

# To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the *Kosovo* Advisory Opinion

## ABSTRACT

*Too often states have invoked territorial integrity and nonintervention in defending abuses perpetrated against peoples within their borders. This practice must be stopped by embracing a robust remedial right to secession. Remedial secession takes place when an oppressed people creates an independent state by seceding from a state that denies its right to self-determination. It has been speculatively posited as an “extreme circumstances” possibility, but remedies to denials of the right to self-determination have not been clearly determined beyond the decolonization context. In the post-colonial era, international law has recognized the importance of fundamental human rights to such a great degree that the right to remedial secession now warrants assessment as a possible entitlement. The Kosovo Declaration of Independence and its adjudication before the ICJ showcased the tension between self-determination and territorial integrity, demonstrating that territorial integrity must not protect those committing egregious violations of human rights. This Note then proposes that the remedial right to secede should vest in a group that: (1) constitutes a “people,” (2) has been systematically oppressed, (3) has been denied self-determination within the existing state, (4) freely chooses to secede, and (5) respects the rights to self-determination of other minorities. This proposal offers a last-resort way for a victimized people that has been denied its rights under international law to exercise self-determination.*

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#### I. INTRODUCTION: THE TENSION BETWEEN SELF-DETERMINATION AND TERRITORIAL INTEGRITY COMPLICATES WHETHER AN OPPRESSED PEOPLE MAY SECEDE

During the past century, the right to self-determination has figured prominently in the law concerning independence movements and the emergence of new states.<sup>1</sup> The right to self-determination, generally, entitles a community to participate in determining its own form of government.<sup>2</sup> The right developed from the principle of noninterference—a principle reflecting a state's right to determine its own government without external interference<sup>3</sup>—to encompass the succession of colonial regimes with self-governing states.<sup>4</sup> In this conception, the right to self-determination crystallized as a foundational international rule, recognized as a *jus cogens* norm.<sup>5</sup>

1. IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 40–41 (1998).

2. Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 1, 5 (James Crawford ed., 1988).

3. See JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 114 (2d ed. 2006) (noting sovereign equality and nonintervention as the primary meaning of self-determination).

4. See Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 *STAN. J. INT'L L.* 255, 265 (1996) (observing the right's emergence as an effective means of emancipating colonial territories).

5. See CRAWFORD, *supra* note 3, at 101 (adding self-determination and the basic rules for protections of civilians in wartime alongside recognized categories of rules: first, protecting foundations of international order (e.g., prohibiting genocide);

The principle of self-determination occasionally operates in tension with territorial integrity.<sup>6</sup> The principle of territorial integrity entitles a nation to exercise sovereignty over the area within its borders, without unwanted incursions by other states.<sup>7</sup> Where a minority group within a state is oppressed, it may only be able to participate in determining its mode of government—and thereby exercise its right to self-determination—by forming a new state. This act would change the national boundaries of the existing state and conflict with the principle of territorial integrity. Consequently, whether the right to self-determination includes a right to secession is less clear. This confusion should be resolved by embracing a remedial right to secession to ensure that a minority may exercise its right to self-determination where its surrounding state violates its fundamental rights.

The tension between self-determination and territorial integrity is at the heart of the debate surrounding Kosovo's statehood. On July 22, 2010, the ICJ responded to the General Assembly's request to determine whether Kosovo's Declaration of Independence violated international law<sup>8</sup> with the advisory opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.<sup>9</sup> In determining the legality of Kosovo's claimed right to break away from Serbia and be an autonomous state, *Kosovo* would allow the ICJ to determine the scope of the right to self-

second, concerning peaceful cooperation in common interests (e.g., freedom of the seas); and third, protecting fundamental human rights). *Jus cogens* norms are peremptory norms of international law from which no derogation is permitted. BLACK'S LAW DICTIONARY 937 (9th ed. 2009).

6. See Anne Peters, *Does Kosovo Lie in the Lotus-Land of Freedom?*, 24 LEIDEN J. INT'L L. 95, 102 (2011) (finding territorial integrity and self-determination to be conflicting principles through the public law perspective).

7. BROWNLIE, *supra* note 1, at 53–54.

8. G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008). The formulation of the question itself constituted a minor victory for Serbia, which submitted the draft resolution. See U.N. GAOR, 63rd Sess., 22d plen. mtg. at 1, 15, U.N. Doc. A/63/PV.22 (Oct. 8, 2008) (Vuk Jeremic, Serbia's Foreign Minister, introducing and debating Serbia's draft proposal). This Note observes that Serbia succeeded in persuading the question posed to characterize the Declaration of Independence as "unilateral," implying that it deviated from the standards of the international community. Distinct from the separation or secession itself, however, any declaration of independence must almost necessarily be unilateral, as it is an assertion by the new entity of a claim to sovereignty. Framing the declaration as unilateral adds little to the issue at bar, but succeeds politically in adding a conclusory gloss of dissonance with existing norms. The Court's ultimate determination that international law neither authorizes nor prohibits declarations of independence mooted this victory. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 141, ¶ 81 (July 22) (noting that prior determinations of illegality for particular declarations of independence attached because of egregious violations of international legal norms by the party declaring independence, not owing to the declaration per se).

9. *Kosovo*, 2010 I.C.J. 141.

determination beyond the traditional decolonization context.<sup>10</sup> Traditional claims to self-determination grant a people independence from an existing state to terminate colonial or foreign occupation.<sup>11</sup> As Kosovo was not occupied by a colonial or foreign power, it tested the law of self-determination as applied to an oppressed minority within a state.<sup>12</sup> The Court's majority, however, refused to consider whether the Kosovo situation manifested a right to self-determination or a right to remedial secession based on its particular historical context.<sup>13</sup> Though the majority opinion did not address the rights to self-determination and secession, the separate and dissenting opinions engage these issues and provide an excellent vantage to assess the right, as it should be applied in the post-colonial world.<sup>14</sup>

Territorial integrity should not be able to provide impunity to states committing human rights abuses, as states possess fundamental obligations to respect the rights of different peoples within their borders.<sup>15</sup> A state that abuses a people within its borders should lose its legitimacy as a state with respect to that group.<sup>16</sup> The

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10. See Marc Weller, *Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?*, 24 LEIDEN J. INT'L L. 127, 129–30 (2011) (finding the *Kosovo* advisory opinion to have sat on the borderline of the established law of self-determination, offering to possibly revitalize a concept of remedial secession, and evaluating the status of unrecognized entities within States); Marko Milanovic, *Kosovo Advisory Opinion Preview*, EJIL: TALK! (July 14, 2010), <http://www.ejiltalk.org/kosovo-advisory-opinion-preview> (discussing the relation between the Declaration of Independence, secession, and state creation, noting that Kosovo's team de-emphasized matters of self-determination, hewing to the *sui generis* argument).

11. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 131 (Can.) (noting that in certain contexts the right to self-determination creates a right to external self-determination (i.e., secession) for those under colonial rule or foreign occupation); Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21); Daniel Thürer & Thomas Burri, *Self-Determination*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 15 (2008), available at <http://www.mpepil.com> (citing Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 54–59 (Oct. 16)).

12. See TIM JUDAH, KOSOVO: WHAT EVERYONE NEEDS TO KNOW 130–31 (2008) (explaining that Kosovo was not able to gain sovereign independence after the dissolution of Yugoslavia because Kosovo was merely an autonomous province within Yugoslavia rather than an internal republic. Kosovo's autonomy did not change the fact that it was still part of Serbia).

13. *Kosovo*, 2010 I.C.J. ¶¶ 82–84. For criticism of this point, see Hurst Hannum, *The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?*, 24 LEIDEN J. INT'L L. 155, 156 (2011) (noting that “[t]he Court somewhat lamely—although correctly—concludes” that it could resolve the matter without answering these questions); Peters, *supra* note 6, at 98 (reasoning that it might have been possible for the Court to speak to such issues, but such a choice would likely have invited criticisms of judicial activism).

14. See *infra* Part III (discussing the separate opinion of Judge Cançado Trindade and the dissenting opinion of Judge Koroma and their analyses of the secession issue).

15. *Kosovo*, 2010 I.C.J. ¶ 199 (separate opinion of Judge Cançado Trindade).

16. *Id.* ¶¶ 205–06.

modern era of international human rights law must not permit massive violations of its order under the fig leaf of territorial integrity.

This advocacy recognizes and finds unpersuasive the counterargument that permitting remedial secession would erode the principle of territorial integrity, jeopardize the foundations of international law, and encourage separatists worldwide.<sup>17</sup> This concern highlights the real risks of moral hazard and of the refashioning of international law such that noncompliant states cease to be legitimate. Nevertheless, this concern fails to outweigh the need to protect the right to self-determination.

Territorial integrity is contingent on compliance with the principle of self-determination and equality, but international law does not make clear the consequences or available remedy if a state denies self-determination and equality to a people within its borders.<sup>18</sup> International law must address the consequences and remedies incumbent on such a violation to ensure that the human rights in the right to self-determination receive effective protection under international law. Resolving this uncertain area will combat the use of territorial integrity for impunity, while demonstrating the commitment of international law to defending the rights of minority peoples worldwide. A right that cannot be exercised is no right at all.

Part I introduces the contested terrain between secession and territorial integrity, particularly in the context of the Kosovo Declaration of Independence and the International Court of Justice (ICJ) advisory opinion addressing the legality of Kosovo's declaration. Part II frames the right to self-determination by surveying the development of the right in international law, highlighting the tension between self-determination and territorial integrity. Part III contrasts the positions of Judges Antônio Augusto Cançado Trindade and Abdul G. Koroma in their separate and dissenting opinions, respectively, to *Kosovo*. Judge Cançado Trindade interpreted the right to external self-determination expansively, reasoning that if a state fails to respect the rights of a people within its borders, it forfeits its right to territorial integrity over that people.<sup>19</sup> Judge Koroma dissented, stressing that territorial integrity constitutes a fundamental principle of international law, such that self-determination may not be invoked to justify acts conflicting with territorial integrity.<sup>20</sup> Building on the strength of Judge Cançado Trindade's reasoning, Part IV proposes a remedial right to secede as a

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17. See *Kosovo*, 2010 I.C.J. ¶ 21 (dissenting opinion of Judge Koroma) (objecting to the Court's conclusion that Kosovo's Declaration of Independence did not violate international law).

18. See CRAWFORD, *supra* note 3, at 118–19 (discussing the safeguard clause).

19. See *infra* Part III.A.

20. See *infra* Part III.B.

component of the right to self-determination. This right should be available when the existing state has foreclosed all other means of exercise of the right to self-determination. Under this rule, an entity would have a right to secede when it (1) constitutes a “people” under applicable law, (2) is governed unequally or subjected to systematic oppression, (3) is denied the internal exercise of its right to self-determination, (4) freely chooses to secede, and (5) respects the rights of other minorities within its general territory.

## II. THE RIGHT TO SELF-DETERMINATION PERMITS SECESSION ONLY IN EXTRAORDINARY CIRCUMSTANCES

The right to self-determination has strong foundations in modern international law. The UN Charter makes the protection of equality and self-determination a fundamental purpose of the United Nations.<sup>21</sup> The protection of equality and self-determination further serve as considerations to the UN promotion of development and respect for human rights.<sup>22</sup>

### *A. General Assembly Declarations Establish Self-Determination as a Decolonizing Principle*

Early in the UN era, the right to self-determination became closely associated with the process of decolonization.<sup>23</sup> To promote the transition from colonial rule to self-governance, the General Assembly passed the Declaration on the Granting of Independence to Colonial Countries and Peoples (Declaration on Colonial Independence).<sup>24</sup> This document declared that subjugation by foreign

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

22. *Id.* art. 55 (“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”).

23. See Simpson, *supra* note 4, at 265–66 (1996) (noting that the primacy that self-determination achieved in the decolonization process threatened to push the right towards obsolence in the post-colonial period).

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

domination or exploitation violates a people's fundamental human rights.<sup>25</sup> A people has the right to self-determination, entitling it to freely determine its political status and freely pursue economic, social, and cultural development.<sup>26</sup> In exercising this right, however, a people may not seek to disrupt the national unity or territorial integrity of the existing state.<sup>27</sup> The declaration based this limit on, *inter alia*, equality and "respect for the sovereign rights of all peoples and their territorial integrity."<sup>28</sup> This formulation of the right strictly limits the right to the context of colonialism and its exercise to maintaining territorial integrity.<sup>29</sup> The right could not support a group's secession *from* a state, but rather supported occupied peoples in their campaigns to expel existing colonial occupiers while maintaining the existing territorial boundaries,<sup>30</sup> per the succession principle of *uti possidetis*.<sup>31</sup>

The General Assembly's subsequent Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration)<sup>32</sup> introduced the so-called "safeguard clause," a vital qualification to the law of self-determination.<sup>33</sup> The safeguard clause provides that expression of the right must be limited and may not be construed to authorize or encourage any act that would threaten the territorial integrity of "States conducting themselves in compliance with the principle of equal rights and self-

25. *Id.* ¶ 1.

26. *Id.* ¶ 2.

27. *Id.* ¶ 6.

28. *Id.* ¶ 7.

29. *See id.* pmb. (proclaiming the necessity of bringing about an end to colonialism before setting out operative principles).

30. *See* CRAWFORD, *supra* note 3, at 123 (citing Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 121–22 (Oct. 16) (separate opinion of Judge Dillard)) (arguing that a norm of international law had emerged with respect to decolonization of non-self-governing territories); *id.* at 125 (citing ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 103 (1963)) (noting that the transition only permitted change of governance within existing boundaries); Note, *The United Nations, Self-Determination and the Namibia Opinions*, 82 YALE L.J. 533, 541 (1973) (observing that the main consideration in decolonization was the political boundaries of former colonies).

31. *See* Daniel Thürer & Thomas Burri, *Secession*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 29 (2009), available at <http://www.mpepil.com> (explaining that administrative boundaries were preserved during decolonization owing to the principle of *uti possidetis*). *Uti possidetis* is the doctrine that the boundaries delineating colonial borders become national borders on the colony's succession to independence. BLACK'S LAW DICTIONARY 1686 (9th ed. 2009).

32. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, Annex, at 123–24, U.N. Doc. A/8018 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration] (expressly framing the right to self-determination with the purpose of bringing colonialism to a speedy end).

