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# TOWARDS “NEVER AGAIN”: SEARCHING FOR A RIGHT TO REMEDIAL SECESSION UNDER EXTANT INTERNATIONAL LAW

*Steven R. Fishert*

## INTRODUCTION

On March 16, 2014, the Crimean Status Referendum was held.<sup>1</sup> The referendum asked the people of Crimea and the city of Sevastopol<sup>2</sup> if they supported political alignment with Russia or a restoration of the 1992 Crimean constitution that granted a greater degree of sovereignty than both entities were accustomed to under the then-existing political structure with the Ukraine.<sup>3</sup> This referendum notably did not allow the option of maintaining the “status quo” of both Crimea and Sevastopol as being a part of the Ukraine.<sup>4</sup> Oddities and irregularities regarding the potential desire to maintain the current political situation aside, an overwhelming majority (while there is some variance among numerous reports, the conservative consensus seems to be over 95%) of both Crimea and Sevastopol voted to join the

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† I would like to thank several people, without whom this Article would not be possible. First and foremost, I must thank Mike Hecker and Kevin Espinosa for their time and patience with me while I initially grappled with these ideas. I hope they view that time as being as productive as I believe it was. Stephanie Forman, Amanda Webber, Brittany Crowley, and Kathryn Krause were tremendously helpful with research and were always willing to debate on secession and international law generally. Their work was instrumental in making this work and the ideas contained within what they are. Finally, I must thank the *Buffalo Human Rights Law Review*, specifically my good friends Marc Smith and Cara Cox, for helping craft my manuscript into the Article it is today. Without your work and efforts, this Article would amount to little more than a few disjointed thoughts.

1. Denver Nicks, *Crimea Signs Treaty to Join Russia*, TIME (Mar. 18, 2014), <http://time.com/28443/putin-paves-way-for-crimea-annexation>; *Crimea Referendum: Voters ‘Back Russia Union,’* BBC NEWS (Mar. 16, 2014), <http://www.bbc.com/news/world-europe-26606097>.

2. Sevastopol is a city located in the Crimean Peninsula on the coast of the Black Sea. The city has lengthy ties to Russia and is currently used under lease by the Russian Black Sea Fleet. See generally Serhii Plokyh, *The City of Glory: Sevastopol in Russian Historical Mythology*, 35 J. CONTEMP. HIST. 369 (2000) (providing additional information on Sevastopol).

3. Noah Sneider, *2 Choices in Crimea Referendum, but Neither is ‘No,’* N.Y. TIMES (Mar. 14, 2014), <http://www.nytimes.com/2014/03/15/world/europe/crimea-vote-does-not-offer-choice-of-status-quo.html>.

4. *Id.*; Noah Rayman, *Ukraine Secession Referendum Does Not Have a ‘No’ Option*, TIME (Mar. 7, 2012), <http://time.com/16318/ukraine-crimea-referendum-russia>.

Russian Federation.<sup>5</sup> Many commentators—including the governments of the Ukraine, the United States, the European Union, and many other state governments—asserted that any referendum held by a local government without the permission of the Ukrainian government violated both Ukrainian and international law.<sup>6</sup> Russia and the Crimean Parliament have argued to the contrary—claiming that the secession is legal as an exercise of the right to self-determination, the International Court of Justice’s (“ICJ”) ruling in its Kosovo advisory opinion, and the precedent of the situation in Kosovo and its secession from Serbia generally.<sup>7</sup>

Two days after the referendum, on March 18, 2013, the Treaty on the Adoption of the Republic of Crimea to Russia was signed, integrating Crimea and Sevastopol into the Russian Federation.<sup>8</sup> The Russian Federal Assembly ratified the treaty on March 21, 2013, acting to fully integrate the

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5. Elisha Fieldstadt, *Early Count Shows 95 Percent of Crimea Votes Want to Be Russian*, NBC News (Mar. 16, 2014), <http://www.nbcnews.com/storyline/ukraine-crisis/early-count-shows-95-percent-crimea-voters-want-be-russian-n54096> (asserting that 95.7% of voters elected to break away from Ukraine and join Russia); Anton Troianovski & Paul Sonne, *Ukraine Region Votes to Join Russia*, Wall St. J. (Mar. 16, 2014), <http://www.wsj.com/articles/SB10001424052702304914904579441563920333966> (reporting over 96% of voters in the referendum voted to join Russia); *Official Results: 97 Percent of Crimea Voters Back Joining Russia*, CBS News (Mar. 17, 2014), <http://www.cbsnews.com/news/official-results-97-of-crimea-voters-back-joining-russia> (finding 97% of voters in favor of aligning with Russia).

6. *Official Results: 97 Percent of Crimea Voters Back Joining Russia*, CBS News (Mar. 17, 2014), <http://www.cbsnews.com/news/official-results-97-of-crimea-voters-back-joining-russia> (“The U.S., EU and Ukraine’s new government do not recognize the referendum held Sunday in Crimea, saying it violates both Ukrainian and international norms.”); *Is Crimea’s Referendum Legal?*, BBC News (Mar. 13, 2014), <http://www.bbc.com/news/world-europe-26546133> (indicating that leaders of the G7 all condemn the referendum in Crimea as being contrary to international law); Tom Cohn, *Legal or Not, Crimean Referendum will Shape Ukraine Crisis*, CNN (Mar. 15, 2014), <http://edition.cnn.com/2014/03/13/politics/crimea-referendum-explainer> (explaining the believe that the referendum in Crimea is in violation of both Ukrainian constitutional law and established international law).

7. Cohn, *supra* note 6 (reporting the Russian argument that the referendum in Crimea is legal as it is similar to Kosovo’s secession from Serbia); *Crimea Crisis: Russian President Putin’s Speech Annotated*, BBC News (Mar. 19, 2014), <http://www.bbc.com/news/world-europe-26652058> (translating into English Russian President Vladimir Putin’s speech defending Russia’s treaty to integrate Crimea and Sevastopol).

8. *Agreement on the Accession of the Republic of Crimea to the Russian Federation Signed*, PRESIDENT OF RUSSIA (Mar. 18, 2014), <http://eng.kremlin.ru/news/6890>; *Crimea Annexation into Russia: Putin Approves Draft Treaty to Absorb Peninsula*, HUFFINGTON POST (Mar. 18, 2014), [http://www.huffingtonpost.com/2014/03/18/crimea-annexation-into-russia-putin-approves-treaty\\_n\\_4983534.html](http://www.huffingtonpost.com/2014/03/18/crimea-annexation-into-russia-putin-approves-treaty_n_4983534.html).

two territories into Russia.<sup>9</sup> Russian forces swiftly seized control of many of Ukraine’s military bases in the region, aided by the decision of Ukrainian leadership to withdraw Ukrainian forces in the interest of preventing the loss of life.<sup>10</sup>

On the international stage, much was made of the situation in Crimea. The United Nations Security Council debated and attempted to pass a resolution condemning the actions, only to have it blocked by Russia, a permanent member of the Security Council with veto power.<sup>11</sup> All other members voted in favor with one state, China, abstaining.<sup>12</sup> The General Assembly, however, had more luck in its actions to denounce Russia’s actions. Adopting a resolution titled “Territorial Integrity of Ukraine” by a vote of 100 versus 11 (with 58 abstentions) the General Assembly called on states to not recognize any change to Ukrainian territory.<sup>13</sup> The resolution asserted the Assembly’s determination that the Crimean referendum “has no validity” and that all involved parties must work together to pursue a peaceful resolution as quickly as possible.<sup>14</sup> At the time of this writing, the situation remains largely unresolved and the status of Crimea and Sevastopol will vary from source to source.

In light of the recent events in Crimea, secession has been thrust to the center of the public consciousness. Particular attention has been given to the legality of secession, not just in relation to Crimea, but also generally, under international law. Everyone from scholars to world leaders offered their interpretation of the legal status of the Crimean referendum, with the views expressed often being as varied as those offering them. Russian President Vladimir Putin indicated his belief that the situation in Crimea is legally

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9. *Russian Federation Council Ratifies Treaty on Crimea’s Entry to Russia*, THE RUSSIAN NEWS AGENCY TASS, (Mar. 21, 2014), <http://tass.ru/en/russia/724749>.

10. Marie-Louise Gumuchian & Victoria Butenko, *Ukraine Orders Crimea Troop Withdrawal as Russia Seizes Naval Base*, CNN (Mar. 25, 2014), <http://edition.cnn.com/2014/03/24/world/europe/ukraine-crisis>.

11. *UN Security Council Action on Crimea Referendum Blocked*, UN NEWS SERV. (Mar. 15, 2014), [http://www.un.org/apps/news/story.asp?NewsID=47362#.VOIDUPnF-\\_s](http://www.un.org/apps/news/story.asp?NewsID=47362#.VOIDUPnF-_s).

12. *Id.*

13. *General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region*, UNITED NATIONS: MEETINGS COVERAGE & PRESS RELEASES (Mar. 27, 2014), <http://www.un.org/press/en/2014/ga11493.doc.htm>.

14. *Backing Ukraine’s Territorial Integrity, UN Assembly Declares Crimea Referendum Invalid*, UN NEWS SERV. (Mar. 27, 2014), [http://www.un.org/apps/news/story.asp?NewsID=47443#.VOIDIvnF-\\_s](http://www.un.org/apps/news/story.asp?NewsID=47443#.VOIDIvnF-_s).

acceptable following precedent set by Kosovo's secession from Serbia.<sup>15</sup> President Putin declared:

Our western partners created the Kosovo precedent with their own hands. In a situation absolutely the same as the one in Crimea they recognized Kosovo's secession from Serbia legitimate while arguing that no permission from a country's central authority for a unilateral declaration of independence is necessary.<sup>16</sup>

President Putin argued as well that the ICJ affirmed that same assertion as law with respect to the situation in Kosovo.<sup>17</sup> Conversely, much of the international community, including both United States President Barack Obama<sup>18</sup> and United Kingdom Prime Minister David Cameron, have condemned the action as violating both Ukrainian domestic law as well as international law.<sup>19</sup>

The controversy over secession does not, however, end with its specific and recent application to the situation in Crimea. While this incident did certainly draw new attention to the issue, the issue itself is not new.

