

2012

Signal and Affirm: How the United Nations Should Articulate the Right to Remedial Secession

John R. Ablan

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Law Commons](#)

Recommended Citation

John R. Ablan, Signal and Affirm: How the United Nations Should Articulate the Right to Remedial Secession, 45 *Vanderbilt Law Review* 211 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol45/iss1/4>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

NOTES

Signal and Affirm: How the United Nations Should Articulate the Right to Remedial Secession

ABSTRACT

In international law, the right of peoples to self-determination as applied to remedial secession is anything but clear. The International Court of Justice had an opportunity to clarify this area of law in its recent advisory opinion concerning the unilateral declaration of independence made by Kosovo. Much to the disappointment of international commentators, the Court expressly declined to adjudicate whether Kosovo had, by its declaration, attained state status. Instead, the Court declared that international law does not prohibit unilateral declarations of independence. This Note argues that the proper method for the United Nations to articulate international law of secession is via resolution of the General Assembly combined with application of that resolution by the International Court of Justice. This is the method the United Nations used when it articulated another form of the right to self-determination, the right to be free from colonization. The method's success in this latter area demonstrates its viability for the right to secession, a similarly situated right.

TABLE OF CONTENTS

I.	INTRODUCTION	212
II.	MISSED OPPORTUNITY: THE ICJ BALKS AT A FUNDAMENTAL QUESTION OF INTERNATIONAL LAW.....	217
	A. <i>Kosovo Declares Independence</i>	217
	B. <i>The ICJ's (Non) Advisory Opinion</i>	218
III.	THE RIGHT TO SELF-DETERMINATION IN OTHER CONTEXTS.....	221
	A. <i>Decolonization</i>	222
	B. <i>Occupation During International Armed Conflict</i>	225
IV.	METHODS OF INTERNATIONAL LAWMAKING.....	229
	A. <i>State Practice</i>	229
	B. <i>The General Assembly</i>	231
	C. <i>The International Court of Justice</i>	233
V.	PRESCRIPTION FOR THE UNITED NATIONS.....	236
	A. <i>Summary of the Issues</i>	236
	B. <i>Signal and Affirm</i>	236
VI.	CONCLUSION.....	242

I. INTRODUCTION

A fundamental tension exists between a sovereign state's interest in maintaining territorial integrity and the right of peoples to self-determination.¹ On one hand, modern international law has developed under the assumption that states are the proper units for creating a system of international rights and obligations.² Under this system, states are entitled to be free from external interference when exercising sovereign authority.³ However, a state's sovereign authority is not absolute; precedent suggests that states become

1. See LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 269 (4th ed. 2001) (stating that reconciliation of the right to self-determination and other competing principles is one of the most difficult problems the international legal system currently faces); Milena Sterio, *The Kosovar Declaration of Independence: "Botching the Balkans" or Respecting International Law?*, 37 GA. J. INT'L & COMP. L. 267, 276 (2009) ("[S]ecession seems inherently at odds with the principles of state sovereignty and territorial integrity . . .").

2. See Karl Doehring, *Self Determination*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 48, 50 (Bruno Simma ed., 2d ed. 2002) ("The starting point was the assumption that nations represent a natural structure of mankind . . .").

3. *Id.*

vulnerable to legitimate ouster when they abuse their power against the will of their subjects.⁴

On February 17, 2008, Kosovo unilaterally declared independence from The Republic of Serbia.⁵ With the UN Security Council paralyzed by permanent members vetoing any resolution addressing the matter, the UN General Assembly requested an advisory opinion from the International Court of Justice (ICJ), the principle judicial organ created by the United Nations Charter (the Charter), to determine the declaration's legal validity.⁶ Some commentators considered the opinion the most important case ever to come before the Court.⁷ To the disappointment of many international commentators—not to mention the dissenting justices on the Court—the ICJ interpreted the General Assembly's question narrowly and expressly refused to opine on whether or not Kosovo's declaration of independence is sufficient for it to achieve statehood.⁸ Instead, the opinion merely stated that Kosovo's unilateral declaration of independence is not prohibited under international law.⁹

The right to self-determination can be divided into two broad categories: internal and external.¹⁰ Internal self-determination concerns a people's right to pursue political, economic, and cultural goals within the framework of an existing state.¹¹ It includes the right to free expression, the right to vote, and the right to take part in public affairs.¹² A people invoking the right to internal self-determination does not challenge the legitimacy of the sovereign per

4. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("But when a long train of abuses and usurpations . . . evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government . . ."); Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 134 (Can.) ("[W]hen a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession."); Diane F. Orentlicher, *International Responses to Separatist Claims: Are Democratic Principles Relevant?*, in SECESSION AND SELF-DETERMINATION 19, 22 (Stephen Macedo & Allen Buchanan eds., 2003) (describing more recent versions of the right to remedial secession to include a situation where "a defined subpopulation is persistently excluded from full political participation").

5. Dan Bilefsky, *In a Showdown, Kosovo Declares Its Independence*, N.Y. TIMES, Feb. 18, 2008, at A1.

6. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶1 (July 22).