33. *Id.* at 124.



determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory and without distinction as to race, creed or colour.”<sup>34</sup>

The Friendly Relations Declaration limits the scope of both self-determination and territorial integrity. The document recognizes the possibility of *external* self-determination, where a people creates an independent sovereign state, detached from the existing state—though not when acting unilaterally.<sup>35</sup> If a people could exercise their right to self-determination *internally*, within the existing governmental structure of the state, then the right to *external* self-determination would not exist. Meanwhile, the document limited territorial integrity by providing that a state’s failure to safeguard the rights of its minorities might defeat reliance on territorial integrity.<sup>36</sup> The Friendly Relations Declaration clarifies that self-determination has external and internal modes of exercise, while suggesting that the domain of the existing state may be limited by failure to respect the self-determination of peoples within its borders.<sup>37</sup>

Other bodies have agreed that self-determination does not require creating a new state. The African Commission on Human and Peoples’ Rights held that self-determination may be exercised through independence, self-government, local government, federalism, confederalism, unitarism, or another form of political action that gives force to the people’s will without abrogating territorial integrity.<sup>38</sup> The Supreme Court of Canada distinguished internal from external self-determination in *Reference re Secession of Quebec*.<sup>39</sup> Internal self-determination consists of a people’s pursuit of political, economic, social, and cultural development within the existing state’s framework.<sup>40</sup> As discussed in the Friendly Relations

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34. *Id.*

35. *Id.* at 123–24.

36. See CRAWFORD, *supra* note 3, at 118–19 (noting that under this formula, a state that represents all people in its territory without distinction complies with the principle of self-determination with respect to its entire people and may consequently rely on territorial integrity for protection).

37. See Friendly Relations Declaration, *supra* note 32, at 123–24 (“Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.”). While the declaration lacks general applicability and provides only analogical force outside of decolonization, it nevertheless significantly elucidated the contours of self-determination. See Note, *supra* note 30, at 557 (observing that the fact that the General Assembly was only assessing self-determination in the decolonization context only reflected that the issue arose in that context and did not preclude applying the principle to new contexts as they develop).

38. *Katangese Peoples’ Cong. v. Zaire*, Comm. No. 75/92, [2000] Afr. Hum. Rts. L. Rep. 72, para. 4 (Afr. Comm’n on Hum. & Peoples’ Rts. 1995).

39. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 126 (Can.).

40. *Id.*

Declaration, external self-determination may permit a people to create a new state in only the most extreme cases.<sup>41</sup>

B. *The Namibia and Western Sahara Advisory Opinions*  
*Illustrate the Application of Self-Determination*

The ICJ relied on the General Assembly declarations in applying the principle of self-determination to the Namibian and Western Saharan situations and their decolonization.<sup>42</sup> The *Namibia* opinions ultimately asserted the Namibian population's right to self-determination from South African colonial occupation.<sup>43</sup> The territory of Namibia had been previously administered under a League of Nations Mandate with South Africa as the mandatory power.<sup>44</sup> The League of Nations established the Mandate System as a "sacred trust of civilization" to secure the well-being of the mandated territory, which was not yet able to self-govern.<sup>45</sup> *Namibia* found that the sacred trust included colonial territories and that all colonial peoples and territories without independence possessed the right to self-determination, under the Declaration on Colonial Independence.<sup>46</sup>

The Court concluded that the "ultimate objective of the sacred trust was the self-determination and independence of the peoples

41. *Id.*

42. CRAWFORD, *supra* note 3, at 122–23.

43. See Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 (June 21) (holding that South Africa's occupation of Namibia was illegal, that South Africa was obligated to withdraw immediately, and that UN member states were obligated to recognize the illegality of South Africa's presence); Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, 1956 I.C.J. 23, 32 (June 1) (holding that granting oral hearings before the Committee was consistent with the 1950 ruling); Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67, 76 (June 7) (holding General Assembly decisions relating to South West Africa to address "important questions" within the meaning of the UN Charter); International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128 (July 11) (finding that the territory was under the mandate of South Africa within the League of Nations Mandate System, that South Africa still had international legal obligations under that system, and that the United Nations should supervise administration). The Territory of South West Africa renamed itself 'Namibia.'

44. Note, *supra* note 30, at 536. Administering countries were called "Mandatories" and had particular rights and obligations under the League of Nations Covenant. *Id.* at 535.

45. See Covenant of the League of Nations art. 22 (describing the purpose and method of the mandate, noting that its character ought to reflect the stage of development, geography, economic conditions, and other factors of the territory); *infra* Part III.A.1 (discussing Judge Cançado Trindade's use of the Mandate and Trusteeship Systems to support his argument of a new *jus gentium*).

46. *Namibia*, 1971 I.C.J. ¶ 52.

concerned.”<sup>47</sup> Self-determination was bound to the colonial context, but conferred a general right in those instances.<sup>48</sup> All colonial peoples possess this entitlement, by virtue of the oppression of colonialism.<sup>49</sup> In decolonization, self-determination follows *uti possidetis* and preserves existing territorial boundaries for the successor states, remaining consistent with territorial integrity.<sup>50</sup> The entitlement to self-determination hinged on the existing legal relations between the colonial power and the territory, rather than rights possessed by a people.<sup>51</sup> The Namibian territory could exercise self-determination because the territory already had international legal recognition.<sup>52</sup>

In *Western Sahara*, the Court interpreted the Declaration on Colonial Independence to require that self-determination involve the “free and genuine expression of the will of the peoples concerned,”<sup>53</sup> before affirming *Namibia’s* finding that self-determination constitutes part of the law of nations.<sup>54</sup> Self-determination might be realized by creating a sovereign independent state, freely associating with an independent state, or integrating with an independent state.<sup>55</sup> The right entitles a people to its exercise—whether exercise is internal or external depends on the factual circumstances at hand.

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47. *Id.* ¶ 53 (looking to the League of Nations origin of the mandate and the ensuing developments through the UN Charter and customary international law).

48. Note, *supra* note 30, at 553–55 (noting the Court’s recognition that the General Assembly’s conduct since the Declaration on Colonial Independence has contributed to the development of a general right in international law, remarking that there is no reason to limit the application of the right to colonialism).

49. *Id.* at 541, 546 (finding little doubt that self-determination and independence was the objective of the sacred trust, while preserving territorial boundaries).

50. *Id.* at 541.

51. *See Namibia*, 1971 I.C.J. ¶ 74 (discussing the importance of the continuity of international obligations owed in the transition between the mandate and trustee systems, implying that international system as the source of the rights of the mandated people, rather than as a steward and protector of those rights). The end of the League of Nations did not change this: the rights and obligations under the League of Nations Mandate System continued in the international trusteeships created under the UN Charter to fulfill a similar function. *See id.* ¶¶ 56, 60 (finding it clearly contemplated that existing mandates should transfer into international trusteeships and that such succession must not alter the rights of any states or peoples).

52. *See id.* ¶ 52 (stating that the principle of self-determination applies to all non-self-governing territories as an entitlement of all territories recognized by UN tutelage). Noting *Namibia* with satisfaction, the General Assembly embraced this narrow treatment of the right, reaffirmed UN commitments to independence and self-determination, and recognized the legitimacy of the Namibian struggle against illegal occupation. G.A. Res. 2871 (XXVI), U.N. Doc. A/RES/2871 (Dec. 20, 1971).

53. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 55 (Oct. 16).

54. *Id.* ¶ 56 (citing *Namibia*, 1971 I.C.J. ¶ 53).

55. *Id.* ¶ 57 (citing G.A. Res. 1541 (XV), Annex, U.N. Doc. A/4526 (Dec. 15, 1960)) (“Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 of the Charter.”).

Recognizing that self-determination may be exercised internally signifies that the people can have an international legal personality independent of their territorial status.<sup>56</sup> A people can freely choose to integrate with an independent state, exercising its right to self-determination consistently with international law so long as the state neither limits that free choice nor governs with distinction.<sup>57</sup> Exercise of the right to self-determination that takes into account the free choice of the people concerned then satisfies the principle of equal rights and self-determination of peoples.<sup>58</sup> *Western Sahara* shifted the interpretation of the right from considering self-determination as an attribute of relations between states to one attaching rights to peoples as non-state actors in their dealings with states.<sup>59</sup> It did this by stressing that multiple peoples may have rights to self-determination in a state and that internal exercise is then appropriate, so long as the free choice of the people is given voice.<sup>60</sup> In the decolonization context, the Namibian and Western Saharan situations demonstrate that the right to self-determination may entitle a people to form a new state.

*C. After Decolonization, the Right to Self-Determination Is  
Universal, but Lacks Remedial Mechanisms*

Since the close of the colonial period, the right to self-determination has been enumerated as a fundamental principle of general applicability, implying scope beyond *uti possidetis*

56. See *id.* at 125–26 (separate opinion of Judge Dillard) (disagreeing with the Court in its method of assessing the international legal personality of a nomadic tribe, arguing the assessment ought to reflect the tribe’s understanding of itself as a whole, and disagreeing with Court’s analysis of characterizing interpersonal ties as ‘legal’ where relations of obligation are present—both perspectives implying that such a tribe is eligible to have international legal personality of its own accord).

57. CRAWFORD, *supra* note 3, at 127; *Katangese Peoples’ Cong. v. Zaire*, Comm. No. 75/92, [2000] Afr. Hum. Rts. L. Rep. 72, para. 4 (Afr. Comm’n on Hum. & Peoples’ Rts. 1995); see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 87 (Can.) (speculating that a referendum clearly expressing the will of the majority of the people of a region would suffice to indicate that region’s desire to renegotiate its incorporation).

58. *Western Sahara*, 1975 I.C.J. ¶ 58 (referencing the enumeration of the principle from the Friendly Relations Declaration).

59. See CRAWFORD, *supra* note 3, at 387 (interpreting *Western Sahara* for the proposition that self-determination is predicated on the free will of the people at issue—their free choice completes the exercise of the right). Compare this with *Namibia’s* emphasis on the right’s emerging from the colonial status. See *Namibia*, 1971 I.C.J. ¶¶ 46, 53 (finding it “self-evident” that the sacred trust sought to assist non-self-governing territories to the point where they “would be ‘able to stand by themselves’” as independent nations).

60. *Western Sahara*, 1975 I.C.J. 12, ¶ 55 (finding that self-determination requires the free and genuine expression of the will of the people).

succession.<sup>61</sup> Common Article One of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights protects the right of all peoples to self-determination as the foundation for the free enjoyment of other rights.<sup>62</sup> The Helsinki Final Act stipulates that member states respect the principle of equal rights and self-determination.<sup>63</sup> Further, member states must provide all peoples the right to determine their internal and external political status and pursue political, economic, social, and cultural development as they choose.<sup>64</sup> The act reaffirms the universal significance of the principle.<sup>65</sup> The ICJ later affirmed this universality in holding that right of self-determination of peoples was inalienable and held *erga omnes*.<sup>66</sup>

Despite the widespread recognition of the scope of the right, international law does not agree on the consequences of its violation. The Vienna Declaration and Programme of Action (Vienna Declaration) recognizes that the denial of the right of self-determination constitutes a violation of human rights.<sup>67</sup> The Vienna Declaration reaffirms the right of a people under colonial or foreign occupation to take legitimate action to realize its inalienable right.<sup>68</sup> Such action ceases to be legitimate where it violates the territorial integrity of states “possessed of a Government representing the whole people belonging to the territory *without distinction of any kind*.”<sup>69</sup>

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61. See Karl Doehring, *Self-Determination*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 52 (Bruno Simma ed., 2d ed. 2002) (observing that “the sheer number of resolutions concerning the right of self-determination makes their enumeration impossible”). Owing to the breadth of these affirmations, an exhaustive treatment is beyond the scope of this Note.

62. International Covenant on Civil and Political Rights art. 1(1), Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

63. The Final Act of the Conference on Security and Co-operation in Europe art. 1(a)(VIII), Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter Helsinki Final Act] (establishing the Organization for Security and Co-operation in Europe).

64. *Id.*

65. *Id.*

66. East Timor (Port. v. Austl.), 1995 I.C.J. 90, ¶¶ 29, 31 (June 30) (finding the right to self-determination to be *erga omnes*). *Erga omnes* rights are rights that are held with respect to all nations and are not subordinate to a legal regime between the two parties. Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, ¶¶ 33–35 (Feb. 5) (distinguishing *erga omnes* obligations, such as protection from slavery, from obligations subordinate to relations between parties, such as diplomatic protection).

67. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, § I(2), U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*].

68. *Id.*

69. *Id.* (emphasis added). This safeguard clause is expanded slightly by the qualifying phrase “without distinction of any kind” from the Friendly Relations

The Vienna Declaration limits territorial integrity—under this formulation, egregious discrimination does not permit secession, but eliminates the ability to invoke territorial integrity.<sup>70</sup> Despite finding the right to be universal, the Vienna Declaration fails to address the appropriate remedy for violations in non-decolonization situations.<sup>71</sup>

The arbitration resolving claims arising from the dissolution of Yugoslavia grappled with this challenge. The Conference on Yugoslavia Arbitration Commission resolved claims to statehood by Serb minorities in Bosnia and Croatia.<sup>72</sup> The Commission did not address Kosovo's independence.<sup>73</sup> The Commission found the Serb minorities in Croatia and Bosnia-Herzegovina entitled to self-determination, encompassing a *jus cogens* requirement that the state ensure respect for their rights.<sup>74</sup> The Commission, however, found that international law does not dictate the implications of the right to self-determination beyond that it does not change existing borders, per *uti possidetis*.<sup>75</sup> Effectively, the Commission required Bosnia and Croatia to respect the rights of the Serb minorities,<sup>76</sup> without providing the minorities with any recourse if the state were to violate that right. This Note regards this gap as a fundamental deficiency in the law. Other remedies might exist under other areas of international law,<sup>77</sup> but under this formulation, self-determination cannot provide a mechanism for its own realization. A construction of a right that cannot be enforced by its possessors when that right is most egregiously violated is a deficiently weak construction of that right.

Declaration's "without distinction of race, creed or colour." See Friendly Relations Declaration, *supra* note 32, princ. 5; *Vienna Declaration*, *supra* note 67, pt. 1, ¶ 2.

70. See CRAWFORD, *supra* note 3, at 119 (asserting the primary view of the passage as safeguarding the privileges of compliant states, while acknowledging the reading that the passage supports a claim for remedial secession supported by international law where a state fails to comply with regard to a discrete people within that state).