15. Patrick Goodenough, *Crimea Vote: Putin Cites Kosovo 'Precedent,'* CNS NEWS (Mar. 16, 2014), <http://cnsnews.com/news/article/patrick-goodenough/crimea-vote-putin-cites-kosovo-precedent>; Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West,* N. Y. TIMES (Mar. 18, 2014), <http://www.nytimes.com/2014/03/19/world/europe/ukraine.html>.

16. *Putin: Crimea Similar to Kosovo, West is Rewriting its own Rulebook,* RUSS. TODAY (Mar. 18, 2014), <http://rt.com/news/putin-address-parliament-crimea-562>; see also *Crimea Crisis: Russian President Putin's Speech Annotated,* *supra* note 7.

17. *Putin: Crimea Similar to Kosovo, West is Rewriting its own Rulebook,* *supra* note 16. A more detailed discussion and analysis of the ICJ's determination in its case concerning the Kosovo situation can be found later in this article. See *infra* text accompanying footnotes 244-56.

18. Coral E. Lee & Jay Solomon, *Obama Warns of Sanctions Over Crimea Conflict,* WALL ST. J. (Mar. 6, 2014), <http://www.wsj.com/articles/SB10001424052702304554004579422861484329156>, (quoting President Obama as claiming Russia's actions constitute illegal intervention under international law); *Ukraine crisis: 'Illegal' Crimean referendum condemned,* BBC NEWS (Mar. 6, 2014), <http://www.bbc.com/news/world-europe-26475508> (quoting President Obama as stating a referendum in Crimea would: "violate the Ukrainian constitution and international law").

19. *Crimea Vote on Russia Illegal, Says Cameron,* THE TIMES (Mar. 11, 2014), <http://www.thetimes.co.uk/tto/news/world/europe/article4028884.ece>; Nicholas Winning, *Planned Crimean Referendum Illegal, Cameron Says,* WALL ST. J. (Mar. 10, 2014), <http://www.wsj.com/articles/SB10001424052702304020104579431360886355696> ("A planned referendum in Crimea to decide whether the region will secede from Ukraine and become part of Russia would be illegal, illegitimate and wouldn't be recognized by the international community, British Prime Minister David Cameron said Monday.").

Though secession was once the most common means by which states came into existence,<sup>20</sup> it is now regarded with little short of unrelenting skepticism in most cases.<sup>21</sup> During the decolonization era, peoples commonly seceded and created new states, often accompanied by revolutions and wars of independence.<sup>22</sup> Despite the prevalence of secession at this time, the law remained unclear. As the Aaland Island situation indicates, there seemed to be little clarity over who could secede and when secession could be permissible.<sup>23</sup> Even in the United Nations (“UN”) era, the law on secession has been anything but clear. The UN’s judicial arm, the ICJ has struggled with the issue, at least tangentially, numerous times.<sup>24</sup>

It is difficult to imagine a topic in international law—save perhaps humanitarian intervention—so fraught with dispute as secession. Some assert that unilateral secession is entirely prohibited as it would violate the well-established principle of territorial integrity, while others argue it is completely permissible in some cases as a means by which people may exercise their human right to self-determination. The reality to this dilemma, as with most controversies, lies somewhere in the middle.<sup>25</sup> Secession may easily be understood as one of international laws’ most

20. JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 375 (2007) [hereinafter *THE CREATION OF STATES*].

21. *Id.* at 415 (“State practice since 1945 shows the extreme reluctance of States to recognize or accept unilateral secession outside the colonial context.”)

22. *See id.* at 375–76, 388.

23. This is plainly apparent when comparing the perceived legal secessions of numerous states effecting decolonization with the situation of the Aalanders. *Compare infra* text accompanying notes 39–48 (giving examples of wars for independence leading to secession), *with infra* text accompanying notes 83–140 (discussing the report of the League of Nations Commission of Rapporteurs concerning the Aaland Islands and the decision that the Aalanders lacked the legal ability to secede).

24. This article will specifically address the ICJ’s decisions pertaining to Kosovo, East Timor, Western Sahara, Namibia, and the Palestinian Wall. All of these decisions, while not specifically addressing secession, deal with a related issue such as territorial integrity or the self-determination of people. Accordingly, they are instructive on the current legal status of secession under international law.

25. Former UN Secretary-General U Thant offers one of the most articulate expressions of this conflict in his Introduction to the Report of the Secretary General in 1971. Secretary-General Thant opined: “[a] . . . problem which often confronts us, and to which as yet no acceptable answer has been found in the provisions of the [UN] Charter, is the conflict between the principles of the integrity of sovereign States and the assertion of the right to self-determination, and even secession, by a large group within a sovereign State. Here again . . . a dangerous deadlock can paralyse the ability of the United Nations to help those involved.” U.N. Secretary-General, *Introduction to the Report of the Secretary-General on the Work of the Organization*, ¶ 148, U.N. Doc. A/8401/Add.1 (Sept. 1971).

controversial gray areas.<sup>26</sup> Indeed, noted scholar and current Judge of the ICJ James Crawford has indicated that secession is neither legal nor illegal.<sup>27</sup>

Despite this, there have been numerous historical examples of when secession has been accepted, either explicitly or implicitly, including several from the modern UN era.<sup>28</sup> The common theme to most, if not all, accepted modern secessions is that the seceding group is or has been subjected to widespread subjugation and exploitation at the hands of the original state.<sup>29</sup> To use just a few examples: the Albanians in Kosovo were subject to massive human rights violations by the Serbian government,<sup>30</sup> the largely Christian population of South Sudan was subjugated by the mostly Muslim majority in the Sudan,<sup>31</sup> and Russia has defended accusations that it illegally intervened in Crimea by claiming that ethnic Russians living in the region were being mistreated by the Ukrainian government.<sup>32</sup> Secession for this purpose, correcting human rights violations, has been termed remedial secession—that is, secession accomplished in an attempt to remediate an ongoing situation—and will be the specific focus of this Article.

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26. See JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF INTERNATIONAL LAW 141 (8th ed. 2012) [hereinafter BROWNLIE'S].

27. *Id.*

28. Examples include the secession of Kosovo from Serbia and the secession of South Sudan from the Sudan, both of which will be discussed in greater detail later in this article. Arguably, even Crimea's secession from the Ukraine—while legally dubious for a variety of reasons—may provide further evidence as, at the time of the writing of this article, it has not been re-integrated into the Ukraine despite severe condemnation for the secession and annexation from all corners of the international community.

29. Compare the situations in Kosovo (secession occurred with Kosovo now widely recognized as an independent state following a genocide perpetrated by the Serbian government), and South Sudan (now a recognized independent country where a southern Afro-Christian population was oppressed by the northern Arab-Muslim population while a part of Sudan), with Crimea (secession has been largely condemned and few states recognize Crimea as a legitimate part of Russian territory where there were no reports of large-scale, wide-spread, and/or systemic discrimination against ethnic Russians by the Ukrainian government).

30. See *infra* text accompanying notes 262-74 (discussing the *Kosovo* opinion and situation generally).

31. See generally JAMES COPNALL, A POISONOUS THORN IN OUR HEARTS: SUDAN AND SOUTH SUDAN'S BITTER AND INCOMPLETE DIVORCE (2014) (detailing the human rights situation in South Sudan and the causes, motives, and actions concerning South Sudan's eventual secession from Sudan).

32. See *supra* text accompanying notes 15-17.

## I. GOALS

In the wake of the ICJ’s *Kosovo* advisory opinion much was written in the academic community about remedial secession. While many scholars have discussed what this comment will term remedial secession—with some going as far as to argue that perhaps such a right to secession *should* exist—few, if any, asserted that it *did* exist.<sup>33</sup> This comment seeks to accomplish that. Since *Kosovo*, the international landscape has changed immeasurably. State practice has become more favorable to a right to remedial secession in certain, limited circumstances. Viewed in totality, current international law may support a cognizable right to remedial secession.

This comment will assert that there does currently exist a right to remedial secession under extant international law. In doing so, it will review the history of secession and the *jus cogens* right to self-determination<sup>34</sup> that is frequently asserted as providing the legal basis for secession. It will argue that two of the most commonly posited justifications for secession—secession to cure egregious human rights violations (what is often termed—and what this comment will call—remedial secession) and secession as an expression of external self-determination where a people are unable to effect meaningful internal self-determination—are, *de facto*, the same. Finally, this comment will briefly attempt to synthesize the extant law of self-determination and secession and attempt to create a unified rule for when, if ever, remedial secession is permissible under international law.

## II. HISTORICAL PERSPECTIVES AND FRAMEWORK

To understand the current state of secession it is necessary to examine the historical background of the concept. Prior to World War I, secession was likely the most common means of creating a new state.<sup>35</sup> Secession at this time was widely thought of as involving the threat or use of force against a sovereign in an effort to gain political independence from that

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33. See, e.g., Joshua Castellino, *Territorial Integrity and the “Right” to Self-Determination: An Examination of the Conceptual Tools*, 33 BROOK. J. INT’L L. 503, 565-68 (2008); Thomas W. Simon, *Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo*, 40 GA. J. INT’L & COMP. L. 105, 172-73 (2011); Jure Vidmar, *International Legal Responses to Kosovo’s Declaration of Independence*, 42 VA. J. TRANSNAT’L L. 779, 849-51 (2009).

34. A *jus cogens* right (also known as a peremptory norm) is one from which no derogation is legally permitted. BROWNLEE’S, *supra* note 26, at 594. The right of a people to self-determination is accepted as a *jus cogens* right. Int’l Law Comm’n, *Fragmentation of Int’l Law: Difficulties Arising from the Diversification & Expansion of Int’l Law*, ¶ 33, U.N. Doc. A/CN.4/L.702 (July 18, 2006).

