treaty.

The adoption of ICERD followed this orderly progression.[376] It was the first human rights treaty to codify a portion of the 1948 Universal Declaration of Rights, coming into force in 1969.[377] ICERD, unanimously adopted by the U.N. General Assembly on December 21, 1965, ranks as one of the most widely supported human rights treaties[378]—173 nations have ratified it.[379] Further, it was the first human rights treaty to set up a monitoring mechanism.[380] Its Committee (CERD) periodically reviews reports from the State Party members to the treaty.[381] CERD has the shortest reporting period—two years—as compared to four or more years for other treaty monitoring bodies.[382] Given this shorter reporting period, CERD examines a relatively large number of state reports each year.[383]

Under Article 14, individuals may submit complaints to CERD.[384] Article 14

> establishes a procedure that makes it possible for an individual or a group of persons claiming to be the victim of racial

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desired goals rather than black letter, substantive law.").

[374] GLAHN & TAULBEE, *supra* note 373, at 399.

[375] The International Law Commission, created in 1947 by the U.N., which plays a critical role in drafting multilateral treaties, defines codification as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine." U.N. Secretary-General, *Survey of International Law*, at 3, U.N. Doc. A/CN.4/1/Rev.1 (Feb. 10, 1949).

[376] ICERD, *supra* note 368; *see* Hadar Harris, *Race Across Borders: The U.S. and ICERD*, 24 HARV. BLACKLETTER L.J. 61, 62–63 (2008) (examining the U.S. government's actions with respect to CERD).

[377] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 2, 7, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). For an overview of the implementation of the ICERD, see Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUM. RTS. L. REV. 239 (2005).

[378] Vernellia R. Randall, *Racial Discrimination in Health Care in the United States as a Violation of the International Convention on the Elimination of All Forms of Racial Discrimination*, 14 U. FLA. J.L. & PUB. POL'Y 45, 47 (2002).

[379] Harris, *supra* note 376, at 62.

[380] *Id.*

[381] ICERD, *supra* note 368, arts. 8, 9.

[382] HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 920 (3d ed. 2008).

[383] *Id.*

[384] ICERD, *supra* note 368, art. 14.

> discrimination to lodge a complaint with the Committee on the Elimination of Racial Discrimination against the State concerned. This may only be done if the State is a party to the Convention and has declared that it recognizes the competence of CERD to receive such complaints.[385]

Fifty-three State Parties recognize the competence of CERD to hear individual complaints.[386] ICERD also has a provision for state-to-state complaints.[387] Unfortunately, CERD decides only a few cases each year.[388]

Despite its name, ICERD does not attend only to racial discrimination. ICERD's Article 1 contains a broad definition of discrimination:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[389]

Given this broad definition of discrimination, it is not surprising that CERD has addressed a wide range of group harms, from the ethnic violence in Africa's Great Lake Region to the illegal Israeli settlements in the Occupied Palestinian Territories.[390] Also, the standard recognized by CERD, since its inception, includes both intentional and disparate impact

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[385] *Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination: Overview of Procedure*, OFF. UNITED NATIONS HIGH COMM'R FOR HUM. RTS, http://www2.ohchr.org/english/bodies/cerd/procedure.htm (last visited Dec. 27, 2011); ICERD, *supra* note 368, art. 14.

[386] THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 433 (Ruth Mackenzie et al. eds., 2d ed. 2010).

[387] ICERD, *supra* note 368, art. 11.

[388] STEINER ET AL., *supra* note 382, at 920 (noting, for example that CERD only decided six cases in 2005 and 2006 combined).

[389] ICERD, *supra* note 368, art. 1.

[390] *See* MINORITY RIGHTS GRP. INT'L, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2011), *available at* http://www2.ohchr.org/english/bodies/cerd/docs/ngos/MRGI_Rwanda_CERD78.pdf (an NGO shadow report on Rwanda); Comm. on the Elimination of Racial Discrimination, Rep. on Measures Taken to Guarantee the Safety and Protection of the Palestinian Civilians in the Occupied Palestinian Territory: Israel. 05/03/1995, U.N. Doc. CERD/C/282 (May 3, 1995).

discrimination.[391] CERD does not require proof of intentional or purposeful discrimination; the complaint merely needs to show discriminatory effect.[392]

Some U.N. treaty bodies, such as the Committee Against Torture and the Committee on Enforced Disappearances, focus on certain kinds of harms such as discrimination,[393] but CERD does not focus simply on one form of group harm.[394] More importantly, CERD recognizes connections among group harms, ranging from discrimination to genocide.[395] This has something to do with the origins of ICERD. ICERD was introduced as a response to a wave of anti-Semitic incidents.[396] CERD sees itself as charged with preventing and ending discrimination, ethnic cleansing, and other group harms that could turn into genocide.[397] CERD has developed an early warning and urgent action procedure on patterns of oppression that may lead to greater violence or that may even slide toward genocide.[398]

Many U.N. treaty bodies protect only certain kinds of groups,[399] but CERD puts all individuals and groups under its protection. As evidenced by some Concluding Observations and General Recommendations, CERD does not confine itself to concern for any one kind of group, such as minorities.[400] In fact, CERD does not cover a minority's right to a distinct identity.[401]

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[391] Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, 4 DEPAUL J. SOC. JUST. 263, 269–70 (2011).