71. See *Vienna Declaration*, *supra* note 67, pt.1, ¶ 2 (addressing only the particular situation of colonial rule or other forms of alien or foreign occupation).

72. Opinions on Questions Arising from the Dissolution of Yugoslavia, No. 2, 31 I.L.M. 1488, 1497–99 (Yugoslavia Arb. Comm'n 1992) (commonly known as the Badinter Commission).

73. See U.N. Secretary-General, *Report on the International Conference on the Former Yugoslavia*, ¶¶ 82–92, U.N. Doc. S/24795 (Nov. 11, 1992) (establishing a special group on Kosovo within the Working Group on Ethnic and National Communities and Minorities, rather than including a claim to independence in the questions before the Badinter Commission).

74. *Opinion No. 2*, 31 I.L.M. at 1497–98.

75. *Id.*

76. *Id.* at 1498–99.

77. See CRAWFORD, *supra* note 3, at 149 (discussing the Chechen example, and noting that Russian human rights abuses would prompt consequences in terms of legal responsibility, enhanced scrutiny, and loss of general legitimacy, but would not extend to forfeiting Russian title over the region).

The Supreme Court of Canada endorsed internal exercise when determining whether Quebec possessed the right to secede, but left open the possibility of a right to external exercise.<sup>78</sup> The Court identified internal self-determination as the preferred way to exercise self-determination, reaffirming the inviolability of the territorial integrity of states qualified by the safeguard clause.<sup>79</sup> The Court found that international law does not grant subordinate parts of sovereign states a specific legal right to unilaterally secede where decolonization is not at issue.<sup>80</sup> International law neither explicitly permits nor prohibits unilateral secession, while implicitly denying a general right by providing exceptional circumstances under which secession might be permissible.<sup>81</sup> In dicta, the Court suggested that the right of self-determination might justify unilateral secession where a people is precluded from exercising its right of self-determination internally, leaving external exercise as a legitimate last resort.<sup>82</sup> As with the colonial and foreign occupation contexts, the right to external self-determination would arise here where a people is deprived of meaningful access to government.<sup>83</sup>

The African Commission of Human and Peoples' Rights addressed this last class as well, concluding that the territorial integrity of the existing state takes priority over the exercise of self-determination unless grave human rights abuses accompanied the denial of self-determination—in such a case, a people might have a right to form a new state.<sup>84</sup> The African Commission is yet to rule that such a right applies in a particular instance before it.<sup>85</sup>

78. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 2 (Can.).

79. *Id.* paras. 126–29 (introducing the scope of the right of self-determination and explaining its modes of exercise while referencing the Friendly Relations Declaration, the Vienna Declaration, and the Helsinki Final Act, among others).

80. *Id.* para. 111. Self-determination allows a people to exercise its right externally by seceding in instances of colonial rule or foreign occupation. *Id.* para. 131.

81. *Id.* para. 112.

82. *Id.* para. 134. Quebec could not claim any denial of access to government, as Québécois occupied many powerful positions in government, freely selected and pursued means of political, economic, social, and cultural development, and was not the victim of discriminating treatment. *Id.* para. 136.

83. *Id.* para. 138.

84. Katangese Peoples' Cong. v. Zaire, Comm. No. 75/92, [2000] Afr. Hum. Rts. L. Rep. 72, ¶¶ 4, 6 (Afr. Comm'n on Hum. & Peoples' Rts. 1995) (noting that absent human rights violations sufficient to trammel over territorial integrity and absent evidence that the Katangese people are denied the right to participate in government as guaranteed by Article 13(1) of African Charter, Katanga's exercise of its self-determination is limited by the sovereignty and territorial integrity of Zaire).

85. See *Mgwanga Gunme v. Cameroon*, Comm. No. 266/03, [2009] Afr. Hum. Rts. L. Rep. 148, ¶ 190 (Afr. Comm'n on Hum. & Peoples' Rts. 2009) (finding that Cameroonians possessed parliamentary representation, so the test from *Katangese Peoples' Congress* could not be applied to weigh the human rights abuses against the claim of territorial integrity); Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AM. J. INT'L L. 60, 66, 70–71 (2011) (observing that cases between *Katangese Peoples' Congress* and *Mgwanga Gunme*

International law recognizes self-determination as a right to which all peoples are entitled, yet offers no recourse when confronted with the right's denial beyond the colonial context.<sup>86</sup>

III. SELF-DETERMINATION IS A FUNDAMENTAL HUMAN RIGHT  
THAT SYSTEMATIC OPPRESSION VIOLATES; SUCH  
VIOLATIONS MUST HAVE REMEDIES, EVEN AGAINST  
INVOCATIONS OF TERRITORIAL INTEGRITY

The conflicting approaches taken by Judges Cançado Trindade and Koroma in their responses to the Kosovo situation reveal the fundamental tension between viewing human rights as the central objective of international law and those privileging territorial stability and state sovereignty instead. This Note accords with the former and rejects that state sovereignty may provide a safe haven where serious violations of fundamental human rights are at issue. *Kosovo* arose from the uncertain legal status of the Kosovo territory following the dissolution of Yugoslavia and the 1998–99 war with Serbia.<sup>87</sup> Kosovo's territorial status had remained in UN-administered limbo after Security Council Resolution 1244 (Resolution 1244) terminated Serbian control over the region in 1999.<sup>88</sup> Resolution 1244 created an international civilian mission, the UN Mission in Kosovo (UNMIK), to serve as an interim administrator.<sup>89</sup> Resolution 1244 envisioned a “final settlement” providing “substantial autonomy” and self-government for Kosovo, without specifying what form this would take.<sup>90</sup> The Comprehensive Proposal for Kosovo Status Settlement, issued in March 2007, substantially advanced Kosovo's independence, in proposing that Kosovo have extensive autonomy in its settled status.<sup>91</sup> On February

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addressed internal self-determination and did not claim for an external right—the Commission did not address the issue in joined cases from Sudan, for which Shelton speculates that the South Sudanese Referendum on independence is the cause).

86. See Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 67 (1993) (advocating wider application for self-determination to incorporate related human rights developments from the late twentieth century).

87. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶¶ 57–58 (July 22) (discussing the interim administration of Kosovo).

88. S.C. Res. 1244, ¶ 3, U.N. Doc. S/RES/1244 (June 10, 1999).

89. *Id.* ¶ 10.

90. *Id.* ¶ 11(a).

91. See U.N. Secretary-General, Letter dated Mar. 26, 2007 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007) (providing that Kosovo shall, *inter alia*, govern itself democratically, possess the capacity to enter into international agreements, establish national symbols, seek no union with any other state, and seek neighborly relations with Serbia). Notably, the 2006 preparatory framework produced by the Contact Group



17, 2008, the Kosovo Declaration of Independence was signed, declaring Kosovo to be an independent sovereign as the final settlement to its status.<sup>92</sup> Opposed to Kosovo's secession, Serbia challenged the legality of the declaration and introduced a resolution before the General Assembly to submit the question of the declaration's legality to the ICJ.<sup>93</sup>

The ICJ declined to address whether the Kosovo situation manifested a right to self-determination or a right to remedial secession.<sup>94</sup> Instead, the ICJ determined that declarations of independence in general are not prohibited by international law<sup>95</sup> and that Kosovo's declaration was not prohibited by the legal framework instituted by Resolution 1244.<sup>96</sup> The Court found issues of self-determination to be beyond the minimum necessary to answer the question posed.<sup>97</sup> The Court did not rule whether the declaration

(France, Germany, Italy, Russia, United Kingdom, and United States) set forth that the status settlement would not include (1) Kosovo's return to its pre-1999 status, (2) union with any other country, or (3) partition. Viola Trebicka, *Recent Development, Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination*, 32 YALE J. INT'L L. 255, 256 (2007) (discussing the status talks in anticipation of SRS G Ahtisaari's Status Settlement); Press Release, The Contact Group, Statement on the Future of Kosovo para. 6 (Jan. 31, 2006), available at <http://www.unosek.org/docref/fevrier/STATEMENT%20BY%20THE%20CONTACT%20GROUP%20ON%20THE%20FUTURE%20OF%20KOSOVO%20-%20Eng.pdf>.

92. KOSOVËS ME RASTIN E SHPALLJES SË PAVARËSISË [KOSOVO DECLARATION OF INDEPENDENCE] (2008) (Kos.), translation available at [http://www.assembly-kosova.org/common/docs/Dek\\_Pav\\_e.pdf](http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf).

93. U.N. GAOR, 63d Sess., *supra* note 8, at 1 (framing the declaration as a threat to Serbian sovereignty and territorial integrity, seeking response from the ICJ on the legality of unilateral declarations of independence in general and in the present case).

94. *Id.* ¶¶ 82–84.

95. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 84 (July 22).

96. *Id.* ¶¶ 114, 119 (concluding that Resolution 1244 did not preclude a declaration of independence because the resolution did not reserve the means of the final determination of Kosovo's status and that the authors of the declaration were not barred from declaring, as they did not declare in their capacity as members of the Provisional Institutions of Self-Government).

97. *See id.* ¶ 83 (finding that the Court need only address the compliance of the Declaration of Independence with international law in general and with the Resolution 1244 framework in order to answer the General Assembly). Several judges took issue with this application of the Court's discretion, arguing that the Court should have more extensively exercised its advisory function to evaluate the legal right at the heart of the dispute. *Id.* ¶ 33 (separate opinion of Judge Cançado Trindade) (arguing that the Court should respond to advisory opinions with an eye towards expanding the scope of international law and thus should attend to such issues as naturally relate); *id.* ¶ 7 (declaration of Judge Simma) (reasoning that a better approach would have considered both prohibitive and permissive rules of international law to speak to the issue more comprehensively); *id.* ¶¶ 33, 35 (separate opinion of Judge Sepúlveda-Amor) (finding that the Court had the authority to offer a more comprehensive response to the question, noting that the question included many issues currently in need of the Court's guidance).

validated a right to self-determination, created a state, or permitted other nations to legally recognize Kosovo as an independent state.<sup>98</sup>

This reluctance did not preclude individual judges from addressing these matters, and Judges Cañado Trindade and Koroma advocate contrasting positions on the right to self-determination's content in post-colonial contexts.<sup>99</sup> Judge Cañado Trindade advocated an affirmative rule establishing a right to secede for peoples that have been subjected to particularly egregious violations of rights under international law.<sup>100</sup> Judge Koroma, however, argued that so readily attaching such a broad right would do grave violence to the principle of territorial integrity and thereby to international law itself, in addition to opening a "Pandora's Box" of secessionist claims.<sup>101</sup>

Building on the reasoning of Judge Cañado Trindade, this Note argues that international law should clarify the role of secession in the law of self-determination by establishing a remedial right as a last resort. This would empower an oppressed people to secede from an existing state where that state has perpetrated egregious abuses against that people and precluded the exercising of their right to self-determination. Judge Koroma's prudently-highlighted concerns help guide this treatment to avoid promoting an overbroad right to secession. The remedial right may be exercised only where a people already possesses the right to self-determination and a state has gravely violated that right.

#### *A. Judge Cañado Trindade Champions Remedial Secession as Valid Exercise of Right to Self-Determination*

In his separate opinion, Judge Cañado Trindade agreed that Kosovo's Declaration of Independence accorded with international law.<sup>102</sup> Further, he interpreted self-determination expansively, permitting exercise through unilateral secession where a people suffers humanitarian abuses and is unable to secure its rights within the existing state.<sup>103</sup> Judge Cañado Trindade argued that an existing state effectively forfeits the right to invoke territorial integrity when it denies the right to self-determination of a people within its borders, consistent with the *jus cogens* status of the

98. *Id.* ¶ 51 (majority opinion).

99. *Infra* Part III.A–B.

100. *Infra* Part III.A.

101. *Infra* Part III.B.

102. *Kosovo*, 2010 I.C.J. ¶ 1 (separate opinion of Judge Cañado Trindade).

103. As with many of his colleagues, Judge Cañado Trindade took exception with the limited application of the ICJ's jurisprudence, arguing that the ICJ's advisory jurisdiction ought to contribute to the progressive development of international law, in addition to answering the questions posed to it. *Id.* ¶ 33.

principle of equal rights and nondiscrimination.<sup>104</sup> In so reasoning, this approach would alter the relations of sovereignty among the community of states by recognizing and protecting certain human rights as precedent to the sovereign prerogative of states.<sup>105</sup>

Judge Cançado Trindade argues that, as a universal human right, the right to self-determination precedes the rights that a state holds with respect to other states, such that no state may invoke territorial integrity to violate the rights of persons subject to its jurisdiction.<sup>106</sup> A state's interference with the exercise of self-determination would void its sovereign privilege over the non-state actor whose rights under the law of nations were violated.<sup>107</sup> This recasts international law with greater emphasis on protecting human and peoples' rights. This sweeping change would initiate a new era in the law of self-determination by empowering oppressed peoples with an international legal entitlement and vastly increasing the consequences for any state obstructing the exercise of internal self-determination among peoples within its borders.

#### 1. International Law Recognizes Fundamental Human Rights as International Rights on Par with Those of States

Where a state invokes its sovereignty to deny a remedy for human rights violations in its territory, the human rights in question must be rights at the international level for international law to provide a recourse. The emergence of international organizations such as the League of Nations and the United Nations demonstrates that legal personality can be held at the international level by non-state actors.<sup>108</sup> This extends the scope of international legal personality beyond that possessed by states on the basis of their sovereign equality to permit non-state actors to have rights and responsibilities under international law.<sup>109</sup> The *Namibia* and *Western*

104. See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003) (concluding that principle of equal rights and nondiscrimination belongs to *jus cogens*); *infra* Part III.A.3 (addressing Judge Cançado Trindade's argument that a right to secede exists when states violate fundamental human rights).

105. See *infra* Part III.A.2 (noting that Judge Cançado Trindade also argued that a state should not be able to invoke its sovereignty and the principle of non-interference to nullify the consequences where it violates the fundamental human rights of peoples within its borders).

106. *Kosovo*, 2010 I.C.J. ¶ 198 (separate opinion of Judge Cançado Trindade).

107. *Id.* ¶ 205.

108. *Kosovo*, 2010 I.C.J. ¶ 53 (separate opinion of Judge Cançado Trindade); see also Reparations for Injuries Suffered in Service of United Nations, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11) (concluding that reparations may be owed the United Nations for harms done, as the United Nations has international personality).