7. Peter Beaumont, *US Backs Kosovan Independence Regardless of UN Ruling*, GUARDIAN (London) (July 22, 2010), <http://www.guardian.co.uk/world/2010/jul/22/kosovo-independence-us-support?INTCMP=SRCH> (quoting James Ker-Lindsay, a Balkans expert at The London School of Economics and Political Science).

8. *Kosovo*, 2010 I.C.J. ¶ 51.

9. *Id.* ¶ 122.

10. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 126 (Can.) (stating that international law recognizes both internal and external forms of self-determination).

11. *Id.*

12. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 53 (1995).

se; instead, the people challenge the manner in which that sovereign is exercising its power. On the other hand, external self-determination refers to a people's ability to create a new state or other political status.¹³ Generally, the existence of the right to external self-determination is not in dispute.¹⁴ A group of people invoking this right is challenging the very legitimacy of the sovereign. External self-determination only arises in a few unusual circumstances.¹⁵ It arises when a colony claims independence from imperial rule,¹⁶ when a people claim that a state is occupying its country illegally,¹⁷ and most controversially, it might arise when a minority group cannot meaningfully exercise its rights to internal self-determination and seeks to secede from an already established state.¹⁸ The first two of these three circumstances are relatively well defined; the final one is not.¹⁹ As applied to remedial secession, the right is vague and uncertain.²⁰ The ICJ had the opportunity to further develop the international law of the third circumstance in the *Kosovo* advisory opinion but was unwilling or unable to do so.

The ICJ's hesitation to opine further on this right in the *Kosovo* advisory opinion may have stemmed from a desire to avoid entering the political thicket surrounding a difficult problem in international law.²¹ On the other hand, it might have been the result of a good faith interpretation of the General Assembly's slightly ambiguous question.²² In either case, the result seems contrary to the ordinary meaning of the phrase: "declaration of independence" and, as such, contravenes the almost certain intent of the General Assembly when

13. *Secession of Quebec*, [1998] 2 S.C.R. para. 126.

14. DAMROSCH ET AL., *supra* note 1, at 268–69.

15. CASSESE, *supra* note 12, at 334; *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That whenever any Form of Government becomes destructive to these Ends, it is the Right of the People to alter or abolish it, and to institute new Government . . . when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty to throw off such Government . . .").

16. CASSESE, *supra* note 12, at 334.

17. *Id.*

18. *Secession of Quebec*, [1998] 2 S.C.R. para. 126 ("A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases, and, even then, under carefully defined circumstances."); *id.* para. 134 (noting that many international commentators have stated that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise its right by secession").

19. *See infra* Part III.

20. DAMROSCH ET AL., *supra* note 1, at 273 ("The international instruments referring to a right of self-determination of 'peoples' do not make clear whether the right applies outside the decolonization context . . .").

21. *See supra* note 1.

22. *See infra* note 62 and accompanying text.

it exercised its power to seek guidance from the Court on this question of international law.

The ICJ, has opined on external self-determination on several occasions;²³ nonetheless, the scope of the right—with the exception of the colonial circumstance—remains controversial.²⁴ The relative precision of the right in the colonial context is largely a result of the General Assembly's leadership combined with subsequent approval of the ICJ.²⁵ Outside the colonial context, the relative lack of guidance from the United Nations has created holes in international law that have been exploited by some countries in an effort to promote their geopolitical interests.²⁶ These holes create a potential for states to engage in armed conflict as the rest of the world wonders whether the aggressing state's actions are legal.²⁷ Even contemporaries of the colonial era foresaw that vagueness in the right to self-determination would threaten international peace and security.²⁸

This Note adopts the following premise: the United Nations ought to lay down a basic framework for the right to remedial secession. This premise flows from the reality that vagueness in defining this fundamentally important right has led and probably will lead to continued armed conflict and the United Nations is responsible for maintaining international peace and security.²⁹ This Note also takes it as a given that the General Assembly wants to have a framework and wants the ICJ to apply that framework. This assumption is likely because of the General Assembly's decision to seek guidance from the ICJ in the Kosovo instance.

Taking this premise as a given, this Note argues that the proper method for the United Nations to articulate the scope of the right to remedial secession—whatever that scope turns out to be—is the “signal and affirm” method. This method was used by the General Assembly when it articulated the right to self-determination with respect to peoples located in colonized territories.³⁰ The General

23. See *infra* Part III.

24. See DAMROSCH ET AL., *supra* note 1, at 269.

25. See CASSESE, *supra* note 12, at 89 (suggesting that the reason the ICJ views the right to self-determination liberally in the colonial context was “to a large extent borne out by UN practice”).

26. See *infra* Part III.B.

27. *Id.*

28. See, e.g., Ved P. Nanda, *Self-determination in International Law: The Tragic Tale of Two Cities – Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321, 322 (1972) (“[I]nternal conflicts whose basis is a desire for self-determination may pose a major threat in the future of international peace and security.”).

