Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo

Thomas W Simon, The Johns Hopkins University
Remedial Secession:
What The Law Should Have Done, from Katanga to Kosovo

Abstract

In considering Kosovo’s secessionist claims, the International Court of Justice missed a rare opportunity to make a difference. It should have set forth the grounds for granting secession within international law. This Article does not provide yet another doctrinal analysis. Instead, it takes a normative, exploratory route, laying out what the grounds for secession should be and how they should be adjudicated. It defends a refurbished Remedial Model, which provides a morally and legally justification for secession as a last resort remedy for injustices.

The Remedial Model requires a three step inquiry, one relational and two status determinations. First, does the parent state have lawful authority over the claimant territory? Second, has the parent state thwarted the claimant’s attempts at self-determination? Third, has the parent state inflicted grievous harms on the claimant?

The saliency of each questions becomes apparent when examined in light of past and present secession claims, including Biafra, Chechnya, Katanga, Quebec, the Republika Srpska, and South Ossetia. Throughout the Article, we test the Remedial Model against actual cases. The Article also provides arguments against competing models. These alternatives unsuccessfully attempt to justify secession on grounds of administrative capacity, cultural preservation, and economic disparity.

Most importantly, the Remedial Model provides a sensible framework for addressing Kosovo’s secession claim. A claim to secession presupposes that one political territory is lawfully part of another political territory. Surprisingly, we find that Serbia has highly questionable claims over Kosovo. Putting these concerns aside, we further find that Kosovo has strong claims over its status being harmed. Serbia continually blocked Kosovo’s attempts at internal self-determination. While the right to internal self-determination is questionable in international law, international law clearly condemns the taking away of self-determination once granted. Finally, we find Serbia responsible for harms, such as ethnic cleansing, against Kosovo that border on preemptory prohibitions. We find that while the case of Kosovo is not sui generis, it also does not pave the way for a slippery slope of multiple secessions.

In keeping with the exploratory thrust of the analysis, the Article ends with some speculations. It entertains the idea of using alternative adjudicatory mechanisms (such as the Human Rights Committee or the Committee on the Elimination of Racial Discrimination), already in place, to address secession claims within international law. No one should have any illusion that the Remedial Model will be warmly received or readily implemented in these or any other ways. However, the failure to at least open the discussion not only commits the sin of omission it also makes us complicit in the next conflict that arises when a secession claim is not resolved peacefully.
Remedial Secession:  
What The Law Should Have Done, from Katanga to Kosovo

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

I  
Theoretical Framework

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

The Remedial Model contrasts most sharply with the ascriptive primary rights view. We can ascribe or designate a group according to certain characteristics such as age, nationality, race, and ethnicity. The type of group at stake in the secession debate cannot be a neutral civic quality associated with membership in a state because the group claiming a right to secede makes that claim against a state, a claim to separate from a state. Chechnya’s claim to a right to secede from Russia, obviously, is not based on their member-

---

ship in the Russian state but on grounds of the group identity as Chechynians. Likewise, the same holds true of those who identity themselves as Quebecois within Canada. However, as the Canadian Supreme Court recently found, ascriptive rights to group identity are not sufficient grounds for a secession claim. It was not enough for the Quebecois to claim that they were a distinct group within Canada. That group also had to prove that it has been harmed.

Secession rights are remedial rights, invoked by a group under limited conditions to rectify harms; they are not rights that apply to all citizens in general. Philosopher Allen Buchanan has provided what is now regarded as the classic formulation of the remedial-rights justification for secession. His approach certainly represents an improvement over many attempts by philosophers to enter the fray of international law. However, his proposal, as will be shown, proves woefully inadequate. In his work solely dedicated to the topic of secession, he proposed three grounds for a remedial right to secession: (1) “genocide or massive violations of the most basic individual human rights”; (2) unjust annexation; and (3) “the state’s persistence in violations of intrastate autonomy agreements.” While the analysis offered here builds on Buchanan’s proposal, it differs from it in significant ways. First, it provides a narrower interpretation of injustice than he does (although his latter writings lean more favorably in the direction of this analysis than his previous ones). Second, contrary to Buchanan, unjust annexation has nothing to do with secession. Third, Buchanan’s inclusion of autonomy needs to be recast in terms of a more fundamental right to internal self-determination. Fourth, an analysis of secessionist claims needs to flesh out a more exact idea of group harms that is critical in assessing secessionist claims.

The Remedi1al Model improves not only upon previous philosophical but also on legal analyses. It offers an elaboration and clarification of a position defended some time ago by Hurst Hannum, a law professor who authored a classic legal text on self-determination. Accordingly to Hannum, the international community should support secession “if reasonable demands for local self-government or minority rights have been arbitrarily rejected by a central government and when there have been “massive, discriminatory human rights violations, approaching the scale of genocide.” I shall spell out more precisely what denials of internal self-determination and what human rights violations justify a right to secession. Indeed, internal self-determination has not played the role that it should in secessionist claims. However, not every violation of human rights should be a basis for a secession claim, only grave ones.

---

7 A right to remedial secession first attained recognition in international in the Aaland Islands case. The Aalanders, claiming Swedish ethnicity, wanted to become part of Sweden. In an advisory opinion the second Commission of Rapporteurs, operating under the auspices of the League of nation, declared that the Aalanders had a right to cultural autonomy under Finland and that only if Finland denied them that right could they separate from Finland. Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations Official Journal, Special Supp. No. 3 (1920): 5-10.
9 Allen Buchanan, Secession and Self-Determination, 152-153.
Overall, an injustice theory, which focuses on the wrongs in the world, provides the framework for making sense and justifying secessionist claims. A classical justice approach guides us to achieving the good. In contrast, an injustice focus centers the analysis on rectifying wrongs. We may disagree over what types of groups deserve entitlements. However, we can forge greater agreement over what harms should not befall any group. The Remedial Model focuses on injustices inflicted upon some peoples within a state.

Kosovo’s recent unilateral declaration of independence (UDL) provides an excellent test case for an alternative prescriptive analysis. The International Court of Justice fell back on the rather lame conclusion that Kosovo’s declaration did not violate international law. What follows is not a doctrinal analysis of the Court’s decision. Rather, the analysis consists of making a normative proposal of what the Court should have said. The power of this approach will become more evident through comparisons of Kosovo’s claims to those of other secessionist movements, historical and current.

II
International Law, Secession, and Kosovo

Background on Kosovo Decision

On February 17, 2008, Kosovo’s parliament took the bold step of declaring Kosovo’s independence. Serbia submitted a request to the General Assembly to have the ICJ issue an advisory opinion on the following question: Is the unilateral declaration of independence by the Provisional Institutions of Self Government in Kosovo in accordance with international law? The ICJ answered that, “general international law contains no applicable prohibition of the declaration of independence.” The court explicitly dodged the question as to whether international law sanctions a remedial right to secession. Indeed, as Judge Bruno Simma bemoaned in his dissent, the Court missed a rare opportunity to present a much more sweeping analysis. While some have called the Court’s decision judicious if not momentous, many jurists have found it disappointing. Effectively and somewhat facetiously, what the Court’s decision does is to opine that the City Council of Killington, Vermont’s decision in 2005 and 2006 to secede from Vermont and join New Hampshire did not violate international law. More charitably, Curtis Doebbler, a law professor writing one of the first academic reactions to the decision, predicted that, “it is unlikely to be remembered as one of the Court’s better attempts to articulate and clarify the law.” Also, the Court examined the factual circumstances only going back to 1999. The analysis developed below fills in the gaps and directly addresses the important issues.

Legal Analysis

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

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

14 I am more hopeful than William Slomanson that a sensible legal approach to secession can be put together within current international law. See William Slomanson, Legitimacy of the Kosovo, South Ossetia, and Abkhazia Secessions: Violations in Search of a Rule, 9 Miskolc J. Int’l L. (Nov. 2009) reprinted in 3 Ukrainian Yearbook of International Law (Feb. 2010).
15 Kosovo AO, para. 84.
17 For the sake of brevity, the term “court” shall be used hereafter as shorthand for “court or international decision maker.”
1. Is the claimant a state-like territory that represents its people and seeks independence from a parent state, which itself has a lawful claim on the claimant entity? (Relational)

2. Has the claimant attempted to exercise internal self-determination and has the parent state seriously thwarted those efforts? (Status: Internal Self-Determination)

3. Has the claimant suffered or been threatened with harms that rise to level of preemptory prohibitions? (Status: Group Harm)

Each question is covered in the separate sections below.