35. THE CREATION OF STATES, *supra* note 20, at 375.



sovereign; what historians would generally term a war of independence or revolutionary war.<sup>36</sup> This pre-World War I period saw numerous secessionist movements, many accompanied by violence and done with the aim of overthrowing colonial rule.<sup>37</sup>

The most notable example is likely the American Revolutionary War, where thirteen of Great Britain's North American colonies fought an almost eight-year war for independence.<sup>38</sup> Similarly, in Central and South America numerous wars of independence resulted in the secession of Brazil from Portugal in 1822.<sup>39</sup> Not to be outdone by its Iberian rival, Spain lost numerous wars resulting in the secession of colonies during this period. Ecuador—then part of Gran Columbia—gained its independence in 1822,<sup>40</sup> the last Spanish troops surrendered to Chile in 1826<sup>41</sup> (though some argue that Chile effectively seceded in 1821),<sup>42</sup> and Peru seceded from the Spanish Empire in 1824,<sup>43</sup> to name just a few.<sup>44</sup> Mexico achieved its independence from Spain, after over a decade of fighting, in 1821.<sup>45</sup> Not only limited to the Americas, this was a global trend, with Greece effecting its secession from the Ottoman Empire in 1832<sup>46</sup> and Belgium seceding from the Netherlands in 1831.<sup>47</sup>

36. *Id.*

37. *Id.*

38. See generally JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* (2010); LELAND G. STAUBER, *THE AMERICAN REVOLUTION: A GRAND MISTAKE* (2010) (discussing the history of the American Revolution).

39. See generally GABRIEL PAQUETTE, *IMPERIAL PORTUGAL IN THE AGE OF ATLANTIC REVOLUTION: THE LUSO-BRAZILIAN WORLD, C. 1770-1850* (2013) (providing a detailed analysis on the history, causes, and legacy of the independence of Brazil).

40. See DAVID W. SCHODT, *ECUADOR: AN ANDEAN ENIGMA* 26-29 (1978).

41. See also SIMON COLLIER & WILLIAM F. SATER, *A HISTORY OF CHILE: 1808-2002* (2004). See generally SIMON COLLIER, *IDEAS AND POLITICS OF CHILEAN INDEPENDENCE 1808-1833* (1967).

42. The 1921 date comes from the expulsion of the Royalist forces from what would become mainland Chile. See, generally, COLLIER, *supra* note 41 (discussing the Chilean independence movement and its associated dates).

43. See TIMOTHY E. ANNA, *THE FALL OF THE ROYAL GOVERNMENT IN PERU* 220-38 (1979).

44. For further information and discussion on the history of the decolonization of Central and South America see CONNECTIONS AFTER COLONIALISM: EUROPE AND LATIN AMERICA IN THE 1820s (Matthew Brown & Gabriel Paquette eds., 2013).

45. See THOMAS BENJAMIN, *LA REVOLUCIÓN: MEXICO'S GREAT REVOLUTION AS MEMORY, MYTH, AND HISTORY* 101 (2000).

46. C.M. WOODHOUSE, *THE GREEK WAR OF INDEPENDENCE: ITS HISTORICAL SETTING* 148-49 (discussing international recognition of an independent Greece in 1832).

47. DANIEL H. THOMAS, *THE GUARANTEE OF BELGIAN INDEPENDENCE AND NEUTRALITY IN EUROPEAN DIPLOMACY, 1830'S-1930'S* 21 (1983).

After World War II, a new period of secessions began. Similar to the pre-World War I secessions, they were accomplished by groups of people seeking independence from colonial rule.<sup>48</sup> Unlike the earlier secessions, however, these were generally accomplished with the consent of the former colonizing power.<sup>49</sup> The UN Charter declared that among the purposes of the UN was “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>50</sup> This nod to self-determination ushered in a period of voluntary decolonization where most states endeavored to grant independence to their former colonies.<sup>51</sup> Despite the willingness to support secession in an effort to effect decolonization, outside of that context the international community has been reluctant to accept unilateral secession.<sup>52</sup> Indeed, since the end of World War II, no state created by unilateral secession has gained UN recognition over the objections of the predecessor state.<sup>53</sup> When permissible unilateral secession is referenced outside of decolonization, it is done in one of two ways.<sup>54</sup> First, as remedial secession to cure human rights violations.<sup>55</sup> Or, in the alternative, to provide the seceding people with a means to exercise their right to self-determination where they are being denied the means to exercise the same right within their current state.<sup>56</sup> In addressing the issue head-on, the ICJ elected to not determine whether or not remedial secession itself is inherently legal or illegal, thus leaving the issue open for further interpretation and, perhaps, litigation.<sup>57</sup>

### III. SECESSION AS AN EXPRESSION OF SELF-DETERMINATION

The conclusion of World War II ushered in a new era of international relations. The formation of the UN and the Cold War combined to create the modern framework for international law. Views on secession shifted, as the prevailing thought was that the state was the smallest unit in the international system. That is to say, a UN member state was indivisible in the

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48. THE CREATION OF STATES, *supra* note 20, at 375.

49. *Id.*

50. U.N. Charter art. 1, ¶ 2.

51. THE CREATION OF STATES, *supra* note 20, at 375.

52. *Id.* at 390.

53. *Id.*

54. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 138 (Can.) [hereinafter *Quebec*]; BROWNIE’S, *supra* note 26, at 142.

55. *Quebec*, *supra* note 54, para. 133.

56. *Id.* para. 134.

57. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, paras. 82-83 (July 22) [hereinafter *Kosovo*]; BROWNIE’S, *supra* note 26, at 142.

international system. As such, it followed that any movements or attempts to partition such a state would be met with resistance. Doing so could upset the delicate balance of peace that was established following World War II. Gone were the times when secession was the most common method of state creation, as the international community attempted to settle its borders. Despite this fact, discussion of secessions continued.

The most prevalent lens through which secession is discussed in modern international law is as an expression of a people's right to self-determination.<sup>58</sup> A people's right to self-determination is generally understood to be exercised internally, that is, via the democratic mechanisms within the people's state.<sup>59</sup> However, because of the irreproachable nature of the right to self-determination there are circumstances where, lacking any effective means of exercising internal self-determination, a people may be entitled to use external self-determination to attain their rights.<sup>60</sup> This external expression of self-determination would cleave the state, preventing the people from exercising their rights, resulting in a new state where self-determination rights would be used internally.<sup>61</sup>

#### A. *Pre-UN Era*

Discussion of a right to self-determination can be found dating back to the beginnings of modern international law and the writings of Hugo Grotius.<sup>62</sup> In his work *De Jure Belli ac Pacis* (On the Law of War and Peace), Grotius gives an early discussion on man's inherent right to self-determination.<sup>63</sup> Grotius begins by defining a "right" as it pertains to individuals.<sup>64</sup> For Grotius a right in this sense is a "moral quality annexed to the person, justly entitling him to possess some particular privilege."<sup>65</sup> The "moral quality" referred to in the aforementioned quote is, when effected perfectly, a "faculty."<sup>66</sup> Grotius then concludes his discussion by writing: "Civilians

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58. See THE CREATION OF STATES, *supra* note 20, at 384-88.

59. *Quebec*, *supra* note 54, para. 131.

60. See *id.* para. 134, see also *Aaland Islands Report*, *infra* note 82, at 4-5.

61. See *Quebec*, *supra* note 54, ¶ 134; see also *Aaland Islands Report*, *infra* note 82, at 4.

62. Hugo Grotius was a Dutch lawyer and scholar widely considered to be the father of modern international law. For further discussion on Grotius, his works, and his importance to the field of international law see, e.g., CHRISTIAN GELLINEK, HUGO GROTIUS (1983); GROTIUS READER, (L.E. van Holk & C.G. Roelofsen eds., 1983).

63. See HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 7-9 (A.C. Campbell trans. 2001).

64. *Id.* at 8.

65. *Id.*

66. *Id.*

call a faculty that Right, which every man has to his own; but we shall hereafter, taking it in its strict and proper sense, call it a right. This right comprehends the power, that we have over ourselves, which is called liberty.”<sup>67</sup>

Grotius’s conception of this “liberty” due to every man is the foundation of the right modern international law recognizes as self-determination. By defining liberty as power over oneself Grotius argues man has the right to determine his own path personally and also politically.<sup>68</sup> This liberty is a faculty when expressed perfectly and—whether perfect or imperfect—is a moral quality and thus a right.<sup>69</sup> As rights justly entitle those who possess them to a privilege, all men are justly entitled to the power over themselves to determine their political future.<sup>70</sup> This power is what modern international law calls self-determination.

While Grotius’s work provides the framework for much of modern international law, progress has obviously been made. Particular strides were made following World War I. The creation of the League of Nations symbolized a new era in international law. For the first time, sovereign states banded together to create a permanent (or so it was thought to be) international body which would serve some form of global governing function. The Covenant of the League of Nations, its founding document, is instructive on this shift. Notably, there is no discussion on the rights of the individual.<sup>71</sup> Indeed, the only time non-state actors are referenced throughout the Covenant is in Article 22, where colonization is discussed and encouraged in order to provide for the “well-being and development of such peoples” who are “not yet able to stand by themselves under the strenuous conditions of the modern world.”<sup>72</sup> While this Article notes that some groups, such as those formerly belonging to the Turkish Empire, may be ready to be recognized as independent nations, others are not deemed to be as advanced.<sup>73</sup> Specific reference is made to the people of Central and South-West Africa along with those inhabiting many South Pacific Islands, as being yet unable to, for some reason or another, fend for themselves in the modern world.<sup>74</sup> In sum, the right of a people to self-determination has yet to emerge to the point where it outweighs the interests of the “civilized” states.

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67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.* at 7-8.

71. *See* League of Nations Covenant.

72. *Id.* art. 22, para. 1.

73. *Id.* art. 22, para. 4.

74. *Id.* art. 22, paras. 5, 6.

In this sense, the Covenant can be seen as a retreat from Grotius' academic idealism. Firmly grounded in realism, the Covenant made no attempt to place all states and, indeed, all people on a like footing.<sup>75</sup> Keenly aware of the human costs of World War I, the writers of the Covenant appear to have been much more concerned with preserving the peace. Indeed, the first line of the preamble indicates the purpose of the League of Nations was to "promote the international co-operation and to achieve international peace and security."<sup>76</sup> Specifically, it goes on to list the "obligation[ ] not to resort to war" that all members would commit themselves to.<sup>77</sup> Article Sixteen reinforces this purpose, declaring that any Member of the League making war on another Member in violation of the Covenant will be assumed to have declared war on the entirety of the League.<sup>78</sup> Even more, Members are bound to supply military might to wage war against the offending nation.<sup>79</sup> Clearly the Covenant was written with a single-minded purpose: the prevention of future conflicts between established states.

The only discussion in the Covenant pertaining to secession, even tangentially, is the Article Ten mandate that the member States must "respect and preserve" the "territorial integrity and existing political independence of all Members of the League."<sup>80</sup> As will become apparent, references to the importance of territorial integrity rarely bode well for secessionist movements.<sup>81</sup> This Article can be seen as the dawning of a pattern of conflict between a people's right to self-determination and a State's right to territorial integrity.