29. See U.N. Charter art. 1, para. 1 (“The purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace . . .”).

30. See Declaration of Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, G.A.

Assembly could have taken this approach rather than referring the issue to the ICJ. Now that the Court has not resolved the scope of the right to remedial secession, the General Assembly ought to adopt a remedial secession resolution that sets standards for the ICJ to apply in contentious cases. This method takes advantage of these organ's strengths and avoids their weaknesses.

Before beginning the argument, it is important to head off an important objection: namely that it is not a good idea in principle to articulate the right to remedial secession because of the increased risks of civil war and oppression.³¹ It is not knowable how much armed conflict will be avoided by clarity in the right to remedial secession³² and how much will be created by it. However, the General Assembly has—by the act of asking the ICJ for an advisory opinion concerning the international law of secession³³—made the policy decision that clarity is the right course to take. This policy judgment deserves respect. Once the objector concedes that the General Assembly may decide to pursue its apparent goal of creating a remedial secession framework, the objector should then ask, "What is the proper method for the General Assembly to pursue that goal?"

Part II of this Note summarizes and analyzes the ICJ's *Kosovo* advisory opinion. Part III describes other forms of the right to external self-determination that have been more fully codified in international law. Lessons from international lawmaking in these areas inform this Note's proposed solution because these forms of the right to self-determination raise similar challenges to articulating the right to remedial secession. Part IV analyzes the strengths and weaknesses of various methods of international lawmaking. Part V

Res. 2625 (XXV), Annex, U.N. Doc. A/8082, at 124 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration] ("The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it . . ."); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶ 1, U.N. Doc. A/RES/1514(XV) (Dec. 4, 1960) [hereinafter Colonial Countries Declaration] ("The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights . . ."); see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21) ("A further important stage in this development was the Declaration of Independence to Colonial Countries and Peoples, which embraces all peoples, and territories which have not yet attained independence." (citation omitted) (internal quotation marks omitted)).

31. See, e.g., *infra* notes 38–44 and accompanying text (illustrating geopolitical controversy surrounding Kosovo's declaration of independence from Serbia).

32. See *infra* notes 226–29 and accompanying text (arguing that clarity will make disputes concerning remedial secession more likely to be peacefully resolved).

33. I am assuming that the General Assembly asked a broader question than the Court ultimately answered. See *infra* text accompanying notes 63–65 (agreeing with the weight of other commentary that the Court's interpretation of the General Assembly's question is overly narrow).

argues that the signal and affirm method is the best method for articulating the right as applied to remedial secession.

II. MISSED OPPORTUNITY: THE ICJ BALKS AT A FUNDAMENTAL QUESTION OF INTERNATIONAL LAW

A. Kosovo Declares Independence

On February 17, 2008, Kosovo unilaterally declared independence from Serbia.³⁴ The news filled Kosovo's streets with tens of thousands of people in celebration.³⁵ Some beat drums declaring, "Independence! Independence! We are free at last!"³⁶ Others put a one hundred foot long birthday cake in the capitol's main street.³⁷

Outside Kosovo, the response varied. Some countries recognized Kosovo as a new state and some did not.³⁸ The Serbian government immediately denied the validity of the declaration.³⁹ Serbian Prime Minister Vokislav Kostunica stated, "Our final word is that no one but Serbia can claim the right to the territory of Kosovo. No police or force can strip Serbia of that right"⁴⁰

From a geopolitical perspective, the declaration was the latest development in a political conflict between western countries and the Kremlin.⁴¹ Serbia, supported by Russia, urged the Security Council to find the declaration invalid; however, the United States took the position that the declaration was consistent with applicable international law.⁴² With two of its permanent members taking opposite positions, the Security Council was not able to pass a resolution on the matter.⁴³ Instead, the General Assembly passed a resolution asking for an advisory opinion from the ICJ.⁴⁴

34. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 57 (July 22).

35. Bilefsky, *supra* note 5, at A1.

36. *Id.*

37. *Id.*

38. G.A. Res. 63/3, para. 4, U.N. Doc. A/RES/63/3 (Oct. 8, 2008) ("Aware that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing legal order."); see Sterio, *supra* note 1, at 269 (stating that most western governments recognized Kosovo as a new state despite Serbian protest).

39. Louise Radnosfsky, *Belgrade Refuses to Recognise Kosovo's Statehood Claim*, GUARDIAN (London) (Feb. 13, 2008), <http://www.guardian.co.uk/world/2008/feb/13/serbia.kosovo>.