Relational

The first stage, then, is relational. It is an assessment of the relationship between the claimant entity and the parent state. The court first should determine the relationship between the seceding state and its parent state. Basically, if a state is claiming to secede, then the first question to ask is, “What is seceding from what?” A claim to secession presupposes that one political entity/territory is a legitimate part of another political entity/territory. The court, therefore, needs a preliminary assessment of the nature of the parent state’s relation to the claimant as well as the nature of the claimant entity. The latter investigation is not a determination per se of whether the claimant constitutes a state under international law. Rather, it is a determination of whether the claimant is state-like, that is, whether it has many of the indices of a state. If it does not, then there is no reason for the court to go any further. Take a more extreme case. If an ethnic group, scattered throughout its parent state and not concentrated in any specific territory, claims independence, then the court should immediately dismiss the claim. Biafra’s secession claim, as shown below, brought this issue into bold relief.

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

How does Kosovo fit into the Badinter Commission’s analysis? James Crawford, a leading international law jurist, and many other commentators give an incomplete account of Kosovo when they describe it only as having been an autonomous unit only within the Republic of Serbia. More accurately, Kosovo was an autonomous region, in part, within Serbia but also, crucially, within the SFRY. Crawford omits the crucial fact that Kosovo was an autonomous region within the SFRY. In fact, Kosovo was in many respects independent of Serbia. It participated in the federal governance of SFRY and had considerable autonomy to administer its own affairs. Recognizing Kosovo’s critical relationship to the SFRY should have given Kosovo a strong case for separation at the time of the Badinter report. Kosovo’s legal status was continuously determined within the framework of the SFRY. Kosovo’s declaration of independence must relate to an

---

18 The Montevideo Convention on the Rights and Duties of States sets out the criteria for statehood: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. 165 LNTS 19.

19 Conference on Yugoslavia, Arbitration Commission, Opinion No. 1, 29 Nov. 1991; 92 ILR 162, 164-6 (the Badinter Commission).

20 James Crawford, The Creation of States in International Law 408 (2nd Ed. 2006).


22 Supra n. 20, 407-8.

23 Serbia’s legal status was amorphous from 1992-2000. However, what was clear was that Serbia could not claim rights on behalf of the SFRY. See Legality of Use of Force (Serbia and Montenegro v. United Kingdom), International Court of Justice, Judgment of 15 Dec. 2004 ([the Federal Republic of Yugoslavia’s] admission to the United Nations [1
entity from which it is seeking independence. The fewer political and legal ties it has to that parent state, the better its claim to independence.

What claims of sovereignty does the alleged parent state Serbia have over the claimant Kosovo? According to some, the answer is “None.” For example, legal analysts Jennifer Ober and Paul R. Williams, claim that, “from 1963 to date, the only country that has had a legitimate rule over Kosovo has been the Socialist Federal Republic of Yugoslavia (SFRY)... In light of the fact that Kosovo has never been legally incorporated into the Republic of Serbia, Serbia may make no claim to sovereignty over Kosovo and can make no claim of territorial integrity.”\(^{24}\) However, a brief look at the history of the formation of the SFRY shows that this is also not an entirely accurate portrayal.

During World War II, the Communist leadership already had decided the basic structure of Yugoslavia as a federation of six republics. They thought that the two smaller regions, Kosovo and Vojvodina (an enclave within the territory of Serbia with a significant minority population of Hungarians), were not ready to become republics. However, the leaders also predicted that these regions gradually would gain autonomy. They thought of Kosovo and Vojvodina as different than the other regions because each had a significant ethnic population connected to another nation-state. Kosovo has mostly Albanians, and Vojvodina, a significant Hungarian minority. Each region had a kin state, Albania and Hungary respectively. Montenegro and Macedonia both made bids for Kosovo, but Serbia seemed like the natural choice.\(^{25}\) So, in 1945, the “People’s Assembly of Serbia established the Autonomous Region of Kosovo-Metohija, declaring it a ‘constituent part’ of Serbia.”\(^{26}\)

In 1963, a new constitution made moderate concessions to Kosovo’s autonomy. However, Kosovo still remained under the authority of Serbia. In fact, some commentators argue that, “for the first time, Kosovo’s constitutional status seemed to have been completely eliminated at the federal level and made a mere function of the internal arrangements of the republic of Serbia.”\(^{27}\)

1974 changed all of that for Kosovo when Yugoslavia constitutionalized the political gains that Kosovo made in its quest for autonomy. 1974 marks a critical date since the new federal constitution gave Kosovo considerable autonomy, wherein it, along with Vojvodina, “became constituent components of the SFRY, with legal representation and voting rights on the major federal bodies, and were no longer subject to the legal jurisdiction of the Republic of Serbia within which they were still nominally located.”\(^{28}\) The important issue is not over Kosovo’s failure to achieve complete autonomy as a republic but over the considerable degree of autonomy that it managed to achieve.

What prevented Kosovo from achieving full status of a republic? In March 1989, “with Kosovo under emergency rule, both the Serbia’s parliament and Kosovo’s intimidated provincial assembly passed constitutional amendments which restored Kosovo to Serbian legal, political and economic control.”\(^{29}\) In 1990, Serb authorities dissolved Kosovo’s government and passed a new constitution that annulled Kosovo’s autonomous status. The legality of Serbia’s actions should have been questioned. However, even more importantly, the denial of previously granted internal self-determination within a state should have been and should be a matter of international legal concern.

Noel Malcolm provided the following description of the subsequent events in Kosovo.\(^{30}\) In 1989, Slobodan Milosevic stripped Kosovo of the autonomy status it attained under Tito. Two organizations, the Association of Philosophers and Sociologists of Kosovo and the Association of Writers of Kosovo, took the lead in establishing an underground civil society for Albanian Kosovars. Dr. Ibrahim Rugova, an aesthetician and literary historian, president of the latter, became the leader of the Democratic League of Kosovo (LDK). Beginning in 1991, the LDK led a pacifist movement for an independent and sovereign Kosovo. No one listened to the peaceful pleas of Kosovo’s leaders. The 1995 Dayton Peace Accords ignored Kosovo. In 1996, sporadic terrorist acts took place. In 1997, the Kosovo Liberation Army, impatient with Rugova’s non-violent secessionist pleas, appeared. Unfortunately for law and morality, the rest is history.

---

24 Jennifer Ober and Paul R. Williams, *Is it true that there is no right to self-determination for Kosovo?*, Case for Kosovo, Passage to Independence. 116 (2006).
30 Malcolm, *Kosovo*. 
Given these historical developments, then, any claims that Serbia had on Kosovo were dependent on the respective parties relationships within the SFRY. Once the SFRY dissolved, then the juridical relationship between Serbia and Kosovo dissolved or, minimally, it should have brought that relationship into question. After all, Serbia, despite its protestations to the contrary, did not qualify as the successor state to the SFRY. Within the SFRY, Serbia never had a right to grant autonomy to Kosovo. After the SFRY dissolved, Serbia did not have a right to strip Kosovo of its autonomy. Serbia did not have a right to give autonomy to Kosovo nor did it have a right to take it away.

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

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

Case Studies

Comparisons of Kosovo to other related cases, namely the Baltic States, Chechnya, and Biafra bring together various strands of the analysis thus far. The analyses will show key dissimilarities with the Kosovo case. The case of the Baltic States is one of unjust annexation and not secession. The relationship between Russia and the Chechnya is clearer than that between Serbia and Kosovo in that Russia was a successor state to the Soviet Union whereas Serbia was not a successor state to the SFRY. Finally, Kosovo unlike Biafra has the indices of statehood.

Baltic States. The establishment of the Baltic States (Estonia, Latvia, and Lithuania) as independent states when the Soviet Union collapsed constituted a case of a restoration of states unjustly denied their previous independent status when the Soviet Union annexed them in 1940. The Union of Soviet Socialist Republics illegally annexed the Baltic states of Lithuania, Latvia, and Estonia—all formerly independent before 1940. Although these states experienced some positive changes as parts of the Soviet Union, those could not “alter the fact that the Baltic people have historically been, and continue to be subjugated, dominated and exploited,”31 For example, from the middle to the late 1940’s, the Soviets deported 600,000, out of a total population of six million, Balts to Siberia and elsewhere.32 Overt oppression allegedly ended in 1952.

Did the Baltic States, in the 1990’s, have what international law should recognize as a right to secession?33 No, because these were cases of unjust annexation, which must not be confused with secession. An unjust annexation is a ground for a previously independent state to seek independence from its annexing state. Unjust annexation and secession should be treated as separate phenomena. Annexation is a restorative right not a remedial one.34 It restores the status quo ante. With respect to Kosovo, Serbia’s take over of Kosovo did not constitute an unjust annexation since Kosovo was not an independent state before Serbia’s effective occupation of Kosovo.

---

33 According to Article 72 of the 1977 Constitution of the Union of Soviet Socialist Republic, “Each Union Republic shall retain the right freely to secede from the USSR.”
34 Buchanan mistakenly treats annexation as a restorative right not as a remedial one. He should decouple unjust annexation from secession; they are two entirely different matters. Buchanan, Secession, 11.
Chechnya. Chechnya poses a case closer to that of Kosovo but also with critical differences. While Kosovo’s status became questionable with the dissolution of the SFRY, the same cannot be said of Chechnya. The international community recognized Russia as a successor state to the USSR, which, in turn, was a successor to the Russian Empire. So, whatever the concerns over the treatment of Chechnya by Russia (and the Soviet Union), its juridical status is not contested, certainly not to the degree that Kosovo’s became problematic with the dissolution of the parent state, the SFRY. For our purposes, at this stage of the inquiry, we need not address the problem of Russia’s abrogation of its 1996 treaty that envisaged an independent Chechnya.