While the Covenant of the League of Nations is not in and of itself tremendously instructive on self-determination, the League of Nations era as a whole is not so underwhelming for this task. In 1920, the League created a Commission of Rapporteurs to lend itself to a solution for what had

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75. *See id.*

76. *Id.* pmb1.

77. *Id.* art. 12.

78. *Id.* art. 16, para. 1.

79. *Id.* art. 16, para. 2.

80. *Id.* art. 10. It is worth noting the dichotomy between the League of Nations reference to territorial integrity and the UN expression of the same norm. The League's Covenant indicates that territorial integrity it is to be preserved for all Member States, whereas the UN Charter indicates it is a right due to all States, irrespective of membership status. *See* U.N. Charter art. 2, para. 4.

81. *See infra* text accompanying footnotes 83-139 (discussing the conflict between territorial integrity and secession in the context of the Aaland Islands situation).

become known as the Aaland Crisis.<sup>82</sup> The memorandum put forth by the Commission outlined the then-existing state of international law with respect to secession and, more largely, self-determination.<sup>83</sup>

The Aaland Crisis itself can be traced back to the 1860s and the complex relationship between Russia and Finland.<sup>84</sup> Since that time Finland, then a somewhat autonomous part of Russia, had regular governmental meetings.<sup>85</sup> This situation began to change in the 1890s when Russia engaged in a widespread policy of “Russification.”<sup>86</sup> To effect this policy, Russia issued the February Manifesto of 1899, placing the legislative mechanisms of Finland under the control of a new Governor-General.<sup>87</sup> This continued until the Russian Revolution in 1917.<sup>88</sup> Seizing the opportunity, Finland declared itself independent in December 1917.<sup>89</sup> Likely having more pressing matters to contend with,<sup>90</sup> Vladimir Lenin recognized an independent Finland.<sup>91</sup>

Shortly after attaining its independence, Finland entered a period of civil war.<sup>92</sup> This conflict would prove to be the direct cause of the Aaland Crisis. Many Aalanders were concerned for the future of Finland given the civil war and uncertain relationship with Russia.<sup>93</sup> Indeed, the very same

82. See generally JAMES BARROS, *THE ALAND ISLANDS QUESTION: ITS SETTLEMENT BY THE LEAGUE OF NATIONS 300-05* (elaborating on the creation of the Commission—termed by Barros the “Commission of Inquiry”—and its composition).

83. See *Report Presented to the Council of the League of Nations by the Comm. of Rapporteurs*, League of Nations Doc. B7 21/68/106 (1921) [hereinafter *Aaland Islands Report*].

84. Sia Spiliopoulou Aakermark, *The Aaland Islands Questions in the League of Nations: The Ideal Minority Case?* 13 *Y.B. POL. THOUGHT, CONCEPTUAL HIST. & FEMINIST THEORY* 195, 198 (2009).

85. *Id.*

86. *Id.* “Russification” involves an increased emphasis on ethnic Russian culture in an attempt to culturally homogenize the Russian state. For further discussion and information see TUOMO POLVINEN, *IMPERIAL BORDERLAND: BOBRIKOV AND THE ATTEMPTED RUSSIFICATION OF FINLAND, 1898-1904* 18-22, (Steven Huxley trans.).

87. Aakermark, *supra* note 84, at 198.

88. *Id.*

89. *Id.*

90. Just a few months before Lenin had overseen the execution of the ruling Romanov family in an effort to consolidate his power. GREG KING & PENNY WILSON, *THE FATE OF THE ROMANOV* 282-95 (2003) (discussing Lenin’s involvement in the killing of the Romanovs). For further discussion of the Russian Revolution generally and its impact on Russia’s foreign policy see *COMPETING VOICES FROM THE RUSSIAN REVOLUTION* (Michael C. Hickey ed. 2011).

91. Aakermark, *supra* note 84, at 198.

92. *Id.*

93. See *id.* at 199.

month Finland declared independence, the Aalanders began to petition the Swedish government to reunify the Aaland Islands with Sweden.<sup>94</sup> Over half of the voting population of the Aaland Islands would sign this petition.<sup>95</sup> Core to this desire for reunification were the similarities between the Aalanders and Swedes in origin, language, and history.<sup>96</sup> A delegation from the Aaland Islands expressed those thoughts saying “[t]he Aalanders’s character and mentality are of a Swedish nature.”<sup>97</sup>

Seeking to turn this rhetoric to action, the Aalanders established and elected an unofficial governing body, the *landsting*, to work towards reunification with Sweden.<sup>98</sup> The Aalander’s arguments focused on the yet-to-be clearly established idea of self-determination.<sup>99</sup> This notion was furthered by post-World War I assertions of then-United States President Woodrow Wilson.<sup>100</sup> To further the notion that the Aalander’s were seeking self-determination, they enacted numerous parliamentary procedures and mechanisms within the *landsting*, all aimed at framing the issue as one of popular representation.<sup>101</sup> The Commission itself was impressed by these steps, especially the complete lack of violence employed by the Aalanders in their quest to secede.<sup>102</sup> The Commission specifically found the Aalanders to be “[p]eaceable and law-abiding, [having] only employed the means most calculated to gain the sympathies of civilised nations in order to win their case.”<sup>103</sup>

It is also necessary to note that a relevant third-party, Sweden, could hardly be termed as disinterested in the situation. Sweden asserted two in-

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94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.* at 199-200; *see also Aaland Islands Report, supra* note 83 at 1, 4.

100. President Wilson was a great advocate for self-determination rights in the wake of World War I. Wilson’s suggestions for stronger language concerning the right to self-determination did not, however, appear in the Covenant. In any event, the United States did not join the League, limiting his impact even further. CLARENCE A. BERDAHL, *THE POLICY OF THE UNITED STATES WITH RESPECT TO THE LEAGUE OF NATIONS* 7-13, 38 (1932). Despite these hurdles, President Wilson’s thoughts clearly still had an impact on then-existing political thought, with his conception of self-determination rights being argued by the Aalanders and seemingly accepted as possessing some level of authority by the Commission in its decision presented to the League. *See Aaland Islands Report, supra* note 83 at 1.

101. Aakermark, *supra* note 84, at 199-200.

102. *Aaland Islands Report, supra* note 83, at 1.

103. *Id.*

dependent interests for annexing the Aaland Islands.<sup>104</sup> The first was to support the self-determination of the Aalanders, a people the Swedish had deep cultural ties to.<sup>105</sup> The Commission seemed to accept this rationale for Swedish involvement, finding that Sweden “ha[d] no selfish rights” nor any “annexationist views,” but was only motivated by a “profound interest aroused by men of her own race and by the fear that their fate may be a precarious and unhappy one if they remain tied to another nationality.”<sup>106</sup>

The second reason was far more strategic; the Swedes wanted to ensure the neutrality of the Aaland Islands, something particularly important to Swedish defense interests given the location of the islands.<sup>107</sup> It is likely that for this reason Sweden never produced an argument in the alternative to the reunification of Sweden and the Aaland Islands. In a move that likely severely—and perhaps fatally—undermined the argument that Sweden was concerned for the rights of their cultural brothers, Sweden elected not to argue that the Aaland Islands could be independent to affect their self-determination rights, even if not unified with Sweden.<sup>108</sup> Put most simply, Sweden argued all-or-nothing; the Aaland Islands should reunify with Sweden to achieve their rights.<sup>109</sup>

Finland’s assertions focused on preserving the territorial integrity and sovereignty of the Finnish state.<sup>110</sup> In this way, Finland first asserted any debate over the status of the Aaland Islands was a political question; one which ought to be handled domestically and internally.<sup>111</sup> Finland’s assertion of its territorial integrity was so strong that it arrested two Aalander leaders, Carl Bjorkman and Julius Sundblom for treason.<sup>112</sup> The men were later convicted, but—perhaps as a result of the growing international controversy—given lighter sentences that they never actually were made to serve.<sup>113</sup> Finland’s alternative argument was that the Aalanders had ample access to self-determination rights and that the Finnish government had taken numerous steps, both constitutional and legislative, to ensure that the Aalanders had ample rights.<sup>114</sup> This argument may be responsible, at least in part, for the effective nullification of Bjorkman and Sundblom’s convic-

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104. Aakermark, *supra* note 84, at 200.

105. *Id.*

106. *Aaland Islands Report*, *supra* note 83, at 1.

107. Aakermark, *supra* note 84, at 200.

108. *Id.*

109. *See id.*

110. *Id.*; *see also Aaland Islands Report*, *supra* note 83, at 1.

111. Aakermark, *supra* note 84, at 201.

112. *Id.* at 200.

113. *Id.*

114. *Id.* at 201.



tions. The position of arguing that a minority population has ample rights within a democracy while that same democracy almost simultaneously convicted two of the group's leaders for publically dissenting against the government is—at best—unenviable.<sup>115</sup>

Viewing the competing arguments together, it is apparent that the struggle between a state's sovereignty and territorial integrity and a people's right to self-determination has already emerged in international law. To reconcile the two, the Commission attempted to find a compromise between the interests of both parties by employing a mixed strategy of what has been termed "the carrot and the stick."<sup>116</sup> The carrot served to incentivize and compensate compliance in the interest of finding a mutually beneficial solution.<sup>117</sup> The stick, unsurprisingly, served to coerce compliance through less agreeable means.<sup>118</sup>

The final determination of the Commission was that the Aaland Islands were not able to secede from Finland under then-existing international law.<sup>119</sup> The Commission felt that "[t]he idea of justice and of liberty, embodied in the formula of self-determination, must be applied in a reasonable manner to the relations between States and the minorities they include."<sup>120</sup> Further, the rights of minorities must be respected as much as possible in a civilized country, including self-determination and cultural rights.<sup>121</sup> In a sense, the Commission is discussing the aforementioned conflict between self-determination and territorial integrity.<sup>122</sup> To reconcile the competing interests, the Commission asks a rhetorical question: "what reasons would there be for allowing a minority to separate itself from the State to which it is united, if this State gives it the guarantees which it is within its rights in demanding, for the preservation of its social, ethical or religious character?"<sup>123</sup> The Commission answers its own question by stating definitively

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115. It should, however, be noted that the League of Nations Commission was unimpressed by the Aalander's argument that the arrests of Bjorkman and Sundblom constitute any sort of persecution of the Aalander people. The Commission was persuaded by Finland's argument that the men were in direct violation of aspects of Finland's penal code. *Aaland Islands Report*, *supra* note 83, at 4.