40. *Id.*

41. Dan Bilefsky, *Kosovo's Declaration of Independence Is Within Law*, U.N. Rules, N.Y. TIMES, July 23, 2010, at A4.

42. *Id.*

43. See U.N. Charter art. 27, para. 3 (requiring all non-procedural Security Council decisions to be endorsed by every permanent member); see also *id.* art. 23,

B. *The ICJ's (Non) Advisory Opinion*

The Charter grants the General Assembly the right to request an advisory opinion from the ICJ regarding “any legal question.”⁴⁵ However the Court, in its discretion, may decline to give an advisory opinion.⁴⁶ According to the Court, it should not refuse a properly made request for an advisory opinion unless there are “compelling reasons” for it to do so.⁴⁷ That its ruling might lead to adverse political consequences is not a sufficient reason for the Court to decline to give an advisory opinion.⁴⁸ The purpose of the Court’s advisory jurisdiction is to enable UN organs to obtain opinions that will help them exercise their functions.⁴⁹

After concluding that it has jurisdiction to give the advisory opinion and that there is no compelling reason against providing the opinion, the ICJ turned to the task of interpreting the General Assembly’s question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”⁵⁰ The Court considered the question “clearly formulated” and “narrow and specific.”⁵¹ According to the Court, the General Assembly did not ask about the legal consequences of the declaration (i.e., whether Kosovo had achieved statehood as a result of it).⁵² Instead, the question asked whether the declaration was prohibited by international law.⁵³

With the scope of the question determined, the ICJ delivered its opinion. The Court first turned to general international law to see whether there is a principle that prohibits unilateral declarations of independence.⁵⁴ Finding “no case” where state practice would suggest a prohibition on the act of making a declaration unilaterally, the Court concluded that the declaration did not violate general

para. 1 (listing among the Security Council’s permanent members, the United States and the Soviet Union).

44. G.A. Res. 63/3, *supra* note 38, para. 5.

45. U.N. Charter art. 96, para. 1; *see also* Statute of the International Court of Justice art. 65(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute] (“The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”).

46. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 44 (July 9).

47. *Id.*

48. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 35 (July 22).

49. *Id.* ¶ 44.

50. *Id.* ¶¶ 48–49.

51. *Id.* ¶ 51.

52. *Id.*

53. *Id.* ¶ 56.

54. *Id.* ¶¶ 78–79.

international law.⁵⁵ Opponents of Kosovo's actions argued that the principle of territorial integrity implies that international law prohibits unilateral declarations of independence.⁵⁶ The Court dismissed this argument in one sentence concluding that the principle only applies to relations between states.⁵⁷

Finally, the Court looked to the *lex specialis* created by Security Council Resolution 1244 (1999) for any prohibitions on the specific unilateral declaration made by Kosovo.⁵⁸ The Court concluded that the resolution creates a framework whereby all legislative power is temporarily vested in the Assembly of Kosovo subject to the overriding authority of a Special Representative to the Secretary-General.⁵⁹ However, whether or not Resolution 1244 and the temporary government it creates are in conflict with the unilateral declaration is ultimately a moot point because the entity that declared independence is not governed by the resolution.⁶⁰ The Court found that the entity is not the Assembly of Kosovo, but instead the "the democratically-elected leaders of our people" as stated by the declaration itself.⁶¹ Because the resolution does not produce binding international law with respect to this entity, the entity cannot be in violation of the international law created by the resolution.⁶² The Court concluded that because neither general international law nor Security Council Resolution 1244 prohibits Kosovo from unilaterally declaring independence, Kosovo's declaration does not violate international law.⁶³

The reasons the Court gave for limiting its opinion to answering an esoteric question of international law are not convincing. Even the best argument in defense of its opinion cannot withstand criticism. Based on previous requests for advisory opinions, there is an argument for claiming that the General Assembly's question does not inquire about the legal consequences of Kosovo's declaration. In the past, both the Security Council and the General Assembly have specifically stated that they were interested in the legal consequences of various state actions,⁶⁴ while here, the question put forth by the

55. *Id.* ¶¶ 79, 84.

56. *Id.* ¶ 80.

57. *Id.*

58. *Id.* ¶¶ 85–121.

59. *Id.* ¶¶ 85, 89.

60. *Id.* ¶ 118.

61. *Id.* ¶¶ 75, 103, 105, 107.

62. *Id.* ¶¶ 115, 118.

63. *Id.* ¶ 122.

64. *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 1 (June 21) (stating the question put to it by the Security Council: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"); *see also* Legal Consequences of the Construction of a Wall in the Occupied

General Assembly does not mention anything about legal consequences. However, this argument seems hollow considering the natural tendency to associate declarations of independence with changes in sovereignty. This criticism is especially damaging in light of the Court's ability to reformulate or clarify questions of various UN organs.⁶⁵

International commentators echo this criticism.⁶⁶ One analysis characterizes the opinion as arbitrarily dividing international rights and obligations concerning "declaring" and "effecting" independence and finds the distinction "artificial and not necessarily convincing."⁶⁷ Some commentators argue that the Court abdicated its responsibility as advisor to the various bodies of the United Nations.⁶⁸ Commentators criticize the ICJ for missing an important opportunity to set down rules in an area of fundamental importance.⁶⁹ In addition, there is confusion in the international legal community about which side prevailed.⁷⁰

Concurring and dissenting judges levied similar complaints in separate opinions. Judge Skotnikov suggested that international law does not regulate declarations of independence per se, but instead addresses claims for statehood that underlie them.⁷¹ He warned that the vagueness associated with the Court's conclusion that international law contains no prohibition on unilateral declarations of

Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 1 (July 9) ("What are the legal consequences arising from the construction of the wall being built by Israel...?").