Biafra. A territory needs the basic characteristics of a state in order to make a successful case for secession. The secession attempt by Biafra will serve as a case study throughout this article to provide continuity. For many reasons, Biafra did not have these indices of a state. Although it had a government, it neither had, nor did it make any attempts to establish, an effective government. Oversimplifying the events that preceded Biafra’s ill-fated attempt at secession, there were electoral irregularities followed by a national coup, led by a military faction largely of Eastern Ibo origin, and counter-coup, staged by Northern military officers. At that critical juncture, Biafra hardly had a history as a territory seeking some form of democratic autonomy. More controversial, and perhaps less telling but nonetheless relevant, are the absence of other key characteristics of a nascent state, namely, a permanent population and a defined territory. While it had a permanent population, the population group most relevant to the secessionist claim, namely the Ibo, resided largely in areas outside Biafra. In fact, “It was not at all clear whether Biafrans sought independence from Nigeria for the former Eastern Region or for Ibos,” who were scattered throughout other regions of Nigeria.

Status: Internal Self-Determination

The second stage of the inquiry proves most crucial when examining Kosovo’s claims. At this stage, the court should make substantive assessments of the status of the claimant, including its relation to the parent state. The assessment has two distinct phases. First, the court should examine the status of the claimant with regards to internal self-determination. The other aspect of the status inquiry revolves around questions concerning harms perpetrated against the claimant by the parent state. A court should establish the grounds within international law for these two determinations. First, in the next section, we shall set forth the legal grounds for internal self-determination, namely, its basis in treaties, customary law, and judicial opinions. In the following sections, we shall establish a basis in international law for addressing certain kinds of harms, namely, those that violate preemiptory norms.

International Law and Internal Self-Determination

Hurst Hannum, agreeing with many commentators, claimed that, “the internal aspect of the right to self-determination is the most important aspect of the right in the twentieth century.” Now, we can add the twentieth-first century as well. Article 2(4) of the Charter provides that, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” Self-determination at first, took a legal back seat to the right to territorial integrity since states successfully promoted the idea that sovereignty constituted the linchpin of the international legal order. That is no longer the case because human rights and the rule of law no longer lie solely within the jurisdiction of states. Indeed, international law supports internal self-determination as the following survey of various sources of international law demonstrates.

36 Joint Declaration and Principles for Determining the Fundamentals for Mutual Relations between the Russian Federation and the Chechen Republic, 31 Aug. 1996 (referring to “the universally recognized right of nations to self determination” and providing for a mutual agreement to be reached by 31 Dec. 2001).
Treaties. Jurists often reject or indicate skepticism towards external self-determination and support or speak favorably about internal self-determination. The UN Charter contains two references to self-determination, in Articles 1(2) and 55. More explicitly, Common Article I of the two Covenants states that,

1. All peoples have a right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principles of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The State Parties to the present Convention, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination and shall respect that right, in conformity with the provisions of the Charter of the United Nations.  

Crawford, one of the foremost experts on these issues, interprets “self-determination” to refer to the “right of people of State to choose its own form of government without external intervention.” Crawford admits that self-determination in the Charter could also mean the right of a people within a territory “to choose their own form of government irrespective of the wishes of the rest of the State to which that territory is a part.” Unsurprisingly, Crawford opts for the former meaning and finds little or no support for the latter one. Yet, Crawford presents us with a false choice. This becomes all the more puzzling since he conveniently ignores the plain language of Common Article 1, which clearly refers to right of people to choose their own government within their State, that is, to a right to internal self-determination. This right is not so much concerned with external interference but with internal interference from their own government. Crawford, however, does admit that the principle of self-determination could apply to a territory like Kosovo. He coined the term carence de souveraineté, “entities part of a metropolitan State but have been governed in such a way as to make them in effect non-self-governing territories.” For Crawford, this is at best a principle and not a right. The subjects of rights are clearly defined in law, whereas those of principles are still an admixture of law and politics.

Self-determination became embedded in international law in 1960 with the passage of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples. According to the Declaration, all peoples under colonial rule have the right to “freely determine their political status.” This right, however, has been given a narrow interpretation in that it applies to colonial peoples. Recent documents, such as the 1970 General Assembly Resolution 2625 (XXV) entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among State in Accordance with the Charter of the United Nations.” [hereafter, Declaration on Friendly Relations], indicate a willingness of the international community to extend the idea of peoples beyond the colonial context. This Declaration has

---

41 *Supra* n. 20, 114.
42 Id., 114.
43 Id., 126.
44 *Declaration on the Granting of Independence to Colonial Countries and Peoples, GA res 1514 (XV), 14 Dec. 1960(89-0; 9).
been found to reflect customary international law.\textsuperscript{47} The so-called safeguard clause in the Declaration of Friendly Relations provides one legal argument for a remedial right of secession. The argument is that although the Declaration does not explicitly grant a right to secession, it does infer such a right. The Declaration states that, “The establishment of a sovereign and independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.” This language clearly suggests a right to internal self-determination as does the Helsinki Final Act, which states that, “all peoples always have the right in full freedom to determine…their internal and external political status.”\textsuperscript{48} The saving clause reaffirms the principle of territorial integrity:

> “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”\textsuperscript{49}

So, presumably, territorial integrity remains intact as long as the State does not oppress a segment of its peoples. If the State does violate the rights of some of its peoples, then those people would have a claim to impair territorial integrity by secession. However, the “language of the saving clause seems to limit any possible entitlement to secede to racial and religious groups.”\textsuperscript{50} Finally, commentaries to CERD\textsuperscript{51} and to ICCPR\textsuperscript{52} confirm the right to internal self-determination. In addition, there are: the 1975 Helsinki Final Act\textsuperscript{53}, the 1981 African Charter on Human Rights\textsuperscript{54}, and the 1993 Vienna Declaration and Programme for Action\textsuperscript{55}. Customary Law. The exact nature of internal self-determination remains controversial, and whether there is a positive right in international to internal self-determination may be disputed. There are an increasing number of international documents making explicit reference to democracy. Yet, more importantly for my argument, international law clearly condemns the taking away of internal self-determination after it has been granted. There are a number of grounds for this claim. The United Nations has condemned regimes that blatantly deny a significant portion of its population internal self-determination. By examining the UN resolutions and legal opinions in the following cases, as well as the treaty and declaration provisions cited above, I shall demonstrate that the principle of internal self-determination has become customary law not only as Judge Dilliard opined in the Western Sahara case, that is, in decolonialization cases, but also in other cases as well, namely, concerning Rhodesia, South Africa, East Timor, Sierra Leone, and Haiti.

In 1965, Ian Smith, leading the whites that only made up six percent of the population, unilaterally declared Rhodesia independent from the United Kingdom. In 1962, the General Assembly passed a resolution that condemned the perpetuation of minority rule as incompatible with principle of equal rights and self-determination.\textsuperscript{56} This was followed by a Security Council resolution, which was “the most recent expression of a general community concern to preserve “the right of self-determination for the people of Rhode-

\textsuperscript{49} GA res 2625 (XXV), 24 Oct. 1970.
\textsuperscript{52} HRC, General Comment No. 12, para. 1, U.N. Doc. HRI/GEN/1/Rev.1(Jul. 29, 1994).
\textsuperscript{56} GA Res. 2012 (XX) (Oct. 12, 1965).
The Security Council condemned the government of Rhodesia and called upon the United Kingdom to restore internal self-determination. It then adopted sanctions against the regime.

The disenfranchisement of colored voters has a long ignorable history in South Africa. The British colonial rulers severely limited the black franchise. However, after independent South Africa’s 1948 elections, apartheid became fully entrenched and institutionalized. After the Sharpeville massacre in 1966, the Security Council began to take action against the apartheid regime, by, for example, imposing sanctions on it. For my purposes, the most important thing to note is that the United Nation’s condemnation of South Africa’s racism tied integrally to its denial of internal self-determination.

Roland Rich, a political scientist, talks about a “Limited doctrine of intervention in support of democratic entitlement.” He cites the interventions in East Timor, Sierra Leone, and Haiti—all endorsed by Security Council resolutions, in support of this claim. Haiti was the first case where the Security Council authorized force to restore democracy. In other cases, the General Assembly and the Security Council reaffirmed East Timor’s right to self-determination. These examples show that, while it may be difficult to make a case for a right to internal self-determination in international law, an entirely different situation arises when a state grants and then takes away internal self-determination to either its entire population or a part thereof. Opinions of the International Court of Justice provide further support for this proposition.