[392] *Id.* at 264.

[393] *See Committee Against Torture*, OFF. UNITED NATIONS HIGH COMM'R FOR HUM. RTS., http://www2.ohchr.org/English/bodies/cat/ (last visited Dec. 27, 2011); *Committee on Enforced Disappearances*, OFF. UNITED NATIONS HIGH COMM'R FOR HUM. RTS., http:// www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx (last visited Dec. 27, 2011).

[394] Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUM. RTS. L. REV. 239, 250–52, 258–66 (2005).

[395] ICERD, *supra* note 368, pmbl.

[396] NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 1 (1980).

[397] ICERD, *supra* note 368, pmbl.

[398] Rainer Grote, *The Struggle for Minority Rights and Human Rights: Current Trends and Challenges*, *in* INTERNATIONAL LAW TODAY 221, 247 (Doris König et al. eds., 2008).

[399] *Committee on the Elimination of Discrimination Against Women*, UN, http://www.un.org/womenwatch/daw/cedaw/committee.htm (last visited Dec. 27, 2011); *Committee on the Rights of the Child*, OFF. UNITED NATIONS HIGH COMM'R FOR HUM. RTS., http://www2.ohchr.org/English/bodies/crc/ (last visited Dec. 27, 2011); *Committee on Migrant Workers*, OFF. UNITED NATIONS HIGH COMM'R FOR HUM. RTS., http://www2.ohchr.org/English/bodies/cmw/ (last visited Dec. 27, 2011).

[400] ICERD, *supra* note 368, art. 5.

[401] The U.N. Declaration on Persons Belonging to National or Ethnic, Religious and Linguistic Minorities explicitly references minority identity in Article 1(1), "States shall protect the existence and the national or ethnic, cultural, religious or linguistic identity of

Rather, CERD sets out to protect all kinds of groups, be they minorities, women, non-citizens (including refugees, migrants, asylum seekers, displaced persons, detainees), or indigenous peoples.[402] In short, CERD protects vulnerable or disadvantaged groups. CERD focuses on these vulnerable groups, in part, because they are particularly prone to genocide. CERD clearly has adopted the term "vulnerable groups" and rejected "marginal peoples."[403]

CERD also has addressed secession issues, albeit indirectly. Georgia charged Russia with violating ICERD Articles 2, 3, 4, 5, and 6 by carrying out discriminatory actions against South Ossetia's and Abkhazia's ethnic Georgian population.[404] "Georgia further alleged that Russia [sought] to consolidate changes in the ethnic composition [of these autonomous regions]," so as to lay a foundation for their respective unlawful secessions.[405] For the first time, the ICJ took jurisdiction under ICERD and issued provisional measures to both parties.[406]

Georgia's case against Russia before the ICJ provides many of the elements for constructing an adjudicatory framework for addressing secession and related claims. Granted, South Ossetia and Abkhazia did not seek independence from its parent state, Georgia, in the same way that Kosovo sought a ruling on the lawfulness of its UDL. Instead, the case was about Georgia trying to offset or block what it claimed were unlawful external interferences against ethnic Georgians. Nevertheless, all the earmarks of what a secession case would look like appear in that case.

First, the case draws the outlines of an adjudicatory hierarchy, not with respect to lower and higher court rulings but with regard to interpretations.

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minorities within their respective territories and shall encourage conditions for the promotion of that identity." G.A. Res. 47/135, art. 1, para. 1, U.N. Doc. A/RES/47/135 (Dec. 18, 1992). There is no comparable provision in the ICERD.

[402] ICERD, *supra* note 368, art. 5; *see also Committee on the Elimination of Racial Discrimination—General Recommendations*, OFF. UNITED NATIONS HIGH COMM'R FOR HUM. RTS., http://www2.ohchr.org/English/bodies/cerd/comments.htm (last visited Dec. 27, 2011) (CERD has issued thirty-four General Recommendations).

[403] In its 2010 session examining Cameroon's periodic reports, ICERD objected to Cameroon's use of "marginal peoples," noting that this label stigmatized the groups in question. The African Commission on Cameroon also talked of "vulnerable groups in general and in particular of that of street children, indigenous populations, and human rights defenders." Concluding Observations on the Periodic Report of Cameroon, African Commission on Human and Peoples' Rights, 39th Sess., para. 14 (2005).

[404] Georgia ICJ Case, *supra* note 369, para. 20.

[405] Cindy Galway Buys, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, 103 AM. J. INT'L L. 294, 295 (2009).

[406] Georgia ICJ Case, *supra* note 369, para. 149.

Georgia successfully argued that Article 22 of CERD[407] permits an appeal regarding interpretations of the treaty in question to the ICJ.[408] The HRC, on the other hand, does not have a comparable provision.[409]

Second, the ICJ took a strong stance by granting provisional measures against Russia.[410] The ICJ, in effect, ordered Russia to stop all forms of group harm, including ethnic cleansing.[411] Also, among the human rights treaty bodies, CERD has distinguished itself as taking and adopting the strongest measures and remedies. For example, CERD alone has instituted both early warning and urgent action devices.[412] These actions taken by the ICJ and CERD show that international law indeed can use strong measures.