109. See Juliane Kokott, *States, Sovereign Equality*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 13 (2007), available at

*Sahara* cases demonstrate this: non-state entities possess entitlements under international law.<sup>110</sup> States no longer possess a monopoly on agency with respect to international law, as international law thus includes more than merely the community of states interacting on the principle of sovereign equality.<sup>111</sup> These international organs act in international law to ensure respect for the human rights of underrepresented groups, supporting that people have legal rights at the international level, just as do states.<sup>112</sup> The recognition of the rights of the human person challenges the state-bound perspective of international law and supports a more expansive consideration of the nature of international law.<sup>113</sup> The establishment and acceptance of these organs demonstrates that human rights are a fundamental component of international law that must be respected for the broader system to fulfill its objectives.

Judge Cançado Trindade found that the old League of Nations Mandate System emphasized the importance of a non-state people in a regime that had previously regarded international law as solely based in relations between state actors.<sup>114</sup> The League of Nations Covenant created the Mandate System as a “sacred trust of civilization” to advance the “well-being and development” of the peoples under a mandate.<sup>115</sup> The mandatory power was entrusted to help develop the mandated population, subject to that population’s wishes and needs, where that population was not yet able to be independent.<sup>116</sup> State sovereignty had no application or primacy in the Mandate System,<sup>117</sup> which focused on the self-determination of

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<http://www.mpepil.com> (“The equality of States before international law is a quality derived from their International Personality.”). The Friendly Relations Declaration affirms that, with respect to sovereign equality, all states are obligated to respect the personality of other states. Friendly Relations Declaration, *supra* note 32, princ. 6.

110. *See supra* Part II.B.

111. *Kosovo*, 2010 I.C.J. ¶ 53 (separate opinion of Judge Cançado Trindade); *see also* Sebastien Jodoin, *International Law and Alterity: The State and the Other*, 21 LEIDEN J. INT’L L. 1, 12 (2008) (observing that the Westphalian system only accorded personhood to states and theorizing that the original ontologies of exclusion effectively persist, although recognition of international non-state actors as possessing legal status interfered with the relations of inclusion and exclusion).

112. *Id.* ¶ 53.

113. *Id.*

114. *Id.* ¶ 54 (focusing its mandate, *inter alia*, on various peoples needing assistance and protection).

115. League of Nations Covenant art. 22.

116. *Id.* art. 22; *see* International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128, 136–37 (July 11) (finding that the purpose of the Mandate System was to provide protection for the rights of the mandated peoples and that this protection could not be secured without international supervision of the mandate); *see also Kosovo*, 2010 I.C.J. ¶¶ 85–87 (separate opinion of Judge Cançado Trindade) (discussing, in the context of *International Status of South-West Africa* opinion, the necessity of international administration to safeguard the rights of the mandated).

117. *Kosovo*, 2010 I.C.J. ¶ 55 (separate opinion of Judge Cançado Trindade).

the mandated peoples.<sup>118</sup> The United Nations International Trusteeship System<sup>119</sup> that succeeded the League of Nations Mandate System<sup>120</sup> retains this emphasis on the peoples of the territories.<sup>121</sup> Judge Cançado Trindade observed that the fundamental objective of each system is to safeguard the rights of the population and to prevent future abuses.<sup>122</sup>

Central to each regime is that the people and the territory are linked.<sup>123</sup> This association is vital for Judge Cançado Trindade, as, in “*intra-State* relations, territorial integrity and human integrity go together.”<sup>124</sup> This followed Judge Dillard’s separate opinion from *Western Sahara*, averring that a people should determine the destiny of a territory and not the territory the destiny of the people.<sup>125</sup> Judge Cançado Trindade lamented that the twentieth-century world privileged state sovereignty and territorial integrity, erroneously failing to consider human beings and peoples, the constitutive elements of statehood.<sup>126</sup> The modern world thus facilitated

118. *Id.* ¶ 58. Article 22 describes certain post-Ottoman Turkish communities nearly sufficiently developed to be independent nations and appoints a Mandatory to provide administrative advice until the point where they might be sufficiently developed to be independent. League of Nations Covenant art. 22, para. 4.

119. U.N. Charter art. 75 (“The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements . . .”). These territories are hereinafter referred to as trust territories. After Palau’s trusteeship terminated in its independence, and the Trusteeship Council, created to oversee the administration of these trusts, amended its rules of procedural to require it to meet only when necessary. *See* S.C. Res. 956, U.N. Doc. S/RES/956 (Nov. 10, 1994); T.C. Res. 2200 (LXI), U.N. TCOR, U.N. Doc. T/RES/2200 (May 25, 1994) (amending rule 1 of the Trusteeship Council). The Council suspended operations on November 1, 1994. *Trusteeship Council*, UNITED NATIONS, <http://www.un.org/en/mainbodies/trusteeship> (last visited Dec. 26, 2011).

120. *See International Status of South-West Africa*, 1950 I.C.J. at 136–37 (finding that the rights and statuses of parties concerned to a mandate should persist until agreement could be reached as to the arrangement of the new mandate, thereby showing that the Trusteeship System was meant to succeed the Mandate System).

121. Article 76 of the UN Charter lists the basic objectives of the International Trusteeship System: (1) to further international peace and security; (2) to promote the advancement of the peoples of the trust territories in the progressive development towards self-government and independence as appropriate per circumstances and the wishes of the peoples; (3) to encourage respect for human rights and fundamental freedoms for all without discrimination; and (4) to ensure equal treatment in social, economic, commercial matters. U.N. Charter art. 76.

122. *Kosovo*, 2010 I.C.J. ¶ 61 (separate opinion of Judge Cançado Trindade).

123. *Id.* ¶ 65.

124. *Id.* ¶ 208.

125. *Id.* ¶ 65 (citing *Western Sahara*, Advisory Opinion, 1975 I.C.J. 116, 122 (Oct. 16) (separate opinion of Judge Dillard)).

126. *Id.* ¶ 77; *see also* Jodoin, *supra* note 111, at 5–6 (observing through the ontology of statehood that international law has been made to only recognize states to the exclusion of other actors, advocating a plural notion of international legal personality, able to capture the interests of non-state actors and implement an ethics of alterity).

oppression by overlooking the needs of subjugated peoples.<sup>127</sup> This practice thereby failed to properly maintain international access to justice.<sup>128</sup>

In contrast to this misguided construction, the mandate and trusteeship systems reflect international law's role of protecting the fundamental rights of abused peoples and minorities within larger states.<sup>129</sup> These systems focus on the living conditions, well-being, and development of the people at question.<sup>130</sup> This progression illustrates that emphasis in the evaluation of statehood has progressively shifted more to that of population.<sup>131</sup> The right to equality and nondiscrimination has crystallized as a *jus cogens* norm.<sup>132</sup>

## 2. The Inviolability of Fundamental Rights of Peoples Constitutes an Absolute Limit on Sovereignty, Reorienting the Hierarchy of International Law

The international legal personality possessed by non-state actors such as the person and a people entitle them to rights in international law that may not be abridged by sovereign prerogatives, even though persons and peoples do not have sovereign equality with states.<sup>133</sup> Judge Cançado Trindade firmly asserted that territorial integrity cannot be invoked to commit atrocities, to permit atrocities

127. *Kosovo*, 2010 I.C.J. ¶ 169 (separate opinion of Judge Cançado Trindade) (highlighting the consequences of the reductionist outlook of seeing international law as strictly inter-state relations).

128. *See id.* ¶¶ 89–90 (arguing that the mandate and trusteeship systems were ahead of their time in the rights protected and the provision of a right of individual petition to seek remedy).

129. *Id.* ¶ 64 (finding the international administrative regimes to signify that prolonged oppression creates a need to safeguard the rights of the inhabitants).

130. *Id.* ¶ 173.

131. *Id.* ¶ 170 (referring to population in the context of the Montevideo criteria for statehood). As discussed earlier, Crawford manages to get around this issue by referring to “units” of self-determination, but this merely shifts the problem back into itself, identifying the well-known category of those entities established with respect to self-determination such as mandates and accepting its own incompleteness by acknowledging a possible category for entities governed so as to be non-self-governing. *See supra* note 23. Separately, the Universal Declaration of Human Rights proclaims the universal right to equality and nondiscrimination as an inalienable human right granted to all persons *qua* human beings. *Kosovo*, 2010 I.C.J. ¶ 84. The instrument was adopted by state consent and vote. U.N. GAOR, 3d Sess., 183d plen. mtg. at 933, U.N. Doc. A/PV.183 (Dec. 10, 1948). Nevertheless, it declares rights as inherent and inalienable in human persons, originating in the person and not the state of nationality. Universal Declaration of Human Rights, G.A. Res. 217(III)A, pmb., U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

132. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003).

133. *See Kosovo*, 2010 I.C.J. ¶ 198 (separate opinion of Judge Cançado Trindade).

while assuming the privilege of sovereign noninterference, nor to indemnify a state after it commits atrocities.<sup>134</sup> To allow territorial integrity to be used this way would reverse the ends of the state such that persons exist to serve the state and not the other way around.<sup>135</sup>

To give effect to self-determination in the post-colonial era, Judge Cançado Trindade applied the reasoning to subjugation for an oppressed people within a state. The Friendly Relations Declaration enumerates the principles of equality and the self-determination of peoples among those with which states must comply.<sup>136</sup> Finding the common denominator of the mandate regimes to be a principle of self-determination for peoples under “prolonged adversity or systematic oppression,”<sup>137</sup> Judge Cançado Trindade drew from the Friendly Relations Declaration that international law supports the exercise of self-determination by peoples under systematic oppression, “beyond the traditional confines of the historical process of decolonization.”<sup>138</sup> Reading the safeguard clause to limit territorial integrity, Judge Cançado Trindade found that the Vienna Declaration supports an entitlement to self-determination for a victimized population, as the oppressor can no longer invoke territorial integrity where abuse of a people constituted governing with distinction.<sup>139</sup> For these principles to have substance after decolonization, they must empower oppressed peoples to exercise self-determination against oppressor states in non-colonial contexts.<sup>140</sup> This entitlement represents the evolving expression of the fundamental principle of equality and non-discrimination to a general entitlement held by oppressed peoples, shifting primacy from sovereign privilege to “people-centered rights and accountability of territorial authorities.”<sup>141</sup>

The primacy of this principle couples well with international personality and access to international recourse for non-state actors to constitute a central attribute of an emerging, reconceived law of

134. *Id.* ¶ 176.

135. *Id.*

136. *Id.* ¶ 182 & n.193 (“1) [T]he principle of the prohibition of the threat or use of force in international relations; 2) the principle of peaceful settlement of disputes; 3) the principle of non-intervention in the internal affairs of States; 4) the States’ duty of international cooperation in accordance with the U.N. Charter; 5) the principle of equality of rights and self-determination of peoples; 6) the principle of sovereign equality of States; and 7) the principle of good faith in the fulfillment of obligations in accordance with the U.N. Charter.”).

137. *Id.* ¶ 173.

138. *Id.* ¶ 184. In addition to the already-discussed *Western Sahara* opinion, Judge Cançado Trindade found that the ICJ reaffirmed these principles in *Nicaragua* and *East Timor*. *Id.* ¶ 182.

139. *Id.* ¶ 181.

140. *See id.* ¶ 173.

141. *See id.* ¶¶ 190–91, 194 (finding that international law, removed from the constraints of the reductionist inter-state paradigm of international law, is now conceived with great regard to this principle).

nations.<sup>142</sup> Judge Cançado Trindade previously described this shift as a “new paradigm” that is “no longer State-centered, but rather anthropocentric, placing the human being in a central position and bearing in mind the problems which affect humankind as a whole.”<sup>143</sup> A people’s right to self-determination is held *erga omnes*.<sup>144</sup> Territorial integrity, meanwhile, is limited to relations between states and does not bear on non-state actors.<sup>145</sup> As fundamental human rights are inalienable and universal, states lack a superior basis on which to claim an entitlement to territorial integrity.<sup>146</sup>

### 3. A State that Violates a People’s Fundamental Rights May Forfeit Its Sovereign Privilege over Them, Creating a Right to Secession

Failure to safeguard these fundamental rights would carry serious consequences. Any state violating fundamental human rights would cease to be a legitimate state for the victimized population by flagrantly reversing the proper humane ends of the state.<sup>147</sup> Self-

142. *Id.* ¶ 197.

143. *Barrios Altos Case (Chumbipuma Aguirre v. Peru)*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 16 (Mar. 14, 2001) (concurring opinion of Judge Cançado Trindade).

144. *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, ¶ 29 (June 30); *see also supra* note 66 (discussing obligations *erga omnes*).

145. *Kosovo*, 2010 I.C.J. ¶ 80 (separate opinion of Judge Cançado Trindade) (observing that Article 2(4) of the UN Charter, the Friendly Relations Declaration, and the Helsinki Final Act address the principle with reference to state actors, without propounding a universal rule).

146. *See id.* ¶ 198 (describing how rights inherent to the person are independent of any social structure and thus precede and are superior to the state, such that the state may not invoke territorial integrity in violating them). Judge Cançado Trindade goes further, insisting that states must safeguard the integrity of the person from systematic violence, discrimination, and arbitrary treatment to preserve these fundamental rights. *Id.* ¶ 199. For Judge Cançado Trindade, the state exists to help realize the common good, assessed with regard to the human being. *Barrios Altos Case*, Inter-Am. Ct. H.R. ¶ 26 (concurring opinion of Judge Cançado Trindade). This Note declines to advocate so far-reaching and affirmative an obligation, as it subjects state legitimacy to liability for harms befalling citizens that have no connection to state responsibility. *See infra* Part IV.B.