Judicial Opinions. In the Namibia Advisory Opinion (1971), the ICJ held that “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination available to all nations.” South Africa administered Namibia (former German South West Africa) by a mandate from the League of Nations following World War I. Namibia’s white minority had sole representation in South Africa’s whites-only Parliament. After World War II, South Africa refused to place Namibia under a trusteeship, which would have made it subject to closer international monitoring. This, of course, is the same South Africa that institutionalized the racist system of apartheid after World War II. The ICJ declared South Africa’s role in Namibia illegal.

The court reaffirmed the principle of self-determination in the Western Sahara case. Judge Dillard’s separate opinion most strongly affirmed internal self-determination: “[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people.” In fact, in the Western Sahara case, the International Court of Justice found the principles of self-determination as a peremptory norm in international law based on a series of General Assembly resolutions and state practice of decolonization.

58 S.C. Resolution called upon the United Kingdom “to take immediate measures in order to allow the people of Southern Rhodesia to determine their own future...” S.C Resolution 232 reaffirmed the “inalienable right of the people of Rhodesia to freedom and independence under majority rule.” See J. E. S. Fawcett, Security Resolutions on Rhodesia, 41 British Yearbook of Int’l L. 103 (1965-1966).
61 “The issues of racism and self-determination are related. The South African system is particularly obnoxious...because the majority of South Africa’s people are denied any effective role in running the society in which they live. That is they are denied the right of self-determination.” UK representative to the Third Committee, 12 Oct. 1984. As quoted in Supra n. 20, 149, fn 197.
63 In the East Timor case, Resolution 1272 (1999) gave the UN Transitional Administration the mandate to develop local democratic institutions. In the Sierra Leone case, Resolution 1132 (1997) demanded that the military junta “make way for the restoration of the democratically elected Government.” Finally, Resolution 940 (1994) explicitly stated that the goal of the international community was “the restoration of democracy.”
69 Western Sahara, Advisory Opinion, ICJ Reports 1975.
At stake in all of these cases is not so much the right to internal self-determination. More accurately, there is a right not to have internal self-determination obliterated or unjustly denied once it has been granted. The ICJ in the Kosovo Advisory opinion could have found a right not to be denied internal self-determination in international law within treaties, customary law, and judicial opinions. It did, at least, find that Resolution 1244 was to establish institutions of self-government, that is “to establish, organize and oversee the development of local institutions of self-government in Kosovo under the aegis of the interim international presence.”

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

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

Case Studies

A great deal of the opposition to Kosovo’s unilateral declaration of independence has come from those who fear that legally acknowledging Kosovo’s right to secession would set a bad precedent. However, the internal self-determination factor actually distinguishes Kosovo from a number of other cases. The most relevant case to the situation in Kosovo is the Republika Srpska, now a political entity within Bosnia-Herzegovina.

Bosnian Serbs. The ICJ has cited Security Council resolutions in three cases that condemned unilateral declarations of independence. The court dismissed these as having applicability only to specific situations. However, a common concern can be gleaned from these resolutions. In short, the Security Council did not want unilateral declarations of independence unduly and unjustifiably interfering with the development of internal self-determination. Let us consider two of these here, namely, the ones concerning the Bosnian Serbs and the Turkish Cypriots given that we have already addressed the one directed at Southern Rhodesia. With Resolution 787 (1992), the Security Council condemned any threat of unilateral secession by any party in Bosnia and Herzegovina while drafting an outline of a constitutional structure to govern the region. Similarly, the Security Council in Resolution 541 (1983) condemned the attempt to establish the Turkish Republic of Northern Cyprus even before the international community had had a chance to broker a peace that would include internal self-determination. These indicate that the international community would look very unfavorably on any attempts by the Republika Srpska to follow Kosovo’s lead at declaring its own independence because now it has a working constitutional structure within which to operate and ad-

---

70 Marc Weller, Contested Statehood: Kosovo’s Struggle for Independence (2009). (“for it is often taken as axiomatic that autonomy cannot be unilaterally revoked by the central government once it has been constitutionally established”).
71 Kosovo Advisory Opinion, para. 99.
72 Later, we shall examine a very important case, namely, Russia’s support for secession efforts by South Ossetia.
73 “The third periodic report of Cyprus to the UN Human Rights Committee of 20 January 1995 on the implementation of the Covenant on Civil and Political Rights States under Article 1 of the Covenant (on the right of peoples to self-determination) … states that ‘in Cyprus democratic elections are held enabling its people to determine their political status and to pursue in a free manner their economic, social and cultural development’ and deals in some detail with presidential, parliamentary and local elections” (UN Doc. CCPR/C94/Add.1, 9.),” Christopher J. Borgen. “The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia,” Vol. 10, Chi. J. Int’l L. 1 (2009)
dress its grievances. The Republika Srpska, therefore, has a rather weak secessionist claim, in part, because it already has considerable internal self-determination.

**Biafra.** Biafra poses interesting challenges to using the doctrine of internal self-determination as a factor in assessing secessionist claims. Was Biafra’s self-determination violated by the central government prior to Biafra’s secessionist claims? A brief foray into the history of Nigeria helps to answer that question. In 1954, the British divided Nigeria into three somewhat autonomous regions—Western Nigeria (dominated by the Yoruba), Eastern Nigeria (dominated by the Ibo), and Northern Nigeria (dominated by the Hausa/Fulani). The attempt of the Eastern Region to secede was not a classical case of a thwarted attempt by the Eastern Region to attain internal self-determination. First, the situation was one of successive military coups at the federal and regional levels. The war began with ethnic rivalry within the armed forces. That is hardly the makings of democratic movements. Second, the secessionist war was, in part, a conflict over different visions of the state.\(^{74}\) One vision held to the colonial division into regions, whereas a competing vision had Nigeria divided up into states. In other words, it is difficult to see how efforts to achieve internal self-determination played a pivotal role in the conflict. The secessionist movement of the Eastern Region was not so much an attempt of one region to remove itself from the whole but rather a competing vision of the nature of the whole. One response to the continuing ethnic conflicts was to divide Nigeria into twelve states; another, taken by the Eastern Region, was to secede.

**Summary.** As demonstrated by treaties, customary law, and judicial opinions it is against international law to deny a legitimate political entity the right to internal self-determination once it has been granted. Serbia denied Kosovo the right to internal self-determination granted to it by the SFRY.

**Status: Group Harms**

The other aspect of the status inquiry that should be undertaken by the court revolves around assessing the harms perpetrated against the claimant and its people by the purported parent state. What harms would trigger a secessionist claim? International law proscribes a set of harms as preempotory norms (*jus cogens*). Prohibitions of these harms are universal; sovereignty does not immunize any state from them. These harms include: genocide, slavery, grave breaches, torture, and (perhaps) ethnic cleansing. Jurists have differed over the inventory of *jus cogens* provisions. Oscar Schacter listed slavery, genocide, torture, mass killings, prolonged arbitrary imprisonment, systematic racial discrimination, and any other gross violations of internationally recognized human rights.\(^{75}\) Commentary of the International Law Commission mentioned, “trade in slaves, piracy or genocide” as examples.\(^{76}\) Other candidates include the prohibition of crimes against humanity, the non-refoulement of refugees, and the illegality of unequal or leonine treaties.\(^{77}\)

Despite the disagreement over what to include on the list, few disagree over the inclusion of two acts on the list. Genocide and slavery make every list. The international community already has made moral and legal progress by acknowledging the universal status of these prohibitions. Genocide did not become a codified international crime until the ratification of the Genocide Convention. Today, two *ad hoc* international war crimes tribunals and a subsequently established permanent one apply the preempotory prohibition against genocide. Genocide qualifies as the worst group harm because there are no viable justification for it within any plausible moral system. Under some carefully circumscribed set of circumstances, we might find a justification for other types of mass killings, such as civilian war deaths, in some plausible (in the sense that rational individuals may disagree about it) moral systems. Killing individuals because of their perceived group affiliation, however, never is morally defensible.\(^{78}\) Indeed, genocide qualifies as among the worst, if not the worst, universally proscribed harms.


Within international law, the prohibition of derogation serves as a critical test for a peremptory norm, and genocide easily passes the test. If states cannot find any justifiable excuse for derogating from a norm, then the norm qualifies as peremptory. Hannikainen analyzes derogation grounds that do not serve as excuses for violating peremptory norms: “derogation from peremptory norms on the ground of necessity, emergency, reprisal, or self-defense, all of them being situations which allow deliberation before the action is taken, is not permitted.”\(^{79}\) None of these would qualify as an excuse for violating the prohibition against genocide. If state officials have the slightest time for reflection, that state has no excuse for choosing genocide. Citing an emergency would not suffice as an excuse for committing genocide.