65. *Kosovo*, 2010 I.C.J. ¶ 50.

66. See, e.g., Björn Arp, *The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities*, 11 GER. L. REV. 847, 847 (2010) ("The Court's short and sometimes clumsy reasoning seem a tortious exercise of avoiding from commenting on complex and difficult issues..."); Thomas Burri, *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links*, 11 GER. L. REV. 881, 885 (2010) ("The weakest point of the ICJ's opinion... is the argument... that there is no necessary link between, on the one hand, self-determination or secession and, on the other, the declaration of independence."); Robert Muharremi, *A Note on the ICJ Advisory Opinion on Kosovo*, 11 GER. L. REV. 867, 874 (2010) ("[T]he ICJ should have exercised its judicial authority to interpret the question asked by the General Assembly more profoundly...").

67. Muharremi, *supra* note 66, at 873.

68. See, e.g., *id.* at 874 ("[The ICJ] failed to properly discharge its judicial functions..."); Jed Odermatt, *The Kosovo Advisory Opinion: A Missed Opportunity?* 5 (Oct. 7, 2010) (unpublished manuscript) (on file with author) ("The Court was free to interpret the question in a narrow fashion as it did. However by doing so, it failed to furnish advice to the organ that requested it.").

69. See, e.g., Burri, *supra* note 66, at 882 ("Nothing less than the foundation of the international order was at issue... [The ICJ] failed to seize the opportunity.").

70. See Bilefsky, *supra* note 41, at A4 (reporting that legal experts advised that the opinion could "allow both sides to declare victory").

71. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 17 (July 22) (dissenting opinion of Judge Skotnikov).

independence may have an “inflammatory effect.”⁷² Other judges predicted that vagueness regarding the validity of an ethnic group’s claim of statehood might cause interruptions in international peace and security.⁷³ Even Judge Koromoa, who dissented from the Court’s opinion, based his opinion on the ground that a state’s right to territorial integrity trumps the right to self-determination.⁷⁴ This reasoning implicitly rejects the Court’s narrow interpretation of the question that does not include issues concerning the end or beginning of a sovereign.

Ultimately, the Court’s hesitation is likely due to the difficulty of solving the problem of remedial secession. Looming large are the specters of civil war, in the case of an overly broad right, and oppression, in the case of an overly narrow right. The Court’s unwillingness to enter this political thicket may stem from an acute awareness of the undesirable consequences of any decision stating the requirements for completing a unilateral secession. This difficulty suggests that multiple UN organs must work together in order to provide a realistic solution.

A prescription for the General Assembly and ICJ’s role in the future of remedial secession is discussed below.⁷⁵ Before providing an analysis of the proper method for articulating the right to self-determination as it applies to remedial secession, Part III discusses the history and law of other forms of external self-determination such as colonization and foreign occupation in order to provide useful background.

III. THE RIGHT TO SELF-DETERMINATION IN OTHER CONTEXTS

In the hands of would-be States, self-determination is the key to opening the door and entering into that coveted club of statehood. For existing states, self-determination is the key for locking the door against the undesirable from within and outside the realm.⁷⁶

At its inception, the United Nations recognized the promotion of self-determination as a “purpose” in Article 1 of the Charter.⁷⁷ Although Article 1 was probably intended to refer only to internal self-determination, it was eventually used as a legal basis for forms of

72. *Id.*

73. *Id.* ¶ 6 (concurring opinion of Judge Yusuf).

74. *Id.* ¶¶ 20–22 (dissenting opinion of Judge Koroma).

75. *See infra* Part V.

76. CASSESE, *supra* note 12, at 6.

77. U.N. Charter art. 1, para. 2 (“The purposes of the United Nations are: . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .”).

external self-determination.⁷⁸ Article 55 gives the right a legal character by referring to self-determination as a “right” and “principle,” not merely a purpose.⁷⁹ Additionally, subsequent practice of the United Nations has demonstrated that self-determination is of a legally binding nature.⁸⁰ In modern international law, the existence of the right is not in dispute.⁸¹ Yet, as the *Kosovo* advisory opinion demonstrates, the contours of self-determination as applied to remedial secession are contested.⁸² It is one thing to state that peoples have a right to self-determination, but it is quite another to craft specific rules for when and how a people may exercise that right and to apply those rules to the messy world of international relations.⁸³

A. Decolonization

Unlike other forms of external self-determination, the right to be free from colonization is well defined.⁸⁴ The General Assembly, in Resolution 1514 (XV), declared that colonization is a violation of “fundamental human rights.”⁸⁵ It also stated that the right to self-determination includes the right of peoples to “freely determine their political status.”⁸⁶ Finally, it called upon states to cease armed action against dependent peoples (i.e., peoples under colonial rule) and to take “immediate steps” to transfer governing authority to those peoples.⁸⁷ The General Assembly also passed Resolution 1541 (XV),

78. See CASSESE, *supra* note 12, at 65–66 (explaining that Article 1 not only “enshrined the right of the whole population . . . to internal self-determination” but also proclaimed external self-determination, whereby States have an “obligation . . . to refrain from interfering with the independence of other States”).