116. Aakermark, *supra* note 84, at 202.

117. *See id.*

118. *See id.*

119. *Aaland Islands Report*, *supra* note 83, at 5.

120. *Id.* at 4.

121. *Id.*

122. *See id.*

123. *Id.*

that, “[s]uch indulgence. . . would be supremely unjust to the State prepared to make these concessions.”<sup>124</sup>

For the Aalanders, this rule meant continued alignment with Finland.<sup>125</sup> In support of this section of its decision the Commission noted that “[t]he new Finnish Constitution seems. . . to establish clearly enough equality between the two languages.”<sup>126</sup> In short, because the Finnish government was willing to make certain concessions to allow the Aalanders the ability to practice their culture, specifically continue to speak Swedish, they were unable to secede.<sup>127</sup> The Commission did not shy away from recognizing that its decision may well have been different under a different factual situation.<sup>128</sup> “If it were true that incorporation with Sweden [and with it, inherently, secession from Finland] was the only means of preserving its Swedish language for Aaland, we should not have hesitated to consider this solution.”<sup>129</sup> In this way, the Commission reconciled the competing interests of self-determination and territorial integrity. The Commission effectively established a rule where a state is due its territorial integrity and, with it, the ability to prevent secessions, where the state is providing for the rights of its people.<sup>130</sup> This is particularly relevant for minority populations within a state, who likely lack the same levels of access to political mechanisms as most in the same state. However, the Commission also left a door open for secession in the event that states do not take steps, as the Commission found Finland had, to preserve the rights of its minority populations.<sup>131</sup> In this case, a people may then have a right to secede in order to protect their access to rights.<sup>132</sup>

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124. *Id.*

125. *Id.* at 5.

126. *Id.* at 6. It is worth noting that the Commission’s assertion with respect to this point seems vague and well-qualified. Upon one reading, that the constitution being discussed “establishes[—] clearly enough[—]equality (punctuation added for clarity),” the impression is given that the equality between the languages may be ambiguous; certainly something which would be unacceptable to the Aalanders. The other possible reading, that the Finnish constitution “establishes clearly[,] enough equality (punctuation added for clarity),” would also be unpalatable to the Aalanders who would certainly prefer to have equality of languages, rather than “enough” equality of languages. Additionally, this reading of the decision would seem to border on oxymoronic. How can a language have “enough” equality? Equality would seem to be binary—either it exists or it does not. *Id.*

127. *See id.*

128. *Id.* at 5.

129. *Id.*

130. *See id.* at 4.

131. *See id.*

132. *See id.*

While the Aalanders' plea for secession may have been denied, the Commission clearly rejected the notion that secession itself is completely impermissible.<sup>133</sup> The larger rule to be gleaned from the decision is, in fact, quite the opposite. Secession, according to the Commission, can be legally permitted.<sup>134</sup> In the Commission's own words: "[t]he separation of a minority. . . can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will of the power to enact and apply just and effective guarantees [of access to rights]."<sup>135</sup> The Commission thus explains that, in a situation where a state is failing to provide for the rights of a people within its borders, those people may be able to express a right to secession as a way to achieve their rights.<sup>136</sup> This can be done when a state is unwilling to provide the rights to its people, such as a totalitarian state or in the presence of a government-sanctioned policy of oppression.<sup>137</sup> It can also be attained when a government, through either impotence, apathy, or a combination of both, is incapable of protecting and providing rights to its people.<sup>138</sup> The Commission tempers this right though, declaring that it is to be used as a last resort; that is to say, all other reasonable options must have failed a people before they may be able to secede legally.<sup>139</sup>

#### B. *UN Era*

The conclusion of World War II announced a radical shift in the organization of the world. The emerging superpowers, the United States and the Soviet Union, would clash, establishing a bipolar globe. Caught somewhere between the two was the vast majority of remaining states. To ensure this powder keg was never sparked, the global community endeavored to create a new international governing body. Considering the failures of the League of Nations to prevent war, the new body would need more power to effectively mediate conflicts. The situation was thought to be particularly dire as the next World War would have nuclear potential.<sup>140</sup>

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133. *Id.*

134. *Id.*

135. *Id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. By 1949, the Soviet Union had joined the United States as a nuclear power, plunging the world into the deepest part of the Cold War. The nuclear arms race only grew for the next several decades rendering mutually assured destruction not just a possibility but the policy of both superpowers. For more discussion of mutually assured destruction and the Cold War nuclear arms race see, e.g., *GETTING MAD: NUCLEAR MUTUAL ASSURED DESTRUCTION, ITS ORIGINS AND PRACTICE* (Henry D. Sokolski, ed.,

The UN was created out of the ashes of World War II, and with the memory of the Holocaust still freshly burned into the international psyche. The world had seen the results of the dual failures of the League of Nations. First, it had failed its main objective: it had not prevented the next “great war.” Even worse, it had failed to prevent the human rights atrocities that came along with the Second World War. The Holocaust, the Rape of Nanking, and countless other tragedies had transpired on the watch of the League of Nations. The new international organization, the UN, would be more well-equipped to mediate and prevent conflict. Not only that, but it would also serve to protect, preserve, and grow human rights, an emerging facet in international law. Necessitated by the scars of the inhumane acts that occurred during the war, human rights would become a core value to the UN. A value that, unlike in the Covenant of the League of Nations, would be enshrined in the founding documents of the new United Nations.

#### 1. UN Documents/Conventions/Covenants/International Agreements

The UN Charter was a vast step forward for human rights, particularly the right to self-determination.<sup>141</sup> Where the Covenant of the League of Nations focuses squarely on the state as the sole actor in the international world,<sup>142</sup> the UN Charter also makes room to discuss human beings as individuals.<sup>143</sup> The Charter asserts that, while the state remains the main actor in the international community, individual people also have rights.<sup>144</sup> Key among these rights for the purposes of secession are the rights to self-determination and the rights of non-self-governing territories.

The self-determination rights of all people are enshrined in article one of the UN Charter.<sup>145</sup> Paragraph two of that article provides that one of the purposes of the UN is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal

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2004). Perhaps the most vivid and famous expression of this thought comes from Manhattan Project veteran Albert Einstein who is said to have opined: “I do not know how the Third World War will be fought, but I can tell you what they will use in the Fourth—Rocks!” ALICE CALAPRICE, *THE NEW QUOTABLE EINSTEIN* 173 (2005).

141. *Compare* Charter of the League of Nations, *with* U.N. Charter art. 1, para. 2.

142. *See supra* text accompanying footnotes 71-80.

143. *See* U.N. Charter art. 1, para. 2 (discussing rights of people).

144. *See, e.g.*, U.N. Charter art. 1, para. 2 (providing self-determination rights to all people); U.N. Charter art. 1, para. 3 (ensuring all people are due human rights, irrespective of race, sex, and religion); U.N. Charter art. 73 (indicating the rights due to individuals living in non-self-governing territories).

145. U.N. Charter art. 1, para. 2.

peace.”<sup>146</sup> Article seventy-three of the UN Charter echoes similar sentiment with respect to non-self-governing territories.<sup>147</sup> This article restrains UN member states to ensure that the cultures of non-self-governing peoples are respected and cultivated.<sup>148</sup> Even more impressive, the article places the burden on member states to aid in the “develop[ment of] self-government [within non-self-governing territories], to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.”<sup>149</sup>

Years after the creation of the UN and its Charter took force, another international treaty, the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) was created.<sup>150</sup> This treaty, which entered into force in 1969, furthered the racial protections afforded under international law.<sup>151</sup> Just one year later, the ICJ determined that several provisions of the ICERD represented *erga omnes* norms of international law.<sup>152</sup> Article fifteen, paragraph two reaffirms the rights of those peoples living in non-self-governing territories.<sup>153</sup> These rights are important

[p]ending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples. . . the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.<sup>154</sup>

In this way, the Convention is again reinforcing self-determination—it is preserving the rights of non-self-governing people until such a time when they are able to achieve a full measure of self-determination.<sup>155</sup>

Additionally, the Covenant specifically enumerates many rights which people have irrespective of race.<sup>156</sup> By providing more rights due to all peo-

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146. *Id.*

147. *See* U.N. Charter art. 73.

148. *See id.*

149. *See id.*

150. *See* G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. A/RES/2106 (XX) (Dec. 21, 1965) [hereinafter ICERD].

151. *See id.*

152. BROWNIE’S, *supra* note 26, at 645 (*citing* Case Concerning Barcelona Traction, Light, and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 1, para. 24 (Feb. 5) (finding the protection from racial discrimination to be an obligation *erga omnes*).

153. ICERD, *supra* note 150, art. 15, para. 2.

154. *See id.* para. 1.

155. *See id.* art. 15.

156. *Id.* art. 5.

ple, the Covenant also presents more ways people may be subject to rights violations.<sup>157</sup> Most simply, by having more rights, people may now be subject to more rights violations.<sup>158</sup> As a result of this, it is easier for certain peoples to make the argument that they are being subjected to rights violations.<sup>159</sup> Accordingly, their right to self-determination may more readily give way to a right to external self-determination and secession so as to preserve a people’s other rights, such as those guaranteed by the ICERD.<sup>160</sup>

The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”)<sup>161</sup> and the International Covenant on Civil and Political Rights (“ICCPR”)<sup>162</sup> are also instructive as to the extent of the right to self-determination. Both Covenants share a common first article.<sup>163</sup> The first paragraph of this article states unequivocally “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political states and freely pursue their economic, social and cultural development.”<sup>164</sup> The ICESCR and ICCPR, with 160 and 167 parties, respectively, as of 2012, are considered to be binding law on those states party to the Conventions.<sup>165</sup> With such a significant acceptance by states, scholars have asserted that the ICESCR and ICCPR may constitute customary international law,<sup>166</sup> making their provisions binding on all states, not just those party to the agreements.<sup>167</sup>

1970 would see one of the strongest conceptions of the right to self-determination to date with the adoption of UN General Assembly Resolution 25/2625.<sup>168</sup> This resolution, titled the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among

157. *Id.*

158. *See id.*

159. *See id.*

160. *Id.*; *Aaland Islands Report*, *supra* note 83, at 4.

161. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/RES/21/2200 (Dec. 16, 1966) [hereinafter ICESCR].

162. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, U.N. Doc. A/RES/21/2200 (Dec. 16, 1966) [hereinafter ICCPR].

163. ICESCR, *supra* note 161, art. 1; ICCPR, *supra* note 162, art. 1.

164. *Id.*

165. BROWNIE’S, *supra* note 26, at 638.

166. *See generally*, Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights,”* 16 *IND. J. GLOBAL LEGAL STUD.* 437 (2009) (discussing the potential for the ICCPR and ICESCR to be considered customary international law).

167. BROWNIE’S, *supra* note 26, at 23-30 (discussing customary international law generally).

168. G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the

States in Accordance with the Charter of the United Nations,<sup>169</sup> has become known commonly as the Friendly Relations Declaration. Recognized by the ICJ as customary international law,<sup>170</sup> the Friendly Relations Declaration is binding on all states.<sup>171</sup> This is of great impact because the Declaration contains some of the most forceful language on self-determination to be found in international law.<sup>172</sup> According to the Declaration “[e]very State has the duty to refrain from any forcible action which deprives peoples. . . of their right to self-determination and freedom and independence.”<sup>173</sup> The Friendly Relations Declaration continues to place a duty on states to recognize that self-determination rights allow all peoples to determine their political status and that states not only may not hinder this exercise of rights, but must actively promote the use of this right.<sup>174</sup>

Despite the utility of these statements for those seeking to exercise self-determination, the Friendly Relations Declaration is most unique for one specific proposition. The Declaration states that:

[t]he establishment of a sovereign and independent State, the free association or integration with an 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.<sup>175</sup>

This seemingly innocuous language represents a titanic shift in the understanding of self-determination by the international community. The Declaration is recognizing that the right to self-determination can be invoked to establish a sovereign and independent state.<sup>176</sup> The functional effect of this is to recognize that the creation of a new state—secession—is indeed an expression of self-determination rights.<sup>177</sup>

The Friendly Relations Declaration, perhaps in an effort to compromise with the firm statement that secession can be an expression of self-

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Charter of the United Nations, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

169. *Id.*

170. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 188, 191, 264 (June 27) [hereinafter *Nicaragua*] (finding the Friendly Relations Declaration to be customary international law).

171. See BROWNLIÉ'S, *supra* note 26, at 23-30 (indicating the consequences of customary international law).

172. See Friendly Relations Declaration, *supra* note 168.

173. *Id.*

174. *Id.*

175. *Id.*

176. See *id.*

177. See *id.*

determination rights, also contains a clause reinforcing territorial integrity.<sup>178</sup>

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.<sup>179</sup>

While at first glance, this seems to bode ill for a people’s ability to secede, such a harsh interpretation is unfounded.

This language, instead, reconciles the decades-old conflict between territorial integrity and external self-determination rights.<sup>180</sup> The underlying rule is that a state’s territorial integrity is to be respected as *indivisible contingent upon* the state respecting the rights and self-determination of all peoples within its borders.<sup>181</sup> In this way, a state failing to effectuate its people’s rights or self-determination has violated its obligation to the international community.<sup>182</sup> As a consequence of this, said state is not entitled to have its territorial integrity respected and the people or peoples whose rights are being violated have the right to express their external self-determination and secede to access their rights.<sup>183</sup>

The Helsinki Final Act of 1975 is also instructive on the growth of the right to self-determination in international law.<sup>184</sup> The Act was signed by thirty-five states, including the United States and the Soviet Union, along with their NATO and Warsaw Pact allies.<sup>185</sup> Overtime, the Act has become more broadly applicable.<sup>186</sup> This Act, held to be indicative of customary international law by the ICJ in its Nicaragua decision,<sup>187</sup> also affirms that self-determination rights can be utilized by a people outside of their state.<sup>188</sup> The most telling statement of the Act indicates that the right to self-determi-

178. *Id.*

179. *Id.*

180. *See id.*

181. *See id.*

182. *See id.*

183. *See id.*

184. *See* Conference on Security and Co-Operation in Europe: Final Act, Helsinki 1975 (Aug. 1, 1975) [hereinafter Helsinki Final Act].

185. BROWNLIE’S, *supra* note 26, at 637.

186. *See id.*

187. Nicaragua, *supra* note 170, paras. 189, 204, 269.

188. Helsinki Final Act, *supra* note 184, art. VIII.



nation grants a people the right "to determine, when and as they wish, their internal and external political status."<sup>189</sup> In this way, the Act recognizes and confirms that the right to self-determination includes the ability of a people to determine their external political status.<sup>190</sup>

## 2. Judicial Determinations

Despite the utility of the international agreements discussed above in determining the status of self-determination and secession in international law, they represent only a portion of the law available. Judicial decisions and opinions are also highly instructive in determining the status of the issue in international law.

The ICJ first grappled with the issue of self-determination in its advisory opinion concerning the situation in Namibia.<sup>191</sup> The situation in *Namibia* arose from the continued occupation of South Africa within the territory of Namibia.<sup>192</sup> Decades before the issue before the Court existed, South Africa was granted a League of Nations mandate to administer the territory of Namibia, then known as German South West Africa.<sup>193</sup> Following the replacement of the League Nations by the UN, this mandate was replaced by a trusteeship.<sup>194</sup> After implementation of a policy of apartheid in Namibia, South Africa was stripped of its trusteeship over the territory.<sup>195</sup> South Africa remained in control of Namibia after this relationship ended, prompting a Security Council resolution condemning the continued occupation.<sup>196</sup> In defiance of this resolution, South Africa continued to occupy Namibia, prompting a request for an advisory opinion on the legal ramifications of South Africa's actions.<sup>197</sup>

Self-determination rights of people were crucial to the Court's determination. The Court noted that the UN Charter made self-determination rights accessible to all people residing in non-self-governing territories.<sup>198</sup> The Court then held that South Africa's continued presence in Namibia was illegal because it violated the self-determination rights of the Namibian

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189. *Id.*

190. *See id.*

191. 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. Reports 16 (June 21) [hereinafter *Namibia*].

192. *Namibia, supra* note 191, para. 1.

193. *Id.* para. 49.

194. *Id.* para. 76.

195. *Id.* paras. 128-31.

196. S.C. Res. 276 (Jan. 30, 1970)

197. *Namibia, supra* note 191, para. 42.

198. *Id.* para. 52.

people.<sup>199</sup> In holding as such, the Court accepted the notion that self-determination rights are legally enforceable.<sup>200</sup> Namibia thus stands for the proposition that a violation of self-determination rights may give those suffering from the violation legal recourse.

Four years later the ICJ again addressed self-determination, this time in its *Western Sahara* advisory opinion.<sup>201</sup> *Western Sahara* arose out of a dispute between Morocco and Mauritania concerning a disputed territory, Western Sahara.<sup>202</sup> The region, initially colonized by Spain, was going through the process of decolonization when both Morocco and Mauritania laid claims to the territory.<sup>203</sup> In an effort to resolve the conflict, the General Assembly called upon the ICJ to answer two questions in an advisory decision. First, at the time of colonization by Spain was Western Sahara *terra nullius*?<sup>204</sup> And, second, if not, what were the legal ties to Morocco and Mauritania?<sup>205</sup> In evaluating these questions, the Court found the law of self-determination to be useful.<sup>206</sup>

As it applies to the topic of secession, *Western Sahara* dealt extensively with the application of the self-determination right of a people.<sup>207</sup> The Court specifically discussed the conception of the right put forth by the General Assembly in its Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>208</sup> In this declaration, the right to self-determination is discussed as a right of the peoples.<sup>209</sup> Accordingly, self-determination is not a right for a state to exercise on behalf of its people, but rather, is a right granted innately to a people.<sup>210</sup> Self-determination need not be a right granted by a state for its people to effect it.<sup>211</sup> Indeed, because it is a right to people, it may well be used against a state should a conflict arise between the two parties.<sup>212</sup> The Court concluded by noting that Western Sahara was not *terra nullius* and it had legal ties to both Mauritania and

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199. *Id.* paras. 52, 53, 133.

200. See *id.* paras. 52, 53.

201. *Western Sahara*, Advisory Opinion, 1975 I.C.J. Reports 12 (Oct. 16) [hereinafter *Western Sahara*].

202. *Id.* para. 1.

203. *Id.*

204. *Id.* *Terra nullius* refers to the notion of land belonging to no one.

205. *Id.*

206. *Id.* paras. 54-59, 71, 162.

207. *Id.* paras. 54-55.

208. *Id.* para. 55.

209. *Id.*

210. See *id.*

211. See *id.*

212. See *id.*

Morocco, though neither state had sufficient ties to claim sovereignty over Western Sahara.<sup>213</sup> Failing to find either of these ties to constitute sovereignty, the Court held that the self-determination of the people ought to be the determining factor in its political alignment.<sup>214</sup>

The debate over secession and self-determination has not been limited to international courts. Domestic jurisdictions have also struggled with applying the murky standards that have evolved over time. One of the most cited cases on secession comes from a domestic court, the Canadian Supreme Court, Canada's highest judicial body.<sup>215</sup> Following growing secessionist sentiment in Quebec, the Canadian Governor in Council submitted a request for an advisory opinion to the Canadian Supreme Court.<sup>216</sup>

The court was faced with three questions to fully determine the issue at hand.<sup>217</sup> The first was: "Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?"<sup>218</sup> Effectively, question one is relatively simple; the Governor in Council is asking whether Canadian domestic law has some mechanism by which Quebec, or a governmental body representing Quebec, may effect a unilateral secession.<sup>219</sup> Being a determination on domestic law, the court's determination that Canadian law does not allow for unilateral secession is of limited value to this analysis.<sup>220</sup>

The second question is significantly more complex and is composed of two parts.<sup>221</sup> It reads:

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?<sup>222</sup>

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213. *Id.* para. 162.

214. *See id.*

215. This may perhaps be because it is easily the most accessible domestic case directly on the subject. The United States Supreme Court itself wrestled with the issue in 1869 when a state (somewhat predictably, Texas) asserted a right to secede. The court roundly rejected Texas's argument that it was entitled to secession. *Texas v. White*, 74 U.S. 700 (1868).

216. *Quebec*, *supra* note 54, para. 2.