It may seem that concerns about genocide have little to do with secession issues. After all, the genocides that took place in Armenia, Germany, and Rwanda did not involve any secessionist claims. Yet, other harms connect to genocide. Some other harms qualify as peremptory prohibitions, in part, due to their connection to genocide in that they have a probability of leading to genocide. Ethnic cleansing, generically, is the “attempt to eliminate or greatly reduce the size of an ethnic or national group in order to achieve greater homogeneity within a territory.”\(^{80}\) Not all instances of ethnic cleansing constitute genocide. However, forcibly moving mass numbers of people from their homes often serves as a prelude to genocide, that is, to killing of individuals because of their group affiliation. So, the list of peremptory prohibitions relevant to the secessionist issue should include ethnic cleansing since it has a genocidal form and has the potential of leading to genocide.

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

One further category of harm is needed to complete the analysis. Group discriminatory harms include those deprivations of basic needs, such as food, clothing, housing, education, and employment, because of an individual’s group affiliation. Discriminatory harms often link to the harms prescribed in the preemptory norms of international law, but they form a class distinct from genocide, ethnic cleansing, and the like. For the most part, international law does not treat discriminatory harms as preemptory primarily because it does not regard discriminatory harms as severe enough to warrant penetrating the veil of sovereignty. A Remedial Model for secession must attend to discriminatory harms, not because their presence alone would justify secession, but because the likelihood that widespread and severe occurrences of discriminatory harms would lead to the more severe forms of harm. The combination of actual severe discriminatory harms and the potential of genocide and its kin form a basis for justifying secession, within international law and global morality.

“Group harms” form a more specific category than “violations of human rights.” Group harms make up those violations of human rights targeted against members of a group because of their group affiliation. China has widespread human rights violations directed at dissidents. However, these violations do not constitute group harms since they are not directed at a group primarily because of their group status.\(^{81}\) Rather, they are, largely unjustly, aimed at individuals primarily for what they have allegedly done (or said), not for who they are. State power unleashed against dissidents does not (although, under certain circumstances, it might) constitute status harms. Secession constitutes a remedy for group, not individual, harm. As noted before, secession rights are remedial rights, invoked by a group under limited conditions to rectify harms. A remedial right does not apply to all citizens in general.\(^{82}\)


\(^{80}\) James W. Nickel, *What’s Wrong with Ethnic Cleansing*, 26 J. Soc. Phil. 6 (Spring 1995).

\(^{81}\) To put it another way, dissidents do not constitute a disadvantaged group. I have developed this more fully in *Democracy and Social Injustice* (1995).

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

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

Case Studies

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

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

The court found that none of these conditions applied to the Quebec people. Obviously, the people of Quebec do not qualify as colonial peoples. More importantly, Quebec had not been denied internal self-determination, and the people of Quebec had not suffered oppression.

The court’s formulation comes close to Remedial Model, but the latter offers greater clarity on a number of points. The court seems to see the forces of oppression as external and not internal. Earlier the court characterized the second condition as “where a people is subject to alien subjugation, domination or exploitation outside a colonial context” (italics mine). However, in its summary, the court used alien or foreign subjugation as an example and not as a defining characteristic. More importantly, the court glossed over a critical ingredient in most secession cases, namely, internal oppression, particularly where the people are “the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights.” Given that the court used this internal oppression standard to evaluate whether the people of Quebec are oppressed, we can only surmise that the failure to include internal oppression was an unfortunate oversight. Finally, while the court duly acknowledged the importance of denying internal self-determination to a secession claim, it failed to link that to oppression.

The ICJ considered the question addressed in the Quebec Secession case to be significantly different than the one posed in the Kosovo case. The question faced by the Supreme Court of Canada was,

“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?”

83 Resolution 1244 uses the following language: “[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia….” However, the reference to territorial integrity is found only in the Preamble of the Resolution and not in its operative body. Further, the resolution and annexes seem to envision an interim and not a final settlement. See Marc Weller, Settling Self-Determination Conflicts: Recent Development, 20 no. 1, Eur. J. Int’l L 111-165, 140 (2009).
84 Quebec Secession Reference, SCI No 61 (1998): Para. 138, 115 ILR 537..
If the issue is “whether international law confers an entitlement on entities situated within a State unilaterally to break away from it,” then not only was the ICJ right to differentiate the question from the one it addressed but also the answer would have to be in the negative. A better formulation is to ask whether international law prohibits the denial of internal self-determination. I have tried to make a case that it does. However, if that denial is not a preemptory norm, then the claimant only has a weak case for secession unless that denial has been egregious and nearly absolute. However, if the denial of internal self-determination combines with serious group harms, then the claimant has a strong case.

**Biafra.** In May 1967, Biafra proclaimed secession from Nigeria, initiating a thirty-month civil war that costs many lives. Severe harms directed at the Ibo preceded the secession demand. In July 1966, hundreds of Ibo military officers and enlisted men were assassinated in retaliation for the January 1966 coup of Ibo majors. September to October 1966 marked the period of pogroms in northern Nigerian cities, resulting in the deaths of 6-30,000 Ibos and the displacement of over a million Ibos. The Biafra case demonstrates the need for an international appraisal of group harm. The Biafra leadership engaged in a concerted effort to convince the international community that Biafrans were and would continue to be victims of genocide at the hands of the Nigerians. The Biafrans raised the right question. Did Biafrans experience severe group harms, actual and threatened, that mark a threshold where secession becomes a justified demand? The multinational observer team, invited by the Federal Government of Nigeria, found no evidence of genocide while the International Committee on the Investigation of Crimes of Genocide in Paris brought forth dramatic depositions describing mass killings of civilians. Although scholars generally agree with the conclusion that the charge of genocide remains unsubstantiated, the Biafra case illustrates the centrality of the issue of group harm in secession claims.

**Cases, Before and After Kosovo**

Two cases loom large over the Kosovo case. Bangladesh is the first of these because of any cases before Kosovo, it most clearly meets the standards of remedial secession. Bangladesh does not stand as a legal precedent for Kosovo since it clearly was not presented as a case of secession at the time. However, it demonstrates a factual precedent, that is, a kind of situation where the international community should have recognized a legal right to secession. The second case involving South Ossetia and Abkhazia does the opposite; it highlights a case very different from Kosovo’s claims. This is important because politically it is the case that might have proven the most troublesome if Kosovo had been granted a remedial right to secession. However, as we shall see, Kosovo’s case would not set a worrisome precedent for South Ossetia or for similar claims.

**Bangladesh.** The East Pakistan case demonstrates a model case for what a remedial right to secession should have looked like. There, we see an unfolding of harms, beginning with discrimination and ending with mass displacement of people. After achieving independence alongside West Pakistan from India in 1947, the Bengali majority in East Pakistan experienced a wave of internal colonialization at the hands of the non-Bengali-speaking West Pakistanis. For example, in 1948, the Pakistani elite launched a campaign to make Urdu, spoken by less than one percent of the Bengalis (who constituted 54 percent of the total population), the state language of West and East Pakistan. Bengalis were poorly represented in the military (disqualified by discriminatory height and weight requirements) and the civil service (despite promises to the contrary). Also, even though the East received more money for economic development than the West between 1965 and 1970, the West retained centralized control of the projects. Secession demands grew in 1970 when West Pakistan helped to annul an election in which the Awami League received massive support for its autonomy proposals. As 80,000 Pakistani troops amassed to quell the secession movement, “ten million refugees streamed across Indian borders, the largest such movement in a single time and place in history.”

The Pakistani army reportedly killed a million Bengalis, including many civilians. The United Nations Sub-Committee on Prevention of Discrimination and Protection of Minorities, meeting in August 1971, hastily rejected requests from twenty-two NGOs and the International Commission of Jurists to ex-

---

87 I have not addressed the many who died of starvation due to the politics of relief efforts. See Dan Jacobs, *The Brutality of Nations* (1987).
88 Crawford claims that only Bangladesh stands out as a clear-cut historical example of a successful secession. *Supra* n. 20, 415.
amine the situation. The intervention of India in December 1971 led to the formation of the new nation of Bangladesh. Perhaps, if the East Pakistanis had had an international means of addressing discriminatory claims and autonomy demands, then the mass killings and displacements of individuals because of their group status could have been abated.

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

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

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

Unlike Serbia’s current claim over Kosovo, Georgia has legitimate legal authority over South Ossetia and Abkhazia. South Ossetia is an autonomous administrative district and Abkhazia, an autonomous republic within Georgia. Let us take the next two questions in reverse order. While everyone thinks that atrocities have been committed on all sides, most analysts agree that Georgia’s actions have not risen to the level of committing violation of preemptory norms. However, the most critical issue is over autonomy. Georgia cannot have violated internal self-determination when there have been few attempts to implement it. Admittedly, Georgia has stifled South Ossetia’s and Abkhazia’s attempts at external self-determination. For example, Georgia withdrew South Ossetia’s autonomy status when, in 1990, South Ossetia declared independence. However, the focus should be on internal self-determination. In this case, South Ossetia, Abkhazia, and Georgia need to demonstrate good faith efforts at internal self-determination. This places the incentives exactly where they should be, namely, on the parties to attempt to broker autonomy arrangements before any full-fledged secessionist claims are entertained.