147. *Kosovo*, 2010 I.C.J. ¶ 205 (separate opinion of Judge Cançado Trindade). Judge Cançado Trindade describes the violations as “grave breaches,” but includes “systematic discrimination” as a possible manner of commission, indicating that he likely did not mean to invoke the category of grave breaches from the Geneva Conventions. *Compare id.* ¶ 205 (“Grave breaches of fundamental human rights (such as mass killings, the practice of torture, forced disappearance of persons, ethnic cleansing, systematic discrimination) . . .”), *with* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 (“Grave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person



determination is an entitlement of all subjugated peoples, including in non-decolonization contexts.<sup>148</sup> Consequently, Judge Cançado Trindade argued that territorial integrity may only be asserted by states acting in accordance with international law and where a population is not being inhumanely subjugated.<sup>149</sup> The right to self-determination applies in any situation of systematic oppression, subjugation, or tyranny, rendering it immaterial whether its exercise is characterized as remedial.<sup>150</sup> Whether the remedy of external self-determination attaches in a given situation depends on the entire factual background, ensuring that the exercising entity stands as a people with respect to the right to self-determination and that further abuses are not perpetrated.<sup>151</sup>

The argument that a state that violates the fundamental rights of a people within its borders ceases to possess a legitimate claim of sovereignty over that people is not new.<sup>152</sup> As the remedy to violations of self-determination was uncertain as recently as the Vienna Declaration, the Badinter Commission Report, *Katangese Peoples' Congress*, and *Quebec*,<sup>153</sup> Judge Cançado Trindade's determination that fundamental human rights exist precedent to sovereign privileges supports a stronger, affirmative right of external self-determination. His explication clarifies the consequences of violating this well-established right in non-decolonization contexts. Judge Cançado Trindade's treatment attends to the unacceptable gap where a people may lack recourse after its encompassing state has obstructed the exercise of its right to self-determination.

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to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”).

148. *Id.*

149. *Id.* ¶ 208.

150. *Id.* ¶ 175.

151. *Id.* ¶ 165.

152. See, e.g., Ramesh Thakur & Albrecht Schnabel, *Unbridled Humanitarianism: Between Justice, Power, and Authority*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION* 497 (Albrecht Schnabel & Ramesh Thakur eds., 2000) (finding that seeking international consensus about the exact point at which sovereignty is forfeited is urgently needed); Richard N. Haass, Ambassador, Remarks to the School of Foreign Service and the Mortara Centre for International Studies, Georgetown University, *Sovereignty: Existing Rights, Evolving Responsibilities* (Jan. 14, 2003), in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 698–99 (Henry J. Steiner et al. eds., 3d ed. 2008) (finding a limit to sovereignty where a state violates fundamental humanitarian and human rights).

153. See *supra* Part II.C.

*B. Judge Koroma Finds Remedial Secession to Threaten  
Territorial Integrity and the Stability of  
International Law*

Judge Koroma's dissent interpreted the right of self-determination conservatively, illuminating by contrast the magnitude of the leap that Judge Cançado Trindade advocated. Judge Koroma envisioned the principle of respect for sovereignty and territorial integrity of states to constitute a fundamental principle of contemporary international law, encompassing respect for the definition, delineation, and territorial integrity of existing states.<sup>154</sup> A state possesses sovereign privilege within and over the territory within its boundaries.<sup>155</sup> An entity attempting to "dismember or amputate" the territory of an existing state breaches the principle of territorial integrity, violating international law and the principles of the UN Charter.<sup>156</sup> In considering the states as the sources of international law, Judge Koroma considered territorial integrity to be precedent to the exercise of a people's rights.

1. Unilateral Acts to Form New States Breach Territorial Integrity and Violate International Law

As did Judge Cançado Trindade,<sup>157</sup> Judge Koroma found that the legality of declarations of independence must be assessed with reference to the broad set of factual circumstances surrounding the declaration.<sup>158</sup> The declaration was not intended to be without effect, being "aimed at separating Kosovo from the State to which it belongs."<sup>159</sup> As the declaration was made with the intent to effect Kosovo's separation, Judge Koroma found that the declaration amounted to an act of unilateral secession.<sup>160</sup> As the principles of international law prohibit infringing on territorial integrity and secession jeopardizes existing territory, secession without the consent of the existing state is a matter of international law.<sup>161</sup> International law does not grant any group the right to withdraw from its

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154. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 21 (July 22) (dissenting opinion of Judge Koroma).

155. *Id.*

156. *Id.*

157. *See id.* ¶ 12 (separate opinion of Judge Cançado Trindade) (stressing the importance of considering the entire factual complex in evaluating declarations of independence, as such declarations are not proclaimed in a vacuum).

158. *Id.* ¶ 2 (dissenting opinion of Judge Koroma).

159. *Id.*

160. *Id.* ¶ 20.

161. *Id.* ¶ 21.

encompassing state merely because the group wishes to do so.<sup>162</sup> Consequently, Judge Koroma dissented from the ICJ's determination that international law neither authorizes nor prohibits declarations of independence, asserting that such a statement only makes sense when referring to declarations in the abstract, and not with regard to a specific declaration in a specific context.<sup>163</sup>

Article 2(4) of the UN Charter, the Friendly Relations Declaration, and *Quebec* support the view of territorial integrity as a fundamental principle of international law barring secession by non-state entities. The UN Charter enumerates territorial integrity among the purposes of the UN,<sup>164</sup> which Judge Koroma takes to enshrine the principle in international law as a rule of general application.<sup>165</sup> This interpretation of Article 2(4) diverges from the Court's determination that territorial integrity solely addresses relations between states.<sup>166</sup> As generally applicable, territorial integrity applies to non-state actors as well.<sup>167</sup>

The Friendly Relations Declaration emphasizes the primacy of the principle of territorial integrity, declaring it and the political independence of the state inviolable.<sup>168</sup> Judge Koroma did not address the safeguard clause.<sup>169</sup> For Judge Cañado Trindade, this qualification acknowledges a fundamental limit to the scope of territorial integrity, that human rights abuses may preclude the application of territorial integrity.<sup>170</sup> Relying on the Friendly Relations Declaration's assertion of inviolability,<sup>171</sup> Judge Koroma

162. *Id.* ¶ 4 (referring in particular to ethnic, linguistic, or religious groups, arguing that such would invite all dissident groups to proclaim independence and seek secession).

163. *Id.* ¶ 20.

164. U.N. Charter art. 2, para. 4 (“[A]ll 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 UN.”).

165. *Kosovo*, 2010 I.C.J. ¶ 21 (dissenting opinion of Judge Koroma).

166. *Id.* ¶ 80 (majority opinion).

167. *See id.* (describing the principle of territorial integrity).

168. *Id.* ¶ 21 (dissenting opinion of Judge Koroma) (“[A]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter.” (quoting Friendly Relations Declaration, *supra* note 32, princ. 5)).

169. Friendly Relations Declaration, *supra* note 32, princ. 5 (“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”).

170. *See id.* ¶¶ 177–81 (separate opinion of Judge Cañado Trindade).

171. Friendly Relations Declaration, *supra* note 32, princ. 6 (stipulating inviolability as a component of the principle of sovereign equality).

concluded that the principle of equal rights and self-determination may not permit a region to withdraw from a state without that state's consent.<sup>172</sup> Invoking *Quebec's* ruling that "international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally," Judge Koroma emphasized that there is no general right to secede.<sup>173</sup> To respond to the uncertainty in the law of self-determination, Judge Koroma argued that the Court should have used the Kosovo situation to conclude that the applicable international law contains express prohibitions of unilateral declarations of independence and secession.<sup>174</sup>

Judge Koroma worried that endorsing the Declaration of Independence would impair the international order, providing an instruction manual for secessionists.<sup>175</sup> He argued that the Court relied *solely* on the "intent" of the drafters of the Kosovo Declaration of Independence to declare independence without thoroughly evaluating their international legal competency to do so.<sup>176</sup> This would jeopardize the international order, as any group could then circumvent international norms specifically targeting them by self-identifying with a different name.<sup>177</sup> Judge Koroma observed that positive international law does not confer a right upon an ethnic, linguistic, or religious group to secede from an existing state, without the state's consent, merely by expressing its wish to do so.<sup>178</sup> To accept otherwise, beyond the decolonization context, and allow any such group to break away from the existing state without that state's consent would create a dangerous precedent.<sup>179</sup> International secessionist movements could then circumvent international law simply by acting in a certain way and making such unilateral

172. *Id.* ¶ 21 (dissenting opinion of Judge Koroma). The Judge's cite to the Friendly Relations Declaration quotes the text immediately leading to the qualification of territorial integrity, proceeding no further into the apparent contradiction in the text that arises of the fundamental tension between the principles of self-determination and territorial integrity.

173. *Id.* ¶ 23 (quoting Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 111 (Can.)).

174. *Id.* That international law already featured an existing legal prohibition of secession likely overstates his argument. Even in the ascendance of territorial integrity of decolonization, the Security Council thoroughly debated whether Katanga or Southern Rhodesia were barred by a rule against secession, before finding that those secessions were illegal for, respectively, the use of foreign mercenaries and being a racist regime. CRAWFORD, *supra* note 3, at 389; *see also* S.C. Res. 169, U.N. Doc. S/5002 (Nov. 24, 1961) (addressing secessionist activities in Katanga); S.C. Res. 217, U.N. Doc. S/RES/217 (Nov. 20, 1965) (addressing secession in Southern Rhodesia).

175. *Kosovo*, 2010 I.C.J. ¶ 4 (dissenting opinion of Judge Koroma).

176. *Id.* ¶ 5 (finding, to the contrary, that the authors declared in the misuse of their capacity as members of the Provisional Institutions of Self-Government (PISG), such that the declaration was *ultra vires* and void).

177. *Id.*

178. *Id.* ¶ 4.

179. *Id.*

declarations in certain terms.<sup>180</sup> In such a construction, the Kosovo example would act as a guide to elude censure by international law in pursuing independence.

*C. A Human Rights-Based Interpretation Permits Remedial  
Secession in Kosovo, While a State Sovereignty-Based  
Interpretation Rejects Secession*

In order to promote the universal applicability of fundamental human rights, this Note advocates the development of a pathway by which oppressed peoples will be able to exercise their rights to self-determination, even against assertions of sovereign privilege. Judge Cançado Trindade did not suggest any generalized, normative mechanism by which rights to external self-determination ought to be exercised. In the Kosovo context, UN engagement led to establishing international administrators charged with overseeing the ultimate resolution of Kosovo's status.<sup>181</sup> As demonstrated in the decolonization context, an international organization like the United Nations may administer a colonial population's transition into independence.<sup>182</sup> If the entitlement to self-determination can be extended to oppressed peoples, then Judge Cançado Trindade's analysis supports including populations subjected to systematic discrimination and serious violations of international humanitarian and human rights law within the administrative mandate, to the point of facilitating self-government for that population.<sup>183</sup> This position avoids comprehensively assessing the mechanics of exercising external self-determination, since Judge Cançado Trindade noted that the United Nations is properly qualified to steward transition.<sup>184</sup> The structural analogy should not be taken too far, as the Kosovo case is not a decolonization matter.<sup>185</sup> Rather here, the legal regime of Resolution 1244 created conditions to bring about substantial autonomy and self-governance in Kosovo.<sup>186</sup> This responded to the recognition that self-determination is an entitlement of all peoples or populations in situations of systematic oppression, subjugation, or tyranny, not only those of decolonization.<sup>187</sup> The

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180. *Id.*

181. See S.C. Res. 1244, *supra* note 88, ¶¶ 10, 11(e) (authorizing establishment of an international civilian presence to serve as interim administrator over Kosovo charged with, *inter alia*, overseeing the PISG and facilitating a political process designed to determine Kosovo's status).

182. See *supra* Part II.B.

183. *Kosovo*, 2010 I.C.J. ¶ 207 (separate opinion of Judge Cançado Trindade).

184. *Id.*

185. See *id.* ¶ 45 (distinguishing the colonization cases of the sixties, seventies, and eighties).

186. *Id.* ¶ 227.

187. *Id.* ¶¶ 175, 208.

propriety of the United Nations' facilitating the Kosovar exercise of self-determination emerges from the particular legal regime and does not exclude the possibility of other valid pathways of exercising this right.<sup>188</sup>

Judge Koroma interpreted the legal consequences of Resolution 1244 to permit a narrower scope of permissible means to resolve the Kosovo situation. Judge Koroma determined that Resolution 1244 sought to uphold the territorial integrity of Serbia,<sup>189</sup> provided that Kosovo receive substantial autonomy within Serbia.<sup>190</sup> Resolution 1244 welcomes Serbia's acceptance of the certain preparatory principles and refers to a future "settlement."<sup>191</sup> Based on its provisions for Serbia's participation, Judge Koroma concluded that the status settlement forbids any manner of resolution lacking Serbia's consent.<sup>192</sup> Such bilateral settlement has strong foundations as an appropriate mechanism in this sort of situation: the Supreme Court of Canada found mutually-consented bilateral secession valid.<sup>193</sup> For example, no new state has been admitted to the United Nations against the wishes of its predecessor state.<sup>194</sup> Nevertheless, Resolution 1244 did not prescribe the mechanism of Kosovo's status settlement, beyond compliance with the Rambouillet Accords, the 1999 agreement to provide for peace, security, and an interim government in Kosovo.<sup>195</sup> Notably, Serbia did not sign the Rambouillet Accords.<sup>196</sup>

188. See *infra* Part IV.D (discussing implementation and enforcement of the proposed remedial right).

189. Judge Koroma referred to the 'Federal Republic of Yugoslavia' (FRY), the official name for the state at the passage of Resolution 1244. See S.C. Res. 1244, *supra* note 88. The name has since changed to 'Serbia.' *The World Factbook: Serbia*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ri.html> (last visited Dec. 26, 2011). This Note refers only to 'Serbia' for purposes of simplicity.

190. *Kosovo*, 2010 I.C.J. ¶ 13 (dissenting opinion of Judge Koroma) (finding it self-evident that Resolution 1244 did not provide for the unilateral secession of Kosovo from FRY). Judge Koroma further noted that the preamble to the Rambouillet Accords stressed the territorial integrity, though he failed to acknowledge that Serbia declined to accept the Rambouillet Accords, an act of uncooperativeness that facilitated NATO's justification of its intervention. *Id.*; JUDAH, *supra* note 12, at 85–87.

191. *Id.* ¶¶ 14, 16.

192. *Id.* ¶ 18.

193. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 84 (Can.).

194. CRAWFORD, *supra* note 3, at 390 (describing the Bangladesh case as illustrative: after breaking away from Pakistan, Bangladesh applied in 1972, but was not admitted until after Pakistan recognized it as a state in 1974).

195. S.C. Res. 1244, *supra* note 88, ¶ 11(e) ("Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648)."); Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, U.N. Doc. S/1999/648, Annex (June 7, 1999).

196. JUDAH, *supra* note 12, at 85–87 (describing Serbia's derailment of the process by offering radically new terms at the eleventh hour, confident that the ultimate outcome would nevertheless be in its favor).