Third, the ICJ's provisional measures and the claims before CERD included recognition of the denial of self-determination as a discriminatory harm.[413] While ICERD, unlike the ICCPR, does not contain a provision on the right of self-determination, the denial of self-determination certainly fits within the treaty's anti-discrimination mandate. Oddly enough, Georgia claimed that Russia had denied the right of self-determination of ethnic Georgians within South Ossetia and Abkhazia.[414] However, it is just as plausible to imagine representatives of South Ossetia and Abkhazia bringing a similar individual complaint of denial of self-determination against Georgia.[415] Interestingly, the violations ascribed to Russia are not put in terms of humanitarian law. Rather, Russia allegedly committed violations of

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[407] ICERD, *supra* note 368, art. 22 ("Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the [ICJ] for decision, unless the disputants agree to another mode of settlement.").

[408] Georgia ICJ Case, *supra* note 369, paras. 2, 117.

[409] TYAGI, *supra* note 334, at 635.

[410] Georgia ICJ Case, *supra* note 369, para. 149.

[411] *Id.*

[412] *Committee on the Elimination of Racial Discrimination—Early-Warning Measures and Urgent Procedures*, OFF. UNITED NATIONS HIGH COMM'R FOR HUM. RTS., http://www2.ohchr.org/English/bodies/cerd/early-warning.htm (last visited Dec. 27, 2011) ("[I]n 1994, the Committee decided that preventive measures including early warning and urgent procedures, should become part of its regular agenda. Early warning measures are to be directed at preventing existing problems from escalating into conflicts and can also include confidence-building measures to identify and support whatever strengthens and reinforces racial tolerance, particularly to prevent a resumption of conflict where it has previously occurred . . . . Urgent procedures are to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention.").

[413] Georgia ICJ Case, *supra* note 369, paras. 13, 21.

[414] *Id.* para. 23.

[415] *Id.* para. 21.

human rights law, or, more accurately in our terms, it stood charged with group harms.[416] Of any of the human rights bodies, only CERD has attempted to find the connections between these harms.

In conclusion, *Georgia v. Russia* contains all of the important elements of a secession case: (1) it addresses, although only in passing, the lawfulness of Georgia's claims over the territories of South Ossetia and Abkhazia; (2) it treats, however obliquely, the denial or thwarting of self-determination as a legally cognizable harm; and (3) it pays particular heed to all aspects of group harm, from discrimination to ethnic cleansing, and worries about the likelihood of genocide. Although the case does not contain an explicit secessionist claim, it still encompasses all the ingredients of a secessionist case. The basic difference between this case and a full-blown secessionist one lies in the remedy, which in this case is not independence but rather the cessation of external interference.

Therefore, CERD is ideally suited for handling secessionist claims. While it does not have as active of a history of developing its jurisprudence as the HRC does, CERD has all the makings of a viable future forum.

V. CONCLUSION

The Remedial Model, with its three-step inquiry, provides a morally and legally defensible way of addressing secession. Before addressing the secession claim, relational issues must be resolved: What is the nature of the territory claiming secession, and what is its relation to the parent state? The parent state must show that it has legal jurisdiction over the seceding territory. This relational inquiry proves critical, particularly in cases where secession attempts occur in the midst of a state that is disintegrating.

The Remedial Model also highlights two harms. First, international law has consistently condemned states that remove internal self-determination from a portion of its citizenry. By making internal self-determination the linchpin of secession, the Remedial Model correctly places the right incentives on states. If states want to avoid secessionist claims attaining legitimacy in international law, they need to address demands for internal self-determination. Finally, the Remedial Model treats secession as a form of humanitarian intervention. If the seceding entity demonstrates violations of peremptory norms by the parent state, then secession provides a remedy of last resort that international law should recognize. If a parent state has

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[416] *Id.* para. 22.

denied internal self-determination and, for example, committed ethnic cleansing against its people, then secession provides a justifiable remedy.

The relational questions raise interesting issues about Kosovo and Serbia. Surprisingly, Serbia has highly questionable claims over Kosovo. Putting these concerns aside, Kosovo's substantive claims prove strong. Serbia removed progress that had been made with internal self-determination in Kosovo. Finally, Serbia, through ethnic cleansing, committed violations of peremptory norms against Kosovo. Unfortunately, the ICJ missed a rare opportunity to make a legal difference by adopting a Remedial Model. No one should have any illusions that the Remedial Model will be warmly received and readily implemented. However, recent conflicts make it imperative to take steps toward realizing the Remedial Model. The failure to act more quickly in Bosnia-fed NATO intervention in Kosovo. Yet, there was an even earlier failure. If the international community had listened to secessionist rumblings in Kosovo earlier, there could probably have been an earlier and less violent intervention. Kosovo pales in comparison to the current situation in a number of other areas around the globe. The future cries out for an approach to secession that puts law and morality first.