---

90 A 1972 report concluded that the killing “was done on a scale which was difficult to comprehend.” East Pakistan Staff Study by the Secretariat of the International Commission of Jurists, in Review of the International Commission of Jurists 8 (1972): 26 as quoted in Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society, 57 (2000).
91 The parties have all charged each other with these grave violations. Abkhazia did engage in ethnic cleansing of Georgians; Georgians made up over 50% of the Abkhazia’s population before 1992 while few remain today. Further, tens of thousands of South Ossetians have fled from Georgia’s incursions into its territory. Russian President Medvedev has gone so far as to accuse Georgia of genocide in South Ossetia and with threatening the same in Abkhazia. Noel M. Shanahan Cutts, Enemies Through the Gates: Russian Violations of International Law in the Georgian/Abkhazia Conflict, Case W. Res. J. Int’l L. (2008) and Gregory Dubinsky, The Exception that Disproves the Rule? The Impact of Abkhazia and South Ossetia on Exceptions to the Sovereignty Principle, 34 Yale J. Int’l L. (2009). In contrast, see Nicolas N. Petro, The Legal Case for Russian Intervention in Georgia, 32 Fordham Int’l L.J. 1524 (2009).
If the party or parties want secession sanctioned by international law, they have to undertake good faith efforts to exert their internal rights to self-determination. If those are suppressed and the parent state perpetuates further grave harms on the claimant, then international law should recognize their right to secede. If the violations of the rights to internal self-determination become so egregious that they amount to violations of preemptory norms, then they should have a legitimate appeal within international law. In short, by adopting the Remedial Model, international law could actually play a role in averting conflicts.

III
Competing Approaches

 Territories should not be permitted to secede merely because they have the wherewithal to do so. Politically, a territory that is able to function like a state may successfully secede, but functionality should not lie at the heart of an internationally recognized legal right to secession (Functional Model). Further, while cultures may be a good thing to preserve, cultural preservation should not be grounds for secession (Cultural Preservation Model). Finally, economic disparity among regions of a state should not warrant secession (Economic Harms Model). The Remedial Model offers distinct advantages over these competitors. Basically, the Remedial Model focuses on two more important values than these other models, namely, the right to internal self-determination and prohibitions against violations of preemptory norms.

Functional Model

The following outlines the justifications for adopting a Functionalist Model. If a majority group occupying a definitive territory can administer itself efficiently, that alone should suffice as grounds for secession. “Anyone who properly values self-determination should defend the right to secede whenever both the separatist group and the remainder state would be able and willing to perform the requisite political functions.”

A territorial group could demand secession on grounds that it was able to govern itself satisfactorily. Good governance would include being able to protect citizens from foreign threats. Secession under the Functionalist Model would not result in an unwieldy proliferation of states since only functionally efficient states would be able to secede. At best, proliferation of secession harms creates a potential worry, and, at worst, it has no basis in reality. If a few smaller states result from secession movements amidst a sea of larger states, then that should not provide overwhelming cause for concern. Small states, such as Liechtenstein and Andorra, have fared well in Europe. Alternatively, if secessionists’ movements proliferate and create a world community of small states, we have little past experience upon which to base our worries. A world of small states may, for all we know, be more just than the current nation-state system.

On the surface, the Functionalist Model does not create problems. Territory B, which has the capability of performing efficiently as a state, wants to secede from State A, which brokers little opposition to the breakup. It sounds so simple. The seemingly simple, however, can lead to horrifyingly complexities as the case of the former Yugoslavia attests. While we have demonstrated the richness of the Remedial Model by applying it to the complicated case of Kosovo’s secessionist claims, let us use a less complicated example, namely, the Slovak Republic.

Slovakia. The case of the Slovaks illustrates a complicated relationship between the Functionalist and Remedial Models. Critics provide incomplete and misleading pictures of the Slovak case. Slovakia may have had justifiable grounds on the Functionalist Model for seceding from Czechoslovakia, but it did not have any strong group-harm grounds for seceding. Nevertheless, the Slovak leaders put their case for secession largely in terms of group harms. Regarding group harm, the Slovaks justifiably could have claimed unfair treatment at the hands of the Czechs during the early 1920s. During that period, Czechoslovakia, forced by economic conditions, curtailed production by shutting down several Slovakian plants. Subse-

---

94 Wellman claims that "secessionist groups couch their appeals in these [injustice] terms in recognition that the international community is open to political reorganization only in cases of extreme injustice, and this is evidence that the [Remedial Model] leaves no room for secession grounded in self-determination." Christopher H. Wellman, A Defense of Secession and Political Self-Determination, Phil & Pub. Aff, fn. 7. The Remedial Model applies to questions of international intervention and does not preclude alternative grounds for secession. Without an institutional mooring, Wellman’s right to secede hovers in the inapplicable philosophical air.
ently, however, the Slovaks fared well in comparison to the Czechs under the communist regime. For example, the Slovaks obtained roughly proportional shares of the country's production. Although the Slovaks had a more agricultural economy in comparison to the more industrialized Czechs, the differences in the economies had not produced the kind of harms that would qualify the Slovaks as disadvantaged. Economic disparity between regions is not tantamount to discrimination against minorities. The Slovaks demanded recognition within the Czech and Slovak Federal Republic (CSFR) as a disadvantaged, harmed group. Yet, the Slovaks had a weak case for secession based on claims of group harm within the CSFR.

In fact, the Slovaks were a powerful and privileged minority within the CSFR. The CSFR had a population divided roughly among ten million Czechs and five million Slovaks. Within the CSFR, the Slovaks had gained a great deal of power despite their numerically minority status. The Slovaks demanded parity in all legislative and executive decision-making bodies on grounds of their minority status. The 1968 constitution gave the Slovaks considerable protection. The bicameral legislature consisted of two houses, the Chamber of People, based strictly on population, and the Chamber of Nations, divided equally between seventy-five Czechs and seventy-five Slovaks. Constitutional amendments required a three-fifths absolute majority in the lower chamber plus three-fifths of each national group in the Chamber of Nations, giving veto power to the Slovaks. A minority vote of thirty-one could defeat constitutional amendments and other major legislative acts requiring a three-fifths majority, and thirty-eight votes of no confidence could (and did) bring down the federal government.

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

Historically, the main claim that Slovaks have for group harm is at the hands, not of the Czechs, but of the Hungarians, who severely curtailed the development of Slovak cultural and political life in the nineteenth and early twentieth centuries. For example, the Hungarians closed Slovak secondary schools and sharply restricted the Slovak voting rights. The Hungarians did not provide for universal male suffrage. Comparatively, during the same period, the Czechs received somewhat benign treatment at the hands of the Austrians. In 1907, the Czechs attained universal male suffrage. The Czechs also had considerably more experience than the Slovaks did at civil service positions in the government, giving them a significant edge in governmental experience. Overall, the Slovaks did not qualify as a harmed group within the CSFR. As one writer stated: "nowhere in the history of the coexistence of these two nations can one find a chapter similar to the Serb-Croatian scenario." Nevertheless, the Slovaks had the wherewithal to secede and to carry out the functions of governing after secession as well as the permission of the Czech Republic.

Does the Remedial Model presuppose the Functionalist Model? In other words, does the harm justification for secession depend upon an assessment that the claimant state can, in fact, perform the functions necessary for governance immediately following the secession? The answer to these questions is a hesitant “No.” Functionality should not be used as a legal condition for secession. However, it should be a factor in a legal assessment. After all, international law should not be responsible for upholding the right of a claimant to

97 Ironically, the Slovaks opposed increasing the federation membership to include Monrovia and Silesia (Katarina Katharina Mathernova, Czech? Slovakia: Constitutional Disappointment, in A. E. Dick Howard, ed. Constitution Making in Eastern Europe 485, fn. 50 (1993).
98 Cutler & Schwartz, Constitutional Reform, 549.
99 Schwartz & Cutler, Constitutional Reform, 552. (“Each community has legislative power over ethnic issues such as education, the right to speak and address the authorities in one's own language, personal identity, and cooperation between and among communities.”).
100 Saladin, Self-Determination, 194.
101 Mathernova, Czech? Slovakia, 479, fn. 35.
secede when that claimant will in all likelihood fail as a newly independent state. The Remedial Model does integrate these concerns when it requires an assessment of the claimant’s relationship to the parent state and more pointedly when it assesses the claimant’s attempts at internal self-determination. Potential failed states generally make little headway at internal self-determination.