Judge Koroma construed the drafting of the Declaration of Independence narrowly and found its proclamation *ultra vires*,<sup>197</sup> disagreeing with the majority's determination of its authorship.<sup>198</sup> The authors of the Declaration consisted of the Prime Minister and members of the Assembly, where the Assembly also served as the Provisional Institutions of Self-Government (PISG).<sup>199</sup> Resolution 1244 empowered the PISG, but merely to facilitate the provisional administration of the territory,<sup>200</sup> such that an act of secession would be *ultra vires*.<sup>201</sup> The Court narrowly distinguished the PISG from the authors of the Declaration.<sup>202</sup> Judge Koroma, however, was not persuaded and regarded the Declaration's authors to be the PISG acting *ultra vires*.<sup>203</sup> As unilaterally declaring independence involved a claim to Serbian territory, Judge Koroma concluded that it violates international law, the principles of the UN Charter, and the legal regime instituted by Resolution 1244.<sup>204</sup> Where the administrative mandate did not expressly endorse breaking away, Judge Koroma would give primacy to territorial integrity.<sup>205</sup>

The conflicting analyses have at their core the dispute whether international law's ultimate objective is human rights or territorial stability. Judge Cançado Trindade privileged the former and elevated the protection of minority rights to effectively serve as a constituent element of statehood. Judge Koroma favored the latter and reasoned that an overly broad interpretation might provide an instruction manual for breakaway actors to organize and withdraw from their states.<sup>206</sup> Under the latter view, a broad interpretation would jeopardize international law by creating an entitlement—which states did not consent to enact as an international rule—permitting

197. *Ultra vires* is defined as acting beyond the powers granted to the entity by its authorizing document. BLACK'S LAW DICTIONARY 1662 (9th ed. 2009).

198. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 19 (July 22) (dissenting opinion of Judge Koroma).

199. KOSOVËS ME RASTIN E SHPALLJES SË PAVARËSISË [KOSOVO DECLARATION OF INDEPENDENCE] (2008) (Kos.), translation available at [http://www.assembly-kosova.org/common/docs/Dek\\_Pav\\_e.pdf](http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf).

200. S.C. Res. 1244, *supra* note 88, ¶ 11; see *Kosovo*, 2010 I.C.J. ¶ 90 (noting the Provisional Institutions of Self-Government were to operate with the Special Representative of the Secretary-General to implement the provisions of Resolution 1244).

201. Marcelo G. Kohen & Katherine Del Mar, *The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of "Independence from International Law"?*, 24 LEIDEN J. INT'L L. 109, 115 (2011).

202. *Kosovo*, 2010 I.C.J. ¶ 109 (finding the authors of the declaration to be acting as representatives of the people of Kosovo and not as agents of the Security Council).

203. *Id.* ¶ 19 (dissenting opinion of Judge Koroma).

204. *Id.*

205. *Id.* ¶ 21.

206. *Id.* ¶ 4.

the invocation of international law by marginal actors alleging oppression in order to pose existential threats to those same states by threatening their territorial definition.<sup>207</sup> This Note regards Judge Koroma's concerns to be important, but capable of mitigation. Carefully tailoring of the remedial right to secession would make clear that the right is not available merely at the whim of any group wishing to secede. Judge Cançado Trindade's concern regarding territorial integrity's use as a shield for human rights abuses and the denial of self-determination, however, cannot be mitigated without a remedial right to secession if the state has already prevented the exercise of internal self-determination.

#### IV. DRAFTING A REMEDIAL RIGHT TO SECESSION TO PROTECT THE RIGHTS OF OPPRESSED PEOPLES

Recognizing a last-resort remedial right of secession modernizes the right of self-determination and eliminates the situation where a violation lacks any possible remedy. A group should have a right to secede, to exercise its right to self-determination externally, where it (1) constitutes a "people", (2) is governed unequally or subjected to systematic oppression or egregious violations of human or humanitarian rights, (3) is denied any internal realization of self-determination, (4) freely chooses to exercise self-determination externally, and (5) respects *jus cogens* norms and the rights of other minorities and has the capacity to ensure such respect in the future. The remedial right would vest only when all conditions are met.

The existing law of the formation of states has its roots in the Westphalian tradition, under which states only recognized other states, consistent with the principle of sovereign equality.<sup>208</sup> This system was inherently hostile towards claimants seeking statehood, as such recognition would entitle claimants to the valuable rights and privileges of sovereignty, including autonomy from other states within the community of nations.<sup>209</sup> Nevertheless, non-state entities have long sought this status in order to secure access to these rights and privileges.<sup>210</sup> Becoming a state, however, is not simple, especially where a people is located within an existing state. As the ICJ made

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207. *Id.* ¶ 24.

208. Jodoin, *supra* note 111, at 9.

209. *See id.* at 17–18 (finding subjecthood of the state to do violence to non-state actors with lesser international personality, including instituting colonialism as justified by the acts of states against non-state territories).

210. *See id.* at 14 (finding that non-state actors seek a measure of the sovereignty of states to access its benefits in participation in the exclusionary realm of international law, crossing the line between subject and other in the process).



clear in *Kosovo*, declaring independence alone does not effect the formation of a new state.<sup>211</sup>

While the risk of provoking separatist movements is always a cause for concern, the fear that recognizing an extreme-circumstances entitlement would pose a systematic threat is overblown. This fear disregards the fact that recognizing a right does not entail recognizing an unconditional right. A carefully crafted right can mitigate the risk that the entitlement harms the international order broadly. This remedial right could provide for the exercise of external self-determination subject to narrow conditions and strict compliance with international legal norms, to ensure that the right receives the protection it lacks and needs without entitling unintended recipients.

A clarified remedial right to secession might motivate some separatist actors.<sup>212</sup> Where such actors possess a valid claim under this Note's proposed remedial right, the oppressed people would be entitled to rectify the oppression imposed upon it. Where an actor fails to meet the conditions for the proposed right to vest, that group would lack the support of the framework and any secessionist acts would be correspondingly illegitimate. Judge Cançado Trindade illustrated the vital importance of providing such an entitlement to protect oppressed peoples, and such a remedial right ought to be widely endorsed.<sup>213</sup> The danger of this misuse motivates careful drafting, but does not justify trampling the intended protection out of fear that some may seek to invoke it improperly.

Applying the right to Kosovo suggests that Kosovo's claim to independence might be hindered by the new framework, should the empowered fact finders and adjudicators determine that Kosovo has failed to respect the rights of minorities within its borders or that the violations have ceased to be sufficiently egregious to permit the remedy.<sup>214</sup> The implementation of the remedial right would require a flexible approach, permitting determinations by either the ICJ or the

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211. See *Kosovo*, 2010 I.C.J. ¶ 51 (refraining from addressing whether the declaration led to the creation of a state as the legal effect of a declaration may be addressed detached from any intended creation of a new state subsequent to the declaration).

212. Whether a misconception might encourage violent responses by secessionist movements would require speculation into the motives of secessionists. See *id.* ¶ 6 (separate opinion of Judge Yusuf) (expressing concern that the opinion might be misinterpreted to endorse unilateral declarations of independence). This analysis is beyond this Note's scope, but would face the unlikely prospect that secessionists would be encouraged to or deterred from acting based on the opinions of international law experts. See Hannum, *supra* note 13, at 159 (suggesting that separatist groups typically only consult lawyers for propaganda purposes). It is unlikely that secessionist actors have been inhibited by the lack of a clear entitlement under international law. See CRAWFORD, *supra* note 3, at 403 (listing many failed secessionist movements since 1945 that attempted to secede without a clear legal entitlement to do so).

213. See *supra* Part III.A.

214. See *infra* Part IV.B.

Security Council, as each has expertise vital to applying the proposed rule in a manner beneficial to the international order as a whole.

*A. Asserting a Positive Right to Secession as a Last-Resort  
Mechanism to Exercise the Right to Self-Determination  
for Oppressed Peoples*

Clarifying the consequences of denying internal self-determination would not open a new frontier for separatist movements. A conditional positive right to exercise the right to self-determination by secession does not entail completely abdicating control over the right, as a remedial right to secession does not constitute a general right to discretionary secession. A clear, positive principle would provide ascertainable limits to the entitlement, facilitating the exercise of the right to self-determination of peoples already entitled to the right, while distinguishing groups lacking such a right under international law.<sup>215</sup>

The case of Kosovo exemplifies the need for a remedial right to secession as a last resort method of exercising the right of self-determination. For much of the twentieth century, the principle of equal rights and self-determination guided the administration of mandated territories, informing the manner by which those obligations had to be fulfilled.<sup>216</sup> In the UN era, non-state actors have increasingly been acknowledged as having international legal personality, and the international legal community has better-protected the inalienable rights accepted by human rights law as universal.<sup>217</sup> Recognizing these rights has complicated the hierarchy of the international legal order, however, as this entails asserting a legal entitlement on the international level that is not empowered by delegated sovereignty.<sup>218</sup> As Judge Cançado Trindade highlighted,

215. Compare Hannum, *supra* note 86, at 68 (finding norm of self-determination as both a shield protecting a state from secession and a spear piercing the veil of sovereignty used to hide undemocratic or unrepresentative regimes), with Written Statement of the Libyan Arab Jamahiriya, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. Pleadings 141, ¶ 2 (Apr. 17, 2009), available at <http://www.icj-cij.org/docket/files/141/15636.pdf> (last visited Dec. 26, 2011) (asserting the principle of territorial integrity under international law gives “absolute sovereignty to States over their regions”).

216. Christopher J. Borgen, *Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia’s “Frozen Conflicts,”* 9 OR. REV. INT’L L. 477, 483 (2007).

217. See Markus Wagner, *Non-State Actors*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 13 (2007), available at <http://www.mpepil.com> (discussing the ascent of human rights law in the post-World War II period as a priority of international law).

218. See Barrios Altos Case (Chumbipuma Aguirre v. Peru), Merits, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 19, 25 (Mar. 14, 2001) (concurring opinion of Judge Cançado Trindade) (affirming that the human person transcends the state, per the “expression of the *reason of humanity* imposing limits to the *reasons of the State*”).

these rights are precedent to the state privilege and not subject to state abridgement.<sup>219</sup>

The proposed, remedial right to secession permits secession only where necessary to realize a people's right to self-determination without infringing that of others. Under this right, an entity could exercise the right to self-determination externally where it (1) constitutes a "people" within the meaning of the law of self-determination, (2) is governed unequally or subjected to systematic oppression or egregious violations of human or humanitarian rights, (3) is denied the internal exercise of its right to self-determination, (4) freely chooses to exercise this right externally, and (5) respects *jus cogens* norms and the rights of other minorities within its general territory and has the capacity to ensure such respect in the future. The remedial right would vest only when all conditions are met.

Each element of this proposed formulation incorporates the traditional concepts of the right, adjusted with the objective of ending impunity for human rights abuses committed under the shield of territorial integrity. The threshold determination of a "people" would rely on a factor-based approach, balancing the entire set of factual circumstances in each instance.<sup>220</sup> Judge Cançado Trindade observed that international law lacks a precise formulation of what constitutes a "people," although several factual elements may be relevant.<sup>221</sup> Among these are "traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, [and] the will to constitute a people," operating as a non-exclusive list.<sup>222</sup> Judge Cançado Trindade added common suffering to complement the conventional lists, noting that shared suffering creates a strong group identity.<sup>223</sup> The International Commission of Jurists included

219. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 198 (July 22) (separate opinion of Judge Cançado Trindade).

220. For assertions that the broad complex of facts must be considered, see for example, *Kosovo*, 2010 I.C.J. ¶ 165 (separate opinion of Judge Cançado Trindade); *id.* ¶ 2 (dissenting opinion of Judge Koroma); *id.* ¶ 13 (separate opinion of Judge Yusuf) (finding consideration of the character and history of the people valuable to the issue).

221. *Kosovo*, 2010 I.C.J. ¶ 228 (separate opinion of Judge Cançado Trindade) (referring to elements put forth by various states in their written statements).

222. *Id.* But see *Kosovo*, 2010 I.C.J. ¶ 4 (dissenting opinion of Judge Koroma) (construing people narrowly, denying ethnic, linguistic, and religious groups the exercise of self-determination as against a claim of territorial integrity).

223. *Kosovo*, 2010 I.C.J. ¶ 229 (separate opinion of Judge Cançado Trindade). The common suffering element incorporates the notion of ongoing violation from Inter-American Court of Human Rights jurisprudence, that abuses must be defined with respect to the harms suffered by the victimized community, such that the abuse may continue even after the apparent indicia subside. See, e.g., *Moiwana Village v. Suriname*, Judgment on Preliminary Objections, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 39 (June 15, 2005) (finding that ongoing violations evade the bar on non-retroactive adjudication); see also *Kosovo*, 2010 I.C.J. ¶ 164 (separate opinion of Judge Cançado Trindade) (discussing that in *Moiwana Village*, the victims of

economic and quantitative factors as considerations.<sup>224</sup> No objective set of factors should be applied rigidly, as a “people” is a constructed concept reflecting a group’s understanding of its own identity.<sup>225</sup>

Inversely, a “people” could be found where recognized by the state from which it seeks to secede, as in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion.<sup>226</sup> Advancing recognition for minority rights in other areas of the law supports interpreting “people” as including groups other than solely the inhabitants of a nation.<sup>227</sup> A “people” may include only a portion of a state.<sup>228</sup> The scope of this element will largely determine the breadth of the entitlement. As each case would require individual appraisal, this determination would rest largely on the findings of the adjudicator. In some situations, the existence of the people might be so generally accepted as to not be at issue, but in others, this may prove a contested point.<sup>229</sup>

The second element of unequal governance and systematic oppression codifies the implicit limitation on territorial integrity in the Friendly Relations and Vienna Declarations.<sup>230</sup> The human rights violations required to satisfy this element would have to be severe, as lesser human rights violations routinely occur universally.<sup>231</sup> Systematic oppression or the egregious violation of human or humanitarian rights would always suffice to show unequal

a massacre were not properly buried, creating an ongoing violation of rights nearly two decades after).

224. THE SECRETARIAT OF THE INT’L COMM’N OF JURISTS, THE EVENTS IN EAST PAKISTAN 49 (1972) (listing the following considerations as characteristics usually shared by members of a people: “historical, racial or ethnic, cultural or linguistic, religious or ideological, geographical or territorial, economic, [and] quantitative”).

225. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 126 (Oct. 16) (separate opinion of Judge Dillard) (challenging the majority’s method of defining the nomadic group, observing that the group understood its ties differently than the Court represented them); *Mgwanga Gunme v. Cameroon*, Comm. No. 266/03, [2009] Afr. Hum. Rts. L. Rep. 148, ¶ 179 (Afr. Comm’n on Hum. & Peoples’ Rts. 2009) (finding it most important that the group self-identifies as a people with a “separate and distinct identity”); THE SECRETARIAT OF THE INT’L COMM’N OF JURISTS, *supra* note 224 (“[A] people begin [sic] to exist only when it becomes conscious of its own identity and asserts its will to exist.”); Borgen, *supra* note 216, at 502–03 (stressing that a “people” is a socially-constructed concept).

226. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 118 (July 9).

227. CRAWFORD, *supra* note 3, at 121; see Borgen, *supra* note 216, at 490 (observing widespread criticism of limited “people” to a national citizenry).

228. Reference re *Secession of Quebec*, [1998] 2 S.C.R. 217, para. 124 (Can.).

229. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. ¶ 118 (finding the existence of a Palestinian “people” no longer in doubt).

230. See *supra* Part III.A.2 (presenting Judge Cançado Trindade’s assertion that the limit in these declarations constitutes a strict limit on sovereignty).

231. See Borgen, *supra* note 216, at 492 (advocating narrow construction of “serious” human rights abuses).

governance, as the abusing state ceases to represent the victimized people, exercises control over the abusing apparatus, and thus governs unequally with respect to the abused.<sup>232</sup> The abuse could include state action, the state's deliberate failure to act, or action by state proxy.<sup>233</sup> Determining the magnitude of the abuse and the fundamentality of the violated rights would also require case-by-case assessments.<sup>234</sup> The temporal nature of the abuse would affect its egregiousness: active violations would be of greater severity than past violations, though past violations may be sufficiently egregious to meet this criterion.<sup>235</sup> The adjudicator would have to be free to determine whether an abuse is sufficiently atrocious so as to avoid enumerating strict terms that would permit impunity in the gaps.

The denial of internal self-determination has been well-addressed previously. Following the African Commission of Human and Peoples' Rights, internal self-determination would encompass local government, federalism, confederalism, unitarism, or another form of political action that gives force to the people's will without abrogating territorial integrity.<sup>236</sup> The Supreme Court of Canada's gloss is likewise helpful, explaining that internal self-determination is met by a people's pursuit of political, economic, social, and cultural development within the framework of the existing state.<sup>237</sup> A claiming people would not satisfy this prong simply by refusing to

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232. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 180 (July 22) (separate opinion of Judge Cañado Trindade).

233. See generally Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) (providing principles, in its Draft Articles on Responsibilities of States for Internationally Wrongful Acts, by which to assess state responsibility for its and others' activities). Contrary to Judge Cañado Trindade, this Note rejects that mere failure to preserve human rights would warrant permitting secession. Judge Cañado Trindade's approach would create too low a threshold, putting state legitimacy at risk for factors beyond state responsibility. See *id.* (distinguishing generally between wrongful conduct for which states are responsible and wrongful conduct that does not constitute internationally wrongful conduct).

234. *Kosovo*, 2010 I.C.J. ¶¶ 98, 156 (separate opinion of Judge Cañado Trindade) (looking to the International Criminal Tribunal for the former Yugoslavia's (ICTY) *Milutinović* judgment and the determinations of UN organs to assert the perpetration of systematic violations against the people of Kosovo).

235. Ongoing violations for the purpose of constituting violations of fundamental rights will have a higher threshold than the ongoing violation discussed in relation to qualifying as a "people," as the latter relates principally to self-identification, while the former relates to breaching a fundamental obligation owed between parties under international law. See *supra* note 207 and accompanying text.

236. *Katangese Peoples' Cong. v. Zaire*, Comm. No. 75/92, [2000] Afr. Hum. Rts. L. Rep. 72, ¶ 4 (Afr. Comm'n on Hum. & Peoples' Rts. 1995) (excising independence and self-government, as those would be external exercise).

237. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 126 (Can.).

negotiate terms of participation with the existing state.<sup>238</sup> Minority representation in a parliamentary body would constitute internal exercise.<sup>239</sup> Should participation only be available on nominal or extortionate terms, this element would be satisfied, as access must be on the basis of equality and without coercion.<sup>240</sup> Otherwise, such participation would fail to advance the access to justice for the minority people that underpins this entire endeavor.<sup>241</sup>

The people must freely choose to secede in order to comply with the Friendly Relations Declaration description of external self-determination as consisting in freely deciding to form an independent state.<sup>242</sup> The free exercise of this right is central to its inclusion in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>243</sup> In order for participation, either internal or external, to suffice for the right, it must be predicated on free and effective choice.<sup>244</sup> The Supreme Court of Canada suggests that a majority of the people, free of ambiguity, must elect the outcome, favoring a supermajority to eliminate doubt.<sup>245</sup> This Note likewise favors a supermajority, as such would provide clarity as to the people's will, best demonstrating the people's sense that the abuse is manifestly intolerable and requires the access to justice that the remedial right provides.

Respecting the rights of other minorities to self-determination and equal treatment would be a necessary limitation to the people's exercise of the right. A remedy designed to facilitate compliance with the right to self-determination could not serve its purpose if its exercise were to bring about violations of other entities' access to the right.<sup>246</sup> The entity would have to possess sufficient capacity to

238. See *id.* ¶ 91 (finding obligation to negotiate); Borgen, *supra* note 216, at 506 (noting that making an issue intractable does not entail that internal representation is not possible).

239. Mgwanga Gunme v. Cameroon, Comm. No. 266/03, [2009] Afr. Hum. Rts. L. Rep. 148, ¶ 190 (Afr. Comm'n on Hum. & Peoples' Rts. 2009).

240. CRAWFORD, *supra* note 3, at 121.

241. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 196 (July 22) (separate opinion of Judge Cançado Trindade).

242. See Friendly Relations Declaration, *supra* note 32, princ. 5 (“[A]ll peoples have the right freely to determine . . . their political status” and that “emergence into any . . . political status freely determined by a people . . . implement[s] the right of self-determination by that people.”).

243. Robert Trisotto, *Seceding in the Twenty-First Century: A Paradigm for the Ages*, 35 BROOK. J. INT'L L. 419, 429 (2010); see *supra* note 62.

244. CRAWFORD, *supra* note 3, at 387.

245. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 87 (Can.); see also Trisotto, *supra* note 243, at 437 (advocating supermajority as the norm).

246. See Nino Kemoklidze, *The Kosovo Precedent and the 'Moral Hazard' of Secession*, 5 J. INT'L L. & INT'L REL. 117, 126–28 (observing with concern the risk that recognizing a right to secede in response to violations of international law might

respect such rights in the future, to avoid endorsing a state that was incapable of governing its territory in compliance with the obligations of statehood.<sup>247</sup> The proposed right would hardly advance a stable and compliant system of international law if the entities it empowered were to immediately fail to uphold its tenets.<sup>248</sup> Additionally, the claiming entity could not violate *jus cogens* norms or commit other egregious human rights violations in pursuing its exercise, as international law has clearly deemed such exercise subsidiary to illegal conduct to be invalid.<sup>249</sup>

In keeping with the tradition of the Friendly Relations Declaration and the Declaration on Colonial Independence, this proposed rule should be put forth in a General Assembly declaration. As a General Assembly resolution, the rule would be nonbinding, but its assertion by the body of member states would constitute a clarifying statement of *opinio juris*.<sup>250</sup> This would secure leeway at the outset for states to structure their compliance to avoid significantly impairing state interests.<sup>251</sup> States would be more willing to accede to a declaration where deviation does not constitute noncompliance that would be met with binding sanctions.<sup>252</sup> The persuasive force of the norm would nevertheless guide state conduct.<sup>253</sup> Ultimately, sufficient state practice in compliance with its

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motivate a secessionist group to use violence to provoke the use of violence by the host state to vest the right).

247. Cf. Aaron Kreuter, Note, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, 19 MINN. J. INT'L L. 363, 395 (2010) (creating a "failed state secession test," permitting a body to secede where existing state cannot provide security, political participation, or basic civil services, thereby lacking ability to administer and secure rights of those peoples within its boundaries).

248. See Antônio Augusto Cançado Trindade, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 COLUM. HUM. RTS. L. REV. 1, 24 (1998) (finding it meaningless to conceive of rights without the capacity to fulfill them).

249. See CRAWFORD, *supra* note 3, at 133, 388–89 (observing declarations of independence and secessions found illegal for occurring following violations of international law); see also Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 81 (July 22) (noting the illegality of declarations of independence in Southern Rhodesia, Northern Cyprus, and Republika Srpska).

250. See Arthur Watts, *Codification and Progressive Development of International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 33 (2006), available at <http://www.mpepil.com> (noting the ICJ's finding that the Friendly Relations Declaration reflected an expression *opinio juris* accepting the rules it contained).

251. Daniel Thürer, *Soft Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 6 (2009), available at <http://www.mpepil.com>.

252. *Id.*

253. *Id.*

terms would provide increasing support for the doctrine to become binding customary law.<sup>254</sup>

The proposed remedial right might work meaningfully only where it fully vests when conditions are sufficiently oppressive that all internal means of exercising self-determination are precluded. Consequently, this right could not permit any exception where sufficiently persuasive interests of territorial integrity might mitigate the claim. As it stands, the remedial right accommodates Serbia's concern with respect to *Kosovo*: "that unilateral attempts at secession must never automatically be recognized."<sup>255</sup> The proposal would not automatically recognize unilateral secession, but would assert that secession is valid where a series of predicate conditions have been met, including the requirement that the existing state violate international law by denying access to the right to self-determination, which is held *erga omnes* by all peoples.<sup>256</sup> Protecting access to justice and a mechanism for recourse would be vital.<sup>257</sup> Marginal cases would fail to meet one or more of the elements. If a situation were to ably satisfy the elements discussed above, the remedial right to secession would vest.

*B. Kosovo's Claim to the Remedial Right Would Succeed  
Unless It Violated the Self-Determination of Minorities  
Within Its Borders*

Under the proposed right, Kosovo's claim to independence would be subject to an additional element of scrutiny for treatment of minorities in its territory. Such a right would require that the claimant administer its territory without distinction of any kind.<sup>258</sup>

254. Tullio Treves, *Customary International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 8 (2006), available at <http://www.mpepil.com>.

255. Press Release, Permanent Mission of Serb. to the United Nations, Position of the Republic of Serbia Concerning the Advisory Opinion on "Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo" Rendered by the International Court of Justice on 22nd July 2010 (July 22, 2010), available at <http://www.un.int/serbia/Statements/76.pdf>.

256. East Timor (Port. v. Austl.), 1995 I.C.J. 90, ¶ 29 (June 30).

257. See Cançado Trindade, *supra* note 248, at 24.

258. See Friendly Relations Declaration, *supra* note 32, princ. 5 (providing for equal rights and self-determination); *Vienna Declaration*, *supra* note 67, pt. 1, ¶ 2 (explaining that the Declaration does not "authorize[e] or encourage[e]" conduct that would "dismember or impair" states "possessed of a Government representing the whole people . . . without distinction of any kind"); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 180 (July 22) (separate opinion of Judge Cançado Trindade) (concluding that the Friendly Relations and Vienna Declarations entail that a state that imposes grave and systematic human rights violations against a people within its borders ceases to possess sovereignty with respect to that people, where denial of the



As Kosovar discrimination against Serbs and Roma within its administrative boundaries has been common since the end of hostilities against Serbia,<sup>259</sup> Kosovo's post-war regime could be found deficient with regard to protecting and ensuring respect for the right to self-determination.<sup>260</sup> If the abuses were systematic and grave, they would negate Kosovo's claim to exercise the right of secession. The abuses perpetrated against Kosovo would need to be sufficiently egregious as well, a point that was contested in the submissions before the ICJ.<sup>261</sup> If both of these were met, then the right would vest, as Kosovo meets the other proposed conditions of the remedial right.

Under the proposed remedial right, the scale, scope, and gravity of any alleged abuses would be assessed to determine whether they suffice to invalidate the claim of the remedial right. Invalidation would occur if the violations constitute systematic violations of the rights to self-determination of those peoples. This highlights a challenge many emergent regimes would face under the proposal. Secessions are rarely met with open arms, and, where successful, the temptation exists to oppress those associated with the defeated opponent.<sup>262</sup> The difficulty that this would place on new states would strengthen the proposed right by emphasizing the necessity of protecting other minorities' rights to self-determination to justify a secession as legitimate under international law. This determination could be distinguished from the Court's affirmation that secession accompanied by violations of *jus cogens* norms is illegal,<sup>263</sup> as this consideration would apply especially where the seceding unit possesses control over its region or where another minority is present

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right of self-determination constitutes such a violation); CRAWFORD, *supra* note 3, at 118–19 (finding that the declarations entail that a state complies with the principle of self-determination by administering without distinction).

259. See Peters, *supra* note 4, at 103 (noting that the abuses against Kosovars referenced in *Kosovo* to have been found by the ICTY in *Milutinović* have ceased, replaced by Kosovar abuses against Serbs and Roma). *But see Kosovo*, 2010 I.C.J. ¶¶ 162–63 (separate opinion of Judge Cañado Trindade) (finding that the harms of the abuses suffered in Kosovo persist and that international law recognizes ongoing harms as a class warranting remedy).

260. Cf. *Vienna Declaration*, *supra* note 67, pt. 1, ¶ 2 (emphasizing, in a secession context, the legitimacy of a government that even-handedly represents its population).

261. *Kosovo*, 2010 I.C.J. ¶ 82 (acknowledging the “sharp difference of views as to whether the circumstances which . . . gave rise to a right of ‘remedial secession’ were actually present in Kosovo”).

262. See Hannum, *supra* note 13, at 161 (attributing to the son of the Macedonian President the statement, “Why should I be a minority in your state, if you can be a minority in mine?”). To illustrate in another context, see for example Steven Erlanger, *Hamas Seizes Broad Control in Gaza Strip*, N.Y. TIMES, June, 14, 2007, at A1 (describing Hamas' violent attacks against Fatah in Gaza following its victory in the 2006 elections).