79. See U.N. Charter art. 55.

80. See Doehring, *supra* note 2, at 49 (noting UN organs’ resolutions, international covenants, and the practice of the ICJ as examples of subsequent practice); Orentlicher, *supra* note 4, at 22 (suggesting that the view of self-determination being a legal right “derives above all” from resolutions adopted by the General Assembly).

81. See Doehring, *supra* note 2, at 50 (explaining that the characterization of self-determination “as a political programme . . . not as a legal duty . . . cannot be regarded as representative of the present-day interpretation”).

82. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 104 (July 22)

83. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 180 (1993) (suggesting that the attitude against recognizing claims of external self-determination stems from a desire to avoid opening a “Pandora’s box” for minority claims).

84. See Doehring, *supra* note 2, at 52 (“[The] demand for decolonization is to be found in Chapter XI of the UN Charter . . .”); see also Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 132 (Can.) (“The right of colonial peoples to exercise their right to self-determination by breaking away from the ‘imperial’ power is now undisputed . . .”).

85. Colonial Countries Declaration, *supra* note 30, ¶ 1.

86. *Id.* ¶ 2.

87. *Id.* ¶¶ 4–5.

which tied the obligations for states administering territories as colonies to the declarations made in chapter XI of the Charter.⁸⁸ In chapter XI, member states administering territories where people have not attained self-government are obligated to develop mechanisms to promote self-government.⁸⁹ By declaring that colonies fall into the non-self-governing territory category, the General Assembly imposed a new set of obligations upon states. The General Assembly resolved that a non-self-governing territory can attain self-government in one of three ways: emerging as a new sovereign state, associating with an existing state, or integrating with an existing state.⁹⁰

Subsequently, in Resolution 2625 (XXV), the General Assembly established that states are required to take steps to bring about a “speedy end to colonialism.”⁹¹ The General Assembly further elaborated that a colony has a status “separate and distinct” from that of a parent state administering it.⁹² These principles were based “under the Charter.”⁹³

While enunciating these principles of self-determination, the General Assembly balanced them against a sovereign state’s right of territorial integrity. After restating that the right to self-determination includes the right to be free from external interference and that it constitutes a fundamental human right, Resolution 2625 (XXV) included text concerning the principle of territorial integrity.⁹⁴ Notably, the declaration provided a caveat to this principle by indicating that it might be voidable should the government not represent “the whole people belonging to the territory without distinction to race, creed or colour.”⁹⁵ This caveat bears a striking resemblance to the principle announced in the U.S. Declaration of Independence; a government may forfeit its legitimacy as sovereign by systematically denying a portion of its subjects’ fundamental human rights.⁹⁶

The ICJ’s role in the development of this right came in a series of advisory opinions concerning *Namibia* and *Western Sahara*. Initially, in its opinion on *Namibia*, the Court concluded that Resolution 1514

88. G.A. Res. 1541 (XV), Annex, princ. I, U.N. Doc. A/RES/1541(XV) (Dec. 15, 1960) (“The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type.”).

89. U.N. Charter art. 73, para. b.

90. G.A. Res. 1541 (XV), *supra* note 88, Annex, princ. VI.

91. Friendly Relations Declaration, *supra* note 30, at 124.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*; see also CASSESE, *supra* note 12, at 114 (interpreting this phrase to give racial or religious groups that are denied access to government institutions a potential right to secede from an existing state).

96. See *supra* note 4 and accompanying text.

(XV) is an important stage in the development of the right to external self-determination.⁹⁷ The Court acknowledged that its interpretation of the scope of this right is influenced by UN resolutions and other events that produce customary international law.⁹⁸ Finally the Court concluded that, because of these resolutions, the field has been "considerably enriched" and that it cannot ignore these developments while properly carrying out its functions.⁹⁹

The ICJ later applied these principles in an advisory opinion concerning *Western Sahara*.¹⁰⁰ After concluding that it had jurisdiction to give an advisory opinion and that there are no compelling reasons for it abstain from delivering an advisory opinion,¹⁰¹ the Court immediately turned to the Charter and to General Assembly Resolutions 1514 (XV), 1541 (XV), and 2625 (XXV) for guidance on the proper scope of the external right to self-determination as applied to decolonization.¹⁰² This reliance on the principles enumerated by the General Assembly is remarkable because, unlike the Security Council, the General Assembly does not have de jure authority to bind member states.¹⁰³ In other opinions, the Court has even gone so far as to declare that General Assembly Resolution 2625 (XXV) reflects customary international law.¹⁰⁴ Ultimately, some commentators argue that the UN practice of implementing a right to be free from decolonization was instrumental in establishing the right to external self-determination.¹⁰⁵

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

98. See *id.* ¶ 53 ("[T]he Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary international law.").

99. *Id.*

100. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 1 (Oct. 16) (quoting the General Assembly's request for an advisory opinion concerning Western Sahara's status at the time of colonization and its relationship to various states).