Secessionist movements often involve minorities within minorities. For example, Slovakia has two significant minorities within its borders. The Slovak Republic has a sizable Hungarian minority. The Slovaks and Hungarians have a long history of bitterness toward one another. Relatively recently, the Slovak government’s actions against its Hungarian minority caused a great deal of saber rattling between it and neighboring Hungary. The Hungarians complained of not being able to use their last names first, of the potential elimination of Hungarian only schools, and of Slovakian road signs. The European Council, in response to the increased tension between Slovakia and Hungary, conditioned Slovakia’s application for membership on Slovak assurances of protections for its Hungarian minority. However, the harms experienced by another minority, the Roma, far exceeded those claimed by the Hungarians. The Roma suffer a disproportionately higher rate of poverty, unemployment, hate crimes, and disease. Both the Hungarians and the Roma pose serious group harm issues for the Slovak Republic. Actual and potential group harm issues should trigger regional and international involvement in any secession claims. Even uncontested secession present risks of group harm. Buchanan correctly notes that “the greater the risk, the stronger the case for subjecting the secessionist efforts to the rule of international law.” However, he incorrectly associates uncontested secession with a risk-free one as the Slovak case illustrates.

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

A far more vulnerable minority in Kosovo is a group that has received relatively little attention despite their numbers almost equaling those of Serbs. Some of the most dire situations that Kosovo Roma find themselves in are under the auspices of the United Nations. The UN sets and directs a housing project in northern Mitrovica, where Roma live atop lead infected slag heaps from a defunct mine. Kosovo at least has tried to address the plight of the Roma since its UDL.

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

Cultural Preservation Model

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

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

Quebec. According to some analysts, Quebec does not satisfy conditions (1), (2), and (5). However, conditions (1) and (2) are too vague. If culture had a relatively clear-cut definition, then it would be easy to specify the imperiling factors needed to fulfill the first condition. However, cultural unity depends considerably on subjective elements. A great deal of what holds a culture together depends upon the collective mind-set of the culture-bearers. Many Quebeckers find their culture imperiled. So, whether a state has taken sufficient measure to preserve a culture is not an empirical question, roughly measurable in objective terms. The situation becomes further complicated by the fact that imperiling forces often serve to strengthen cultures or, at least, to bolster the way people think about their culture. With respect to condition (2), some Quebeckers see secession as the only alternative. Otherwise, the relatively recent referendum held in Quebec would have never gotten on the ballot. If culture preservation makes up the goal of secession, then subjective factors become tending.

Cultural preservation alone does not justify secession. Many aspects of a culture (but not all) and many cultures (but not all) merit preservation. Many of us (but not all) cherish the opportunity to observe and participate in the diverse activities of other groups. However, the parenthetical qualifiers raise warning signals. Passing over those cultures designated as “illiberal” poses more problems than it solves. How illiberal? Does a single practice, for example, female genital mutilation, make a culture illiberal? Assuming we can fill in the details of conditions of illiberal cultures, further problems arise. Preserving a culture is not an entirely innocent activity. It involves a twofold homogenization process. First, campaigns to preserve culture promote single interpretations of the culture. Diversity within the culture becomes discouraged in the name of establishing or reestablishing the culture. Second, bringing one culture into ascendancy tends to lead to devaluing other cultures. The devaluation does not occur “by necessity.” However, when preserving a culture comes to the forefront of political and social consciousness, a culture strengthens relative to its proponents setting themselves apart from other cultures. Movements to preserve a culture do not always lead to more toleration of other cultures.

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

The discussion thus far has assumed that we understand the meaning of “culture.” What other grounds might demarcate one culture from another besides language? Except for aspects of language, the secessionist case for Western Canada resembles Quebec’s. With its frontier mystique, a kaleidoscope population (French and English groups constitute less than fifty percent of the population), stereotypic farm-hick-parochial-clod image, historical grievances (including, unlike other provinces, the denial of control over land and resources), economic discrimination stemming from the National Policy of 1879--Western Canada has grounds to call itself a separate culture.

104 Avishi Margalit & Joseph Raz, National Self-Determination, 86 J. Phil 439-61 (1990). For them, a culture need not be imperiled. Any group with certain ascriptive characteristics should have a right to secession.
105 Buchanan, Secession, 61.
106 Id., at 61-64.
The case for cultural preservation strengthens when tied to group harm. If Quebec could show that its culture became imperiled because of a discriminatory disparate impact experienced by its citizens in their capacity as Quebeckers and that group harm continues to manifest itself, then Quebec would have a stronger case for justifying secession than if Quebec based its claim primarily on grounds of cultural preservation. Whatever we might think about preserving a particular culture, the case for preservation becomes particularly acute when we can link the preservation to systematic harm directed at the group. Not all threats to a culture constitute harms. Canada could refuse to provide enough funds for French films, or Canada could torture Quebeckers because of their group affiliation. The first activity might threaten Quebec’s culture; the second constitutes group harm. Absent a showing of severe group harm, neither Quebec nor Western Canada has a strong case for a legally cognizable right to secession. Surprisingly, the Cree do not have a particularly strong case of group harm vis-à-vis Quebec. The Cree have legitimate complaints against the Quebecois for past actions, but many of these have been rectified. The primary charge by the Cree against Quebec is the denial of its right to exercise its right of self-determination and stay within Canada if Quebec secedes. The Cree have legitimate complaints. The indigenous status of the Cree further complicates the case since international law has come to analyze indigenous peoples differently than, for example, minorities. Nevertheless, the Cree would not have a strong group-harm case.

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

**Economic Harms Model**

Are there other kinds of harms, other than the discriminatory harms used in the Remedial Model, that justify secession? History has provided a number of secessionist claims based on alleged economic unfairness. In these cases, one region will claim that it produces significant portion of a country’s wealth without receiving back its rightful share from the central government. Buchanan defined this discriminatory redistribution as “implementing taxation schemes or regulatory policies or economic programs that systematically work to the disadvantage of some groups, while benefitting others, in morally arbitrary ways.” He found that “it is justifiable for the better off to secede simply in order to pursue their prosperity more effectively, unimpeded by the constraints, that being in the same state with the worse off has imposed on them, without basing their justification for secession on any charge that they, the better off, have suffered an injustice.” Buchanan cited two modern-day examples where the Katangan and Biafran “Haves” tried to sever ties from their respective “Have-Not’s.”

*Katanga*. In 1960, the newly declared independent Republic of Congo immediately faced a secessionist movement by its southern-most province, Katanga. With only 13 percent of the Congo’s population, Katanga had most of the country’s wealth. Yet, it “contributed 50 percent of the Congo’s total revenues and received only 20 percent of the government expenditures.” Katanga’s status as a wealthy region cannot be severed from past injustices, from its “unsavory associations with neocolonialism and mining interests.” Katanga asked the African Commission on Human and People’s Rights to recognize its unilateral declaration of independence. The Commission ruled that,

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

---

109 Buchanan, *Secession*, 40.
110 *Id.*, at 120.
111 At the outset of his book, Buchanan characterizes the Katanga case as a state emerging out of anarchy and not secession. *Id.*, at 21-22.
112 *Id.*, at 41.
In other words, in the absence of a showing of denial of internal self-determination and group harms, Katanga lost its secessionist bid. The United Nations became immersed in the controversy, ultimately helping to stifle Katanga’s secessionist aspirations.

Biafra. Biafrans clearly held the wealth, especially relative to the rest of Nigeria. With only 22 percent of the population, Biafra contributed 38 percent of total revenues, and received back from the government only 14 percent of those revenues.\(^{115}\) The United Nations and the international community carefully avoided direct action in the Biafran war, even though arms shipments and refusal to recognize Biafra (by all but four countries) clearly affected the war. However, if we look closer, the international community refused to aid directly the Have-NotS. For although the Biafrans held the wealth, the Ibo--the only Biafrans, arguably, to have experienced group harm, and the only strong supporters of secession--did not.\(^ {116}\)

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

IV

Legal Forums for Secessionist Claims

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

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

Pie-in-the-sky legalism is contrary to a realist position that sees little or no role for law in questions of secession or, for that matter, for issues of self-determination. Yet, legal appeals seem unavoidable, especially if we interpret “law” in the broad sense of “a set of rules and mechanism for adjudicating disputes.” Adjudicatory institutions are well suited to make decisions about harms. Thus, I shall explore the feasible judicial approaches to secessionist claims, other than the ICJ advisory opinion route that I have focused on so far. Secession claims have centrally employed the language of law. Even if putting the claims in legal terms does not have a major impact on events, the resulting legal analyses should set the framework for evaluating the actions. Is a secessionist movement making legally and morally legitimate demands? Further, are the demands defensible within a justifiable theory of international law? What are the legally cognizable moral grounds for secession? What international institutions should adjudicate these claims?

The answers to these questions lie partially in what grounds fail as justifications for secession. Legal theorists were the first to direct scholarly attention to the legal principles underlying secession.\(^ {117}\) Political philosophers have recently devoted considerable attention to moral justifications of secession. Some have complained, however, that the moral discussions have little application.\(^ {118}\) The Remedial Model meets the

---

\(^ {115}\) Buchanan, *Secession*, 41.