263. *Kosovo*, 2010 I.C.J. ¶ 81 (majority opinion) (noting that secessions in Northern Cyprus, Republika Srpska, and Southern Rhodesia were illegal for their use of force or violations of *jus cogens*).

within an area it predominately inhabits. This consideration reflects obligations incumbent on any administrator, state or not, and would inhibit a seceding unit from claiming the rights and privileges of statehood where it has already neglected duties of protecting the generally applicable right of self-determination. Violating *jus cogens* norms would continue to invalidate this condition under the proposed right, and Kosovo's conduct during in this regard would require evaluation as well. Whether any conduct did, in fact, impermissibly violate the rights of minorities in Kosovo would require a separate inquiry beyond the scope of this discussion. The right could not provide a mechanism for a minority within a state to claim oppression while it simultaneously oppressed others.

Kosovo's claim of systematic abuses and oppression suffered by its people would likely suffice to meet this factor. The events of 1999 were found sufficiently grave by the UN organs as well as by the ICTY.<sup>264</sup> The invocation of these abuses in 2008 as a justification for secession was met with resistance, as opponents highlighted the termination of hostilities and relative stability.<sup>265</sup> By 2008, the abuses might no longer constitute egregious violations of fundamental rights such that secession is necessary.<sup>266</sup> A delay, however, should not per se invalidate a claim, as creating a bright-line rule in this regard would facilitate manipulation by abusing states. Consistent with the approaches of both Judges Cançado Trindade and Koroma, the adjudicator would need to consider the broad complex of facts that represent the entire set of factual circumstances in the situation.<sup>267</sup> In the Kosovo instance, the delay constitutes the period during which the region was administered by international organizations on a Security Council decision mandate and does not demonstrate a permanent resolution by which Kosovo could exercise self-determination within Serbia.<sup>268</sup> Further, the situation that gave rise to declaring independence included the serious abuses perpetrated against the Kosovars, and the declaration cannot be understood without consideration of these motivating

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264. See *id.* ¶ 58 (discussing Security Council's recognition of humanitarian situation in Kosovo); S.C. Res. 1244, *supra* note 88, ¶ 3 (demanding that FRY end the "violence and repression in Kosovo").

265. Written Statement by the Russian Federation, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Apr. 17, 2009), available at <http://www.icj-cij.org/docket/files/141/15628.pdf> (observing the situation in Kosovo to be incomparably better in 2008 than in 1999); see also Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 817 (2009) (finding it difficult to see secession as a necessary last resort in 2008 considering the improvement in conditions).

266. Vidmar, *supra* note 265, at 817.

267. See notes 178–79.

268. See note 10 and accompanying text.

circumstances.<sup>269</sup> This demonstrates that abuses could persist considerably for the purposes of assessing the egregious violation element.

With respect to the other elements, Kosovo would have a strong case, as Judge Cançado Trindade's extensive analysis shows. Kosovo's status as a people with respect to the law of self-determination has been established by the findings of the Security Council and General Assembly.<sup>270</sup> The denial of internal self-determination is established by Resolution 1244, which reaffirmed "the call for substantial autonomy and meaningful self-administration" that had been denied by Serbia's military invasion.<sup>271</sup> In Kosovo's case, the denial of internal self-determination was especially evident by contrast with the considerable autonomy the region possessed under the 1974 Yugoslav constitution.<sup>272</sup> The destruction of this existing autonomy starkly illustrates the deprivation of internal self-determination that took place.<sup>273</sup> The majority opinion found the choice freely made in concluding that the democratically-elected representatives of the people of Kosovo issued the Kosovo Declaration of Independence.<sup>274</sup> Unless the abuses committed against minorities within its own borders were of sufficient magnitude to constitute a systematic oppression and deprivation of the right to self-determination, Kosovo would possess a remedial right to secession under this proposed framework.

### *C. Possible Separate Security Council and ICJ Pathways to Implement the Remedial Right*

This Note proposes that the political and adjudicatory organs of the UN serve as a pathway to implement the remedial right to secession. Under the Chapter VII power to determine if a situation poses a threat to international peace and security,<sup>275</sup> the Security

269. *Id.* ¶ 51. Under Judge Cançado Trindade's reading of the ongoing harm concept, the effects of systematic oppression imposed in 1998 and 1999 remain present, constituting part of Kosovo's Declaration of Independence on February 17, 2008. *Id.* ¶ 40 (observing that it was the humanitarian catastrophe in Kosovo that compelled the Security Council to implement the legal regime of Resolution 1244 and culminated in the Declaration of Independence).

270. *See supra* Part III.C (discussing UN involvement in Kosovo).

271. *See* S.C. Res. 1244, *supra* note 88, pmbl.

272. *See* JUDAH, *supra* note 12, at 57 (noting that Kosovo was almost a full federal entity, possessing a government, parliament, national bank, and police force); Weller, *supra* note 10, at 132 (noting that Kosovo was a quasi-republic).

273. *See* JUDAH, *supra* note 12, at 67 (describing Milosević's dismantling of Kosovo's autonomy).

274. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 107 (July 22).

275. U.N. Charter art. 39.

Council could find that an oppressed minority people satisfies the requirements for a remedial right to secession. Using the advisory opinion pathway,<sup>276</sup> the General Assembly could refer situations to the ICJ, which would then rely on its adjudicatory capacity to determine if the factual circumstances vest such a right. As a thorough construction of implementing mechanisms requires a discussion beyond the scope of this Note, only a rough outline of this proposed structural framework is appropriate here.

The proposed right would vest in oppressed minority peoples regardless whether a designated institutional pathway offers itself as a means of enforcement. Consequently, any enforcement pathway would be non-exclusive. To construe the matter otherwise would suggest that the right is subsidiary to that institutional mandate and not a generally applicable right as proposed. Further, such a construction would limit the scope of the right to that institution's jurisdiction, conflicting with the universal scope of the proposed right.

The Security Council's Chapter VII mechanism could provide determinations able to assess the facts necessary to find a remedial right to secession, justifying further action to realize that right.<sup>277</sup> The Security Council would need to find that the systematic oppression of the minority people posed a threat to international peace and security sufficient to invoke Chapter VII.<sup>278</sup> Security Council practice demonstrates that this authority is applicable to situations found to pose regional threats.<sup>279</sup> Security Council Resolution 1973 on the situation in Libya invoked Chapter VII authority in response to the use of violence against civilians and systematic violations of human rights within the territory of Libya—applying the Chapter VII mechanism to a situation taking place solely within a state's borders.<sup>280</sup> The egregious violations of international law taking place in these situations would, in many cases, justify invoking Chapter VII authority, particularly under the broader constructions sketched above. The United Nations took this role during the colonial period.<sup>281</sup>

276. *Id.* art. 96, para. 1.

277. *See id.* art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measure shall be taken . . .”).

278. *Id.* art. 39.

279. *See, e.g.*, S.C. Res. 940, U.N. Doc. No. S/RES/940 (July 31, 1994) (invoking Chapter VII on finding regional threat posed by Haitian refugee crisis); S.C. Res. 929, U.N. Doc. No. S/RES/929 (June 22, 1994) (invoking on finding regional threat posed by widespread and systematic killings of civilians in Rwanda).

280. *See* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

281. *See supra* note 277 and accompanying text (discussing the Security Council's condemnation of movements in Southern Rhodesia, Katanga, Republika Srpska, and Northern Cyprus).

Using the Security Council as a gatekeeper has the advantage of permitting a flexible consideration of the factual circumstances, yet must confront the Council's politicization and the P-5 veto.<sup>282</sup> In evaluating a situation, the Security Council may seek information or assistance from any person it considers to be competent to make that assessment.<sup>283</sup> While it is charged with maintaining international peace and security, the Council is not bound to any particular standards in determining what threatens this mandate and conducts itself as a political organ, where any resolution may be stopped by nay votes from seven members or a veto from one permanent member.<sup>284</sup> Its political nature, however, would permit the members to reject a right where authorizing would not suit their political needs and any permanent member to veto any resolution conflicting with its interests.

The initial steps toward Kosovo sovereignty took place under a Chapter VII mandate, with Resolution 1244, showing that this method is still valid.<sup>285</sup> Under this approach, the Security Council would act as a fact finder, certifying when a group qualifies as a "people," similarly to its determining whether situations constitute threats to international peace and security sufficient to invoke Chapter VII.<sup>286</sup> This illustrates that the Security Council possesses the necessary institutional competencies to perform the determinations required for this test.

Adjudication before the ICJ would avoid the matter of P-5 impunity by assessing a claimed right after referral to the Court by a majority vote of the General Assembly. The mandate of the General Assembly includes advancing the realization of human rights, which undoubtedly includes jurisdiction over systematic human rights violations committed against a minority people.<sup>287</sup> Referral to the ICJ

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282. See Martin Binder, *The Politicization of International Security Institutions: The UN Security Council and NGOs* 6, 11 (Wissenschaftszentrum Berlin für Sozialforschung, Discussion Paper SP IV 2008-305, 2008), available at <http://bibliothek.wzb.eu/pdf/2008/iv08-305.pdf> (discussing the veto power of the P-5 and the politicization of the Security Council).

283. PROVISIONAL R. P. SECURITY COUNCIL R. 39, U.N. Doc. S/96/Rev. 7, U.N. Sales No. E.83.I.4 (1982).

284. See U.N. Charter arts. 24, 27 (charging the Security Council with primary responsibility for maintaining international peace and security, requiring nine votes to reach any decision of the Council, and requiring that all permanent members concur in Council decisions).

285. S.C. Res. 1244, *supra* note 88, pmbl.

286. See U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . ."); see also Erika de Wet & Michael Wood, *Peace, Threat to*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 16–20 (2009), available at <http://www.mpepil.com> (discussing the debate whether Security Council determinations under Article 39 are or ought to be judicially reviewable).

287. U.N. Charter art. 13, para. 2.

would place this legal determination before a competent adjudicator. In its advisory capacity, the ICJ would be able to receive written and oral communications from interested states and organizations to investigate the factual backdrop and conflicting perspectives of the issue.<sup>288</sup>

Each forum offers different advantages. The medium of resolution by written opinions gives the ICJ the ability to explain the reasoned basis for its outcomes far better than the Security Council can with its much shorter resolutions. Additionally, the ICJ has a particular expertise in addressing border disputes.<sup>289</sup> With this expertise and its ability to explore the content of the right in explaining its application, the ICJ could consolidate the right as it emerges. The ICJ is less adept at effecting its rulings; however, despite the ICJ's finding of a right to self-determination from colonial occupation in Western Sahara in 1975, the Western Sahara has yet to realize independence.<sup>290</sup> The ICJ may order provisional measures, but must turn to the Security Council in order to enforce them.<sup>291</sup> The Security Council, however, may implement sanctions, escalating to the use of force.<sup>292</sup> In light of their mixed strengths, a mutual regime would offer the strongest force and might demonstrate endorsement from all three primary organs of the United Nations. The Security Council could determine that grave abuses are present in a situation, with or without finding a threat to international peace and security, after which the General Assembly could pass a resolution to request an advisory opinion from the ICJ, which could then determine whether the abuses were of sufficient gravity to vest a remedial right to secession in the victimized people. The situation would well-reflect

288. Statute of the International Court of Justice art. 66, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

289. See, e.g., *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment, 2002 I.C.J. 303, ¶ 1 (Oct. 10) (stating that the case arose from a petition related to a "maritime boundary"); *Maritime Delimitation Between Guinea-Buissau and Senegal (Guinea-Buissau v. Sen.)*, Order, 1995 I.C.J. 423, 423 (Nov. 8) (describing the "dispute concerning the maritime delimitation"); *Territorial Dispute (Libya/Chad)*, Judgment, 1994 I.C.J. 6, ¶ 2 (Feb. 3) (acknowledging "the territorial dispute"); *Maritime Delimitation in Area Between Greenland and Jan Mayen (Den. v. Nor.)*, Judgment, 1993 I.C.J. 38, ¶ 1 (June 14) (explaining the dispute as over a "maritime delimitation"); *Land, Island and Maritime Frontier Dispute (El Sal./Hond.)*, Judgment, 1992 I.C.J. 351, ¶ 3 (Sept. 11) (describing the dispute over a "boundary"); *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 554, ¶ 2 (Dec. 22) (explaining that "the disputed area consists of a band of territory"); *Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.)*, Judgment, 1984 I.C.J. 246, ¶ 2 (Oct. 12) (discussing the question at issue concerning a "maritime boundary").

290. Ralph Wilde, *Self-determination, Secession, and Dispute Settlement After the Kosovo Advisory Opinion*, 24 LEIDEN J. INT'L L. 149, 153 (2011).

291. Statute of the International Court of Justice art. 41 ("Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.").

292. U.N. Charter arts. 41–42.

a statement by the community of nations that such a people would be entitled to form its own state.

Rationalizing the process of seeking international legal support for a claim of right of secession would create consistent standards to assess claims, facilitating predictable outcomes. This could diminish the illegal use of force in some situations by motivating at least some actors in breakaway regions to seek recourse before the international legal community.

## V. CONCLUSION

The proposed remedial right to secession is distinguishable from a right to remedial secession in that the proposed right would be generally applicable without being generally held. In order for the right to vest, the specific conditions discussed above would have to be satisfied, indicating that the right to self-determination had been fatally inhibited. In this way, the remedial right would protect the general right to self-determination by illuminating the previously murky consequences of denying a minority people its right to pursue meaningful participation in the society of which it is a part. The objective of such a remedial right is not to facilitate the dissolution of existing states, but to encourage states to ensure respect for the right to self-determination by firmly condemning such violations of international law. Protecting recognized human rights is a vital purpose of international law, which this right would serve by establishing that the systematic violation of human rights is met with severe repercussions.

For the right to self-determination to remain meaningful, it must adapt to the post-colonial age. The realities of the relationship between states and the peoples that live within them is not the same as it was at the drafting of the UN Charter or the issuance of the decolonization advisory opinions. Since that time, international law has increasingly recognized the necessity of protecting oppressed peoples. A remedial right to secession would not be established easily, but that should not inhibit its declaration as an aspirational norm. Such a declaration would clearly demonstrate international law's commitment to ending state impunity for egregious human rights abuses committed against minority peoples in its territory. This will help the victimized escape from ongoing oppression while pressuring abusive states to end their campaigns of systematic deprivation. To allow the consequences of denials of the right to self-determination to persist leads actors on both sides to continue in the belief that their

side will ultimately prevail. The time has come to clarify this uncertain area of international law.

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