101. *Id.* ¶¶ 20, 52.

102. *Id.* ¶¶ 54-59.

103. Compare U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."), with *id.* art. 14 ("[T]he General Assembly may recommend measures for the peaceful adjustment of any situation . . ."). Other commentators have noted this distinction. See, e.g., DAMROSCH ET AL., *supra* note 1, at 142 (drawing a distinction between the Security Council's ability to adopt compulsory resolutions and the General Assembly's power of recommendation).

104. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 191-93 (June 27).

105. Doehring, *supra* note 2, at 53.

B. Occupation During International Armed Conflict

The law of occupation during international armed conflict is another example of a relatively well-defined aspect of the right to external self-determination however, because the international system has no single, independent body applying this law to specific cases, its rules can be exploited.

Section III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War¹⁰⁶ forms the heart of the law of occupation. The treaty grants broad authority to an occupying power. For example, an occupying power may “undertake total or partial evacuation of a given area” when military reasons justify doing so.¹⁰⁷ The occupying power may compel an occupied territory’s nationals to work to provide “for the needs of the army of occupation” so long as the nationals are at least eighteen years old and do not directly take part in military operations.¹⁰⁸ The occupying power may even, with certain limitations, alter the penal code applicable to the territory’s nationals.¹⁰⁹ If the occupying power determines that a national is guilty of espionage or sabotage, it may impose the death penalty.¹¹⁰

However, an occupying force’s power is limited and accompanied by numerous obligations. For example, occupying powers must provide facilities for the education of children.¹¹¹ Unless “absolutely necessary,” an occupying power may not destroy real or personal property belonging to private persons.¹¹² It may not discriminate or sanction public officials or judges.¹¹³ It has an affirmative duty to ensure that food and medical supplies are available to the population, and this duty may even require an occupying power to import necessary supplies from outside the occupied territory.¹¹⁴

The right to self-determination is the limiting principle to the law of occupation. Occupation does not “affect the legal status of the territory in question.”¹¹⁵ Thus, the state’s legal existence is not destroyed by the occupying power; it is merely suppressed or displaced. This principle is similar to the colonial context where a

106. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 47–78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

107. *Id.* art. 49.

108. *Id.* art. 51.

109. *See id.* art. 64 (permitting the occupying power to repeal or suspend penal laws and enact provisions when doing so is necessary to the administration of justice or required to maintain orderly government).

110. *Id.* art. 68.

111. *Id.* art. 50.

112. *Id.* art. 53.

113. *Id.* art. 54.

114. *Id.* art. 55.

115. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 4, June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Protocol I].

colony has a legal existence that is distinct from the sovereign currently exercising power over it.¹¹⁶ The occupying power must "take all the measures in its power to restore, and ensure, as far as possible, public order and safety."¹¹⁷ These provisions, combined with the first Protocol to the Geneva Convention's declaration that peoples can exercise the right to self-determination to counter foreign occupation, demonstrate that an occupying power's rights end where the right to self-determination begins.¹¹⁸

The right to self-determination's role in foreign occupations has increased over time. First, the rules promulgated in the 1907 Hague Regulations dealt primarily with the preservation of ultimate sovereignty in the temporarily suppressed government,¹¹⁹ while the 1949 Fourth Geneva Convention focused on the rights of the individual citizens in the occupied territory.¹²⁰ Secondly, it was originally possible to end an occupation only via a peace treaty between the occupying power and the temporarily suppressed government.¹²¹ International law now permits an occupying power to transfer governmental authority to the suppressed government or another group that legitimately invokes the right of external self-determination.¹²²

The birth of the state Bangladesh provides a good example of such a transfer. In January 1970, the Awami League (a Pakistani political party) did extremely well in the general elections for the Pakistani National Assembly.¹²³ The Awami League's success posed a problem for the West Pakistani military because the League openly sought the secession of the East Pakistan territory from Pakistan.¹²⁴ On March 25, 1971, the West Pakistani military attacked Dacca, a city in East Pakistan,¹²⁵ capturing the attention of several states and international organizations.¹²⁶ Tensions remained high for approximately six months as millions of East Pakistani refugees

116. See Friendly Relations Declaration, *supra* note 30, at 124.

117. Regulations Concerning the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2295 (Annex to the Hague Convention No. IV).

118. See Protocol I, *supra* note 115, art. 1(4) ("[P]eoples are fighting against . . . alien occupation . . . in the exercise of their right of self-determination . . ."); CASSESE, *supra* note 12, at 92 ("Article 1 of the First 1977 Geneva Protocol supports the thesis that the right to external self-determination is considered to arise when a State dominates the people of a foreign territory using military means.").

119. BENVENISTI, *supra* note 83, at 211.

120. *Id.*

121. *Id.* at 214.

122. *Id.* at 215.