\(^ {116}\) I owe this point to Professor Crawford Young.

\(^ {117}\) For an extensive list of legal works that defend a remedial right to secession see Antonello Tancredit, *A Normative "Due Process" in the Creation of States Through Secession*, Secession: International Law Perspectives 171-207, 176, fn 13 (2006).

challenge by constructing morally sound principles that could be realistically implemented into international law. This pushes the discussion a step beyond where legal theorists and political philosophers have taken it thus far. Theorists, to date, have only hinted at how to operationalize within current international institutional structures the moral justifications for secession. The relatively unknown Human Rights Committee (HRC) holds promise as an arbiter of secession disputes.

Before embarking on this ambitious project, I need to address concerns that the entire enterprise engages the issues too late (or too early), operates at too global and unrealistic level, and analyzes primarily historical rather than current cases. First, critics claim that questions about secession for outsiders come either too late or too soon. Outsiders debate secession issues either after the fact when it is too late to change or before the fact when it is too early for outside interference. In response to this concern, the Remedial Model attempts to stake out a middle ground by paving the way for secessionists’ claims to become part of a reasonable debate outside the confines of the state. The project may begin to make more sense and to be more worth undertaking if secession issues are seen as occupying a middle ground between discrimination and genocide. Some regional and international mechanisms already exist (however ineffective at present) for addressing discrimination against a group outside the state where the discrimination takes place. Taking the next step towards entertaining secessionists’ claims just may prevent, lower the probability, or stave off the worst group harm, namely, genocide. Second, critics see that a focus on secession claims at an international level bypasses more effective and more realistic local and regional levels to address the issues. However, the Remedial Model does not rule out similar or complementary ones proposed at local, intrastate, or regional levels. Whatever progress unfolds at other levels, the international one plays a crucial role. An international structure has the advantage of having less at stake in a secessionist issue by being the furthest removed from the conflict. Third, a critic might charge the analysis provided here with being too remote since it concentrates on ethical justifications and on historical cases. However, historical cases provide an opportunity to construct and defend a sound ethical and legal framework before pretending to have answers to current crises. Indeed, as argued below, the United Nations Human Rights Committee could serve as a place to begin implementing the Remedial Model.

Implementation: The Human Rights Committee

A judicial approach to secession should be substantive and not merely procedural. In a procedural model, a group need only meet specified procedure hurdles (for example, three quarters of the residents of the seceding territory must vote for secession after a designated waiting period) to invoke a right of secession. In a substantive model, a group has to prove substantive claims, such as harm to its members. Courts, contrary to some commentators, are not more likely to exhibit a bias under the substantive than under the procedural model since national courts are creatures of the state whose sovereignty substantive claims challenge. An external, regional or international adjudication would more likely exhibit independence than an internal, state court. An international tribunal should adjudicate substantive secession claims. How could this take place within existing international structures?

The Human Rights Committee (HRC), formed in 1977, has jurisdiction to hear complaints about the right to self-determination. States do not have representatives on the HRC. Rather, states elect HRC members. This gives the HRC some measure of independence from its sponsoring states. The HRC operates by consensus and issues opinions on complaints, although provisions exist for appending individual opinions to cases brought before the HRC. Article 1, common to both the International Covenant on Civil and Political Rights and the one on Economic, Social and Cultural Rights, states:

Allen Buchanan, Self-Determination, Secession, and the Rule of Law, The Morality of Nationalism, 301-323 (1997). Buchanan, despite his call for an institutional morality, has little to say about the institutional instantiation of his principles for secession. He hints at the role of the World Court (the International Court of Justice) but ignores the problem of overcoming the problem that Article 34 of the Court’s statute dictates that “[O]nly States may be parties in cases before the Court.” Statue of the International Court of Justice, as annexed to the Charter of the United Nations, 59 Stat. 1031.

All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.

Interpretations must operate within the confines of this language. Nothing precludes an expansive reading of “peoples,” taking it outside of the colonial context. If a minority constituted a “people,” then it would qualify as a candidate for self-determination. Once minorities are recognized, then the remedial road to secession begins with harms to them established under Article 26, most pointedly those harms that undermine the minority’s right to “freely determine their political status and freely pursue their economic, social and cultural development” (Article 1). In other words, secession could remedy harms that undermined internal self-determination. The structure of the HRC and the language of the Convention do not impede implementation of the Remedial Model.

Reporting. Article 40 of the Covenant on Civil and Political Rights requires states to report to the HRC, the only obligation states adopt after ratifying the ICCPR. State parties must describe measures taken to implement rights, including the right to self-determination, contained in the Covenant. The ensuing constructive dialogue between the HRC, through its “good comments,” and the reporting state could open a consideration of conditions for internal self-determination. The HRC has established a five-year period for submitting reports. Supplemental reports could help to maintain the dialogue between a state and the Committee. The HRC has no fact-finding powers itself, but it could make more extensive use of other agencies and of NGOs. Although the HRC is technically not a part of the United Nations, it does submit an annual report to the Third Committee (Social, Humanitarian, and Cultural Questions) of the General Assembly.

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

Complaints. The Optional Protocol, which provides an inquiry and a complaints procedure, allows the HRC to hear individual complaints. The HRC has registered fewer than 600 Communications in more than fifteen years of work. NGOs have not been granted the right to petition the HRC. While carrying considerable moral authority, the HRC issues nonbinding opinions (or “views”) on the complaint. The opinion includes specific recommendations. Individual complaints of discrimination take on a critical importance particularly if failure to address them might engender recourse to violence.

The HRC has rejected complaints by groups. It came close to allowing group representatives to make group harm claims under the Optional Protocol in A.D. v. Canada. It denied the admissibility of Grand Captain of the Mikmaq tribal society’s claim that the Mikmaq were denied the right of self-determination because of harmful policies inflicted upon them by the Canadian government. The HRC found that he had not been authorized to serve as a representative of the Mikmaq and that he had not demonstrated that he was personally a victim of any right contained in the Covenant. The first part of the HRC’s approach makes good sense. The Committee needs to determine whether someone truly represents the group. However, being a group representative does not entail personal injury. The issue is not individual harm to the group representative but harm to members of the group because of their group status. Unfortunately, in a subsequent case, the Lubricon Lake Case, the HRC effectively severed the right of self-determination

---

from the complaint process under the Optional Protocol. The HRC has moved to an interpretation whereby it regards the Optional Protocol as covering complaints by individuals qua individuals whereas Article 1 of the Covenant deals with rights conferred upon people as such. Again, nothing precludes the HRC from rescinding this position and entertaining claims of harm to group members brought by group representatives.

**Arbitration and Advisory Opinions.** The HRC can employ a two-step arbitration procedure. First, the HRC can exercise its Good Offices (article 42). Second, a Conciliation Committee (article 42) can address the matter. Obviously, arbitration has great potential for preventing disputes from escalating into violence. Unfortunately, the HRC does not have authority to issue advisory opinions. If the General Assembly has so authorized, under Article 96 of the Charter, organs of the United Nations and specialized agencies can seek advisory opinions form the International Court of Justice. Provisional measures also can be sought from the ICJ. For example, in 2008, to preserve its rights under the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), the Republic of Georgia filed a request from the ICJ to take provisional measures under Article 41 against the Russian Federation for the latter’s role in ethnic discrimination and ethnic cleansing. The ICJ granted the request for provisional measures.

**Remedies.** The HRC does not have a sterling record of compliance with its decisions. Uruguay has appeared most often before the HRC and has the worst record of compliance. Madagascar, Surinam, and Zaire have refused to cooperate with the HRC. In contrast, Canada, Denmark, France, Jamaica, Mauritius, the Netherlands, and the Scandinavian countries have cooperated. The HRC has not adopted any supervisory or enforcement mechanisms. With this relatively dismal record, how can anyone expect the HRC to play an even greater role in international law, particularly with regard to a radical remedy like secession?

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

**Conclusion**

The Remedial Model, with its three-step inquiry, provides a morally and legally defensible way of addressing secession. Before addressing the secession claim relational issues must be resolved. What is the nature of the territory claiming secession, and what is its relation to the parent state? The parent state must show that it has legal jurisdiction over the seceding territory. This relational inquiry proves critical, particularly in cases where secession attempts occur in the midst of a state that is disintegrating. The Remedial Model highlights two harms. First, international law has consistently condemned states that remove internal self-determination from a portion of its citizenry. By making internal self-determination the lynchpin of secession, the Remedial Model correctly places the right incentives on states. If states want to avoid secessionist claims attaining legitimacy in international law, they need to address demands for internal self-determination. Finally, the Remedial Model treats secession as a form of humanitarian intervention. If the

seceding entity demonstrates violations of preemptory norms by the parent state, then secession provides a remedy of last resort that international law should recognize. If a parent state has denied internal self-determination and, for example, committed ethnic cleansing against its people, then secession provides a justifiable remedy.

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