217. *Id.*

218. *Id.*

219. *Id.*

220. *See id.* para. 107.

221. *See id.* para. 2.

222. *Id.*

As asserted above, the second question put to the court has, in fact, two parts of arguable distinction.<sup>223</sup> The first part asks the court generally whether any standard or rule of extant international law could give Quebec the right to unilaterally secede.<sup>224</sup> The second part does not truly ask a distinct question but, instead, refines and clarifies the first.<sup>225</sup> It directs the court to specifically consider whether a right to self-determination under international law exists and, if so, if that right could give rise to a means for Quebec to unilaterally secede from Canada.<sup>226</sup>

To answer this question, the court surveys numerous sources of international law and comes to the conclusion that secession is permitted under international law in three cases.<sup>227</sup> One of the first points addressed by the court was the argument that, in international law generally, there is a presumption that anything not explicitly prohibited is permitted.<sup>228</sup> This assertion likely stems from the Permanent Court of International Justice’s<sup>229</sup> decision in its *S.S. Lotus* case.<sup>230</sup> The *S.S. Lotus* case is known for establishing what is now known as the Lotus Principle.<sup>231</sup> Simply put, the principle supports the notion that an action not specifically prohibited by international law may be assumed to be permitted.<sup>232</sup> The court largely declines to address the Lotus Principle, noting only that in the case of unilateral secession, the denial necessary under the Lotus Principle may be implicit be-

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223. *See id.* para. 2. The distinction between the two sections is dubious because, as will be discussed *supra* in section V of this article, the effects of the self-determination referenced by the second part of the second question is the most likely and realistic source of the right to unilateral secession asked about in the first part of that question. Accordingly, the second half of the question functions more as a clarification and directive to the court. It serves to instruct the court to specifically consider and evaluate the merits of an argument asserting the legality of unilateral secession stemming from the right to self-determination. In doing so, it cannot be said to be asking the court an altogether different question.

224. *Id.*

225. *See id.*

226. *Id.*

227. *Id.* paras. 132–34.

228. *Id.* para. 111.

229. The ironically named Permanent Court of International Justice was the predecessor court to the ICJ. As such, it served the League of Nations in much the same way that the ICJ serves the UN.

230. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

231. *See id.* paras. 46, 53, 60, 65, 73 (establishing the principle that, in international law, an action not specifically prohibited may be assumed to be permitted).

232. *See id.*

cause of the “exceptional circumstances required for secession to be permitted under the right of a people to self-determination.”<sup>233</sup>

The court uses this to segue into a discussion on the right to self-determination and the extent of such a right.<sup>234</sup> The court starts by noting that, while international law predominantly views the state as the primary actor, certain rights of non-state actors are recognized.<sup>235</sup> Among these rights is the right of people to self-determination.<sup>236</sup> The court then runs through several international conventions and resolutions affirming the right of people to self-determination, some of which were discussed *supra*.<sup>237</sup> It is noted specifically that “the sheer number of resolutions concerning the right of self-determination make their enumeration impossible.”<sup>238</sup>

Having established that a right to self-determination does exist under extant international law, the Canadian Supreme Court turned to addressing the scope of that right.<sup>239</sup> Self-determination is generally meant to be exercised internally.<sup>240</sup> That is to say, “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state.”<sup>241</sup> However, in some rare cases, self-determination may be exercised externally.<sup>242</sup> A people may establish a sovereign and independent nation if the same people is incapable of effecting its self-determination rights internally.<sup>243</sup>

These rare cases fall into three general categories.<sup>244</sup> First, the right of colonized peoples to use their right to self-determination to separate from a colonial power.<sup>245</sup> The court found that this particular case was so well documented within international law that it is an “undisputed” right of colonized people.<sup>246</sup> Second, the court finds it a “clear case” that a people have a right to secession through external self-determination where it is “subject to alien subjugation, domination or exploitation.”<sup>247</sup> This right may occur

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233. *Quebec*, *supra* note 54, para. 112.

234. *See id.* paras. 113-22, 126-30.

235. *Id.* para.113.

236. *Id.*

237. *See id.* paras. 114-22.

238. *Id.* para. 117.

239. *Id.* para. 126.

240. *Id.*

241. *Id.*

242. *Id.*

243. *See id.*

244. *Id.* paras. 132-34.

245. *Id.* para. 132.

246. *Id.*

247. *Id.* para. 133.

outside of the colonial context.<sup>248</sup> This second means to secession—where a people may secede when faced with subjugation and exploitation—is referring to remedial secession.<sup>249</sup> The court also notes the potential for a third means: secession being permissible where a people have no meaningful way to exercise self-determination internally, they may, as a last resort, be entitled to secede in order to gain the ability to access their right.<sup>250</sup> These three situations are later synthesized, with the court stating “[i]n all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.”<sup>251</sup> This understanding of the rule is extremely similar to the League of Nations Commission of Rapporteur’s determination with respect to the Aaland Islands, where it was determined that a minority population may only secede when they are part of a state which is unwilling or unable to guarantee them access to their rights.<sup>252</sup>

Applying the facts present to the framework established, the court determined that Quebec lacked the legal ability to secede under international law, just as it did under Canadian domestic law.<sup>253</sup> Quebec was not currently existing in a colonial context, rendering the first means of secession inoperable according to the court.<sup>254</sup> Similarly, the people of Quebec cannot be said to be an oppressed people, preventing them from accessing remedial secession.<sup>255</sup> With respect to the final means of permissible secession, “[t]he population of Quebec cannot plausibly be said to be denied access to government.”<sup>256</sup> Having failed to meet the criteria for any of the three exceptional circumstance which would have allowed secession, Quebec was denied the ability to secede.<sup>257</sup>

The final question posed to the Canadian Supreme Court asks, “[i]n the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?”<sup>258</sup> The Governor in Council appeared concerned with the potential for conflict between domestic and international law and sought

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248. *Id.*

249. *See id.*

250. *Id.* para. 134.

251. *Id.* para. 138.

252. *Aaland Islands Report*, *supra* note 83, at 4.

253. *Quebec*, *supra* note 54, para. 138.

254. *Id.* para. 154.

255. *Id.*

256. *Id.* para. 136.

257. *Id.* para. 138.

258. *Id.* para. 2.

clarification as to which would apply should the two be found to be incongruent.<sup>259</sup> In any event, the court determined that there was no conflict between domestic and international law, because both indicated that Quebec lacked the legal right to secede under either legal system.<sup>260</sup> Accordingly, the court determined that there was no need to address the third question further.<sup>261</sup>

The closest the ICJ has yet to come to ruling directly on the issue of secession was in its advisory opinion on the situation in Kosovo.<sup>262</sup> In *Kosovo*, the court was asked to determine the legality of a unilateral declaration of independence.<sup>263</sup> The court relied heavily on the self-determination principle to come to the conclusion that the people of Kosovo had the legal right to unilaterally declare their independence from Serbia.<sup>264</sup> This decision paved the way for states to recognize an independent Kosovo and, in effect, allow for Kosovo's secession.<sup>265</sup>

The *Kosovo* case arises from what the UN Security Council termed the "grave humanitarian situation" in Kosovo.<sup>266</sup> The Security Council specifically admonished the "violence and repression in Kosovo."<sup>267</sup> In response to this, a UN coalition was sent into the region to prevent further violence.<sup>268</sup> On February 17, 2008, Kosovo adopted a declaration of independence in an

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259. *Id.*

260. *Id.* para. 147.

261. *Id.*

262. Worthy of note during a discussion of the ICJ's advisory opinion in *Kosovo* is the fact that the ICJ allowed the people that would come to be the people of Kosovo, then a sub-state group, to submit documents to the Court. This in and of itself certainly evidences a changing attitude towards the treatment of sub-state entities under international law generally, and before the ICJ specifically. Indeed, there is significant evidence of the Court allowing such groups—groups one scholar has termed "aspiring states"—to have a voice before it. For further discussion on Kosovo's status before the ICJ in the *Kosovo* advisory opinion and the status of aspiring states generally, see Shana Tabak, *Aspiring States*, 64 BUFF. L. REV. (forthcoming May 2016).

263. *See Kosovo*, *supra* note 57, paras. 1, 51.

264. *See id.* para. 123.

265. To date over 100 states have recognized Kosovo as an independent state. The European Union is currently facilitating discussions between Serbia and Kosovo to take steps towards Serbia's recognition of Kosovo's independence. Kosovo has also begun to take steps towards European Union Membership. U.S. RELATIONS WITH KOSOVO, U.S. DEPT. OF STATE, <http://www.state.gov/r/pa/ei/bgn/100931.htm> (Mar. 17, 2016).

266. *Kosovo*, *supra* note 57, para. 58.

267. *Id.*

268. *Id.*

effort to politically distance itself from Serbia and, presumably, the violence that came with it.<sup>269</sup>

The *Kosovo* Court begins its analysis by noting that self-determination rights have developed to give a right of independence to peoples subjected to subjugation, domination, or exploitation, in effect large-scale human rights violations.<sup>270</sup> While the determination of the lawfulness of the declaration of independence was based largely on grounds that a declaration of independence does not, in and of itself, violate a state’s territorial integrity, the Court notes that many states present in the proceedings discussed the issue before the Court in the context of remedial secession.<sup>271</sup> The Court, however, found it unnecessary to provide a determination on either the legality of remedial secession or its application to the situation in Kosovo.<sup>272</sup> In making this determination, it is noted that “[t]he General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law.”<sup>273</sup>

*Kosovo* provides favorable law relative to remedial secession in two ways. The first is the re-affirming of the ability of a people to seek its independence when subjected to subjugation, domination, or exploitation. In this way, it is arguable that the Court is addressing, and more importantly, accepting, remedial secession by another name.<sup>274</sup> The second important note is that the Court elected to not rule on the idea of remedial secession.<sup>275</sup> While it is certainly true that the Court could have taken this opportunity to affirm the right of remedial secession in some, limited circumstances, it is more important—given the trend towards expanding self-determination rights—that it did not reject the right out of hand.

What the Court refused to do in its advisory opinion, recognize the legitimacy of remedial secession, Judges Antonio Augusto Cançado Trindade and Abdulqawi Yusuf seem to have done so in their individual separate opinions. Judge Cançado Trindade asserted that the traditional in-

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269. *See id.* para. 57.

270. *See id.* para. 79.

271. *Id.* paras. 80-82.

272. *Id.* para. 83.

273. *Id.*

274. Remedial secession is done to cure human rights violations. Thus, for the Court to state that a people may exercise its right to self-determination to gain independence (secession) when subjected to subjugation, domination, or exploitation (assuredly something that would constitute human rights violations under the ICCPR, ICESCR, and many other sources of law), is for the Court to approve of remedial secession without saying it explicitly. Presumably, this is to avoid the connotation associate with the word “secession.”

275. *Id.*



ter-State interpretation (where a state is the smallest recognized actor in the international system and sub-state entities are not recognized in the international community) of international law is actively being overcome.<sup>276</sup> In support of this notion, Judge Cançado Trindade makes clear that presently non-self-governing territories have a unique status *vis-à-vis* the State administering them.<sup>277</sup> This different status exists to protect the right to self-determination of the peoples within the non-self-governing territory.<sup>278</sup> Thus, the “purely inter-State paradigm of classic international law” has been, and continues to be, eroded by present developments.<sup>279</sup> Indeed, “[i]n the current evolution of international law, international practice. . . provides support for the exercise of self-determination by peoples under permanent adversity or systemic repression, beyond the traditional confines of the historical process of decolonization.”<sup>280</sup> Judge Cançado Trindade is accordingly noting that, irrespective of the traditional understanding of international law and its bounds, current practice is supportive to the idea of remedial secession in the event of “permanent adversity or systemic repression.”<sup>281</sup> This is a direct result of the fact that “[c]ontemporary international law is no longer insensitive to patterns of systemic oppression and subjugation.”<sup>282</sup>

Judge Yusuf offered an even more direct and powerful sentiment, writing separately to note that while “[s]urely, there is not general positive right under international law which entitles all ethnically or racially distinct groups within existing States to claim separate statehood. . . [t]his does not, however, mean that international law turns a blind eye to the plight of such groups.”<sup>283</sup> Instead, “the right of peoples to self-determination may support a claim to separate statehood.”<sup>284</sup> This may only occur though where a state not only prevents these peoples from exercising their right to self-determination, but “also subject them to discrimination, persecution and egregious violations of human rights or humanitarian law.”<sup>285</sup> Judge Yusuf thus concludes that under existing international law:

if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situa-

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276. *Id.* para. 183 (separate opinion by Cançado Trindade, J.).

277. *Id.*

278. *Id.*

279. *Id.* para. 184.

280. *Id.*

281. *See id.*

282. *Id.*

283. *Id.* paras. 10-11 (separate opinion by Yusuf, J.).

284. *Id.* para. 11.

285. *Id.*

tion may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State’s territorial unity and sovereignty.<sup>286</sup>

Taking all of the present legal authority together and—more importantly—viewing the historical trend, one can see the evolution of the right to self-determination. The right has grown in both force and scope from the time of Grotius to the modern era. What was, even at the time of the UN’s formation, an almost academic ideal for the international community to reach towards has evolved into a legally enforceable right of all people. This right now includes the ability to, in limited circumstances, express itself externally. Such external self-determination may even take the form of secession when the state to which the people expressing the right are a part of fails to uphold its obligations to provide all of its citizens their human rights, including an effective measure of internal self-determination. As the right has progressed, a clear trend favoring the rights of people rather than those of the state emerges. The next logical step in this progression is a clear, enforceable rule by which a people may enforce their self-determination against a state and secede.

#### IV. REMEDIAL SECESSION AS A *Per Se* Right

One of the most controversial pieces of the secession debate is the fervent dispute over remedial secession not as an expression of self-determination, but, rather, as a *per se* stand-alone right. While remedial secession is often discussed independently of self-determination rights,<sup>287</sup> the two are inseparable. As discussed at length in section IV of this comment, the *Quebec* decision outlines three legal mechanisms for secession.<sup>288</sup> The second mechanism being when a people are subjected to alienation, domination, or exploitation;<sup>289</sup> and the third being when a people are unable to effectuate self-determination within their state.<sup>290</sup>

This section of this comment seeks to establish that these two means of achieving legal secession are *de facto* the same and, accordingly, should not be treated differently. This is because, under relevant international law, a people subjected to the alienation, domination, or exploitation referenced by

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286. *Id.* para. 12.

287. *See Quebec, supra* note 54, paras. 133-34 (separating secession for purposes of correcting the exploitation and domination of people from secession done as an expression of external self-determination when internal self-determination is unavailable).

288. *Id.* paras. 132-34.

289. *Id.* para. 133.

290. *Id.* para. 134.

the court in *Quebec* would, in theory, lack any effective means of self-determination.<sup>291</sup> Similarly, a people lacking any means for sufficient self-determination within their state would likely—if not inherently and by definition—be facing human rights violations which can be said to rise to the level of alienation, domination, or exploitation.<sup>292</sup>

To expand on this issue, a hypothetical is useful. If a people within a country lack acceptable access to self-determination they are inherently suffering alienation, domination, or exploitation. We know this for several reasons. The first is that self-determination in and of itself is a human right. Absent access to this right, a people are inherently suffering from the domination necessary to effect secession. Additionally, if a people were completely denied access to their self-determination rights there would have to be some mechanism by which their state would put them into such a situation. This mechanism would presumably require the violation of other human rights, specifically those enshrined in the ICCPR, among other international agreements.<sup>293</sup> To prevent a specific group or people from exercising their self-determination rights, a state would inherently have to enact a policy which treated that group or people distinctly from the remainder of their compatriots. In doing so, an ICCPR violation would occur.<sup>294</sup>

Just as a lack of self-determination rights is indicative of a policy of alienation, domination, or exploitation, evidence of such egregious human rights violations which rise to the level of alienation, domination, or exploitation will, inherently, mean that the people subject to such a policy have no meaningful access to self-determination. For evidence of this, one need look no further than the definition of self-determination. Numerous previously discussed international agreements conclude that self-determination entails control over one's political situation.<sup>295</sup> If a people finds itself in a situation where it is subject to human rights violations it can be inferred that the people in question has little to no effective control over its political situation. No people would voluntarily create, or allow to be created, a political system that would subject them to human rights violations. In this way, we can know that a people suffering human rights violations on the

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291. See *supra* text accompanying footnotes 281-282 (arguing that a people with effective internal self-determination would be incapable of preventing their own alienation, domination, and exploitation).

292. See *supra* text accompanying footnote 283.

293. ICCPR, *supra* note 162, art. 2.

294. *Id.* (providing that a state must treat its citizens “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

295. See, e.g., ICCPR, *supra* note 162, art. 1; ICESCR, *supra* note 161, art. 1; Friendly Relations Declaration, *supra* note 168.

scale of alienation, domination, or exploitation lacks control over its political situation. Accordingly, it can be inferred that such a people is also lacking self-determination rights.

Thus, the two types of secession discussed by the court in *Quebec*, secession to cure a people’s alienation, domination, or exploitation and secession to achieve a degree of self-determination, are identical in practice. As such, future scholarship and debate concerning the legality of secession would be best served to treat the two as a uniform entity—one legal right to remedial secession in certain, limited circumstances. This understanding provides a clearer, more cogent synthesis of the existing law—from all sources, not simply the *Quebec* decision—concerning secession.

### CONCLUSION

As has been shown, a legitimate right to remedial secession—in certain, limited circumstances—can be found under currently existing international law. When a people is subject to a circumstance where they cannot access the mechanisms of self-determination within their states, as is their right under international law, they may seek external self-determination to remedy this situation. Similarly, when a people is subject to subjugation such that they are suffering large-scale human rights violations, they can access a right to remedial secession to prevent further human rights abuses.

These two aforementioned justifications for secession are, indeed, one in the same. As international law has developed, the reality has arisen that any people lacking any effective means of internal self-determination will be inherently suffering human rights violations, most obviously their right to self-determination. This is as true as is the converse; any people subject to domination and exploitation such that they are suffering significant human rights violations will not be able to achieve meaningful self-determination within their state. If they were, why would they not act through the political process to end their suffering? As the distinction between these two has become practically meaningless, there can be said to exist one right to secession outside of a colonial context.

This conception of remedial secession is not, in itself, new. It is merely a refinement of existing international law. Remedial secession exists as a right to a people where that people is suffering a wide-spread policy of human rights violations. That policy of human rights violations may include a policy by which the people are unable to effect meaningful internal self-determination. Put most simply, the human right being violated need not be something commonly thought of as a human rights violation; something of the severity of slavery or apartheid. A policy by which a people are denied their human right to self-determination may be sufficient to allow for a right

to remedial secession under presently-existing international law. Further scholarship is required to make a definitive determination on the potential applicability of this rule for remedial secession to any currently existing separatist movements.

### PRESCRIPTION

Above all else, the international law concerning secession can best be described as nebulous. Despite this astonishing lack of clarity—even when considered relative to other issues in international law, a famously murky and, at times, quixotic, discipline—some conclusions may be drawn.

Perhaps even more important to the future of the legality of secession than any judicial decision or example of state practice is the reality that the right to self-determination is constantly evolving. Quite simply, the march of progress is slow but certain. Indeed, it may seem that the next logical step in the ICJ's case law is to conclude that the right to self-determination may, in some circumstances, give rise to a right to secession. Numerous instances of secession or attempted secession are likely to occur in the coming years and decades; and, with third-party states likely to become involved the opportunity for the Court to speak on secession in the way it declined to do so in *Kosovo* may well present itself. By taking this step, the Court will be able to clarify the status of secession in international law for the benefit of all states and peoples. In doing so, the Court may also be able to effect a lasting change that may finally allow a clearly-articulated means for an oppressed people to come before the international community and take steps to remediate the harm being done to them.

Since the dawn of the UN-era, international law has alternatively served two masters. On one hand, the law felt the legacies of the League of Nations and focused on the rights of the state as the sole actor in the international world. In opposition stands Enlightenment influences and a post-World War II focus on ever-growing human rights norms and ideals. In the context of secession, these two histories support, respectively, the notion of territorial integrity and the right to self-determination up to, and including, secession. It is time that this conflict be reconciled definitively. It is time that the law takes legitimate, effective steps towards preventing another Rwanda or Kosovo. It is time that the oft-cited and never enforced mantra of "never again" become actionable. The world and, indeed, international law is ready for it. All that remains is for the International Court of Justice to recognize and affirm remedial secession definitively.