123. Nanda, *supra* note 28, at 323.

124. *Id.*

125. BENVENISTI, *supra* note 83, at 174.

126. Nanda, *supra* note 28, at 324-25.

crossed the Pakistani–India border into India.¹²⁷ Meanwhile, the Indian government secretly supported the Awami League by providing war supplies, land to recruit and train volunteers, and eventually, by invading and occupying East Pakistan.¹²⁸ The invasion took place on December 6, 1971, just one day after India formally recognized the sovereign country of Bangladesh in what was East Pakistan.¹²⁹ A month after this invasion, approximately ten countries either recognized or decided to recognize Bangladesh as a sovereign state,¹³⁰ and by August of 1972, when the Security Council considered admitting Bangladesh to the United Nations, eighty-six countries had recognized it.¹³¹

Although both the Security Council and the General Assembly passed resolutions calling for a cessation of hostilities from both sides of the conflict,¹³² a Security Council resolution calling for recognition of Bangladesh could not pass because of a single dissenting permanent member.¹³³ But the General Assembly was able to pass a resolution calling for Bangladesh to be admitted to the United Nations as a state.¹³⁴ Thus, the end of a military occupation came not with India (the occupying power) making a peace treaty with Pakistan (the suppressed government), but instead, with India transferring governmental authority over to a new entity, the Awami League, exercising the right of self-determination to form the new state of Bangladesh.

Contrast the facts and outcome of Bangladesh’s successful bid for self-determination with the conflict, still present today, in Northern Cyprus.¹³⁵ In 1960, the United Nations declared that Cyprus was an

127. BENVENISTI, *supra* note 83, at 174; Nanda, *supra* note 28, at 325.

128. BENEVENISTI, *supra* note 83, at 174–75.

129. *Id.* at 175.

130. Nanda, *supra* note 28, at 325.

131. BENEVENISTI, *supra* note 83, at 175.

132. G.A. Res. 2793 (XXVI), ¶ 1, U.N. Doc. A/RES/2793(XXVI) (Dec. 7, 1971); S.C. Res. 307, ¶ 1, U.N. Doc. S/RES/307 (Dec. 21, 1971).

133. BENVENISTI, *supra* note 83, at 175 (stating that China, a permanent member of the Security Council, vetoed an otherwise “overwhelming majority” of the Security Council in this regard).

134. G.A. Res. 3203 (XXIX), ¶ 3, U.N. Doc. A/RES/3203(XXIX) (Sept. 17, 1974) (deciding to admit Bangladesh into the United Nations); S.C. Res. 351, ¶ 2, U.N. Doc. S/RES/351 (June 10, 1974) (recommending Bangladesh be admitted to the United Nations). *See generally* U.N. Charter art. 4, para. 2 (stating that admission to the United Nations is the decision of the General Assembly upon the Security Council’s recommendation).

135. *Turkey Urges Fresh Cyprus Talks*, BBC NEWS (Jan. 24, 2006), <http://news.bbc.co.uk/2/hi/europe/4644652.stm> (reporting Turkey’s efforts to re-open talks about a political settlement); *UK Renews Offer over Cyprus Island*, BBC NEWS (Nov. 10, 2009), http://news.bbc.co.uk/2/hi/uk_news/8353712.stm (reporting the United Kingdom’s offer to transfer control over some of Northern Cyprus to facilitate a peace deal).

independent republic and admitted it as a member.¹³⁶ At that time, approximately 80 percent of its population was Greek in origin, and 18 percent was Turkish in origin.¹³⁷ The Turkish minority was sympathetic to formally joining the state of Turkey.¹³⁸ Amendments to Cyprus' constitution denied this minority the right to participate in government affairs, and as a result, the group formed their own government to manage their affairs in 1967.¹³⁹ On July 20, 1974, Turkey invaded Cyprus.¹⁴⁰ The invasion coupled with measures taken by both sides caused approximately a third of the population to become refugees.¹⁴¹ Over the course of the Turkish occupation, the territory has undergone various transformations in the type of government that claims sovereignty over it, but in 1983, the Turkish Republic of Northern Cyprus declared its independence and invoked the right to self-determination.¹⁴² Justifying its occupation by stating that it was protecting the Turkish minority from being forcefully unified with Greece, Turkey is still the only country to recognize a Turkish Republic of Northern Cyprus in the territory it still occupies.¹⁴³

The General Assembly has called the situation deplorable and has called for the withdrawal of troops from Cyprus.¹⁴⁴ The Security Council deemed the declaration of independence of the Turkish Republic of Northern Cyprus to be invalid¹⁴⁵ and called upon other states to not recognize the new entity as a state.¹⁴⁶ The matter is still in dispute, and in September of 2008, Greek and Turkish Cyprus inhabitants reentered negotiations.¹⁴⁷

These two instances where the right to external self-determination has been clarified with precision demonstrate two lessons. Decolonization demonstrates that it is possible for the General Assembly to lay down general rules for implementation of the right and for the ICJ to apply those rules to a specific case. The law of occupation shows that general rules that are without an authoritative, independent body appointed to apply them allow geopolitical interests to dominate the outcomes of disputes concerning the right.

136. Marios L. Evriviades, *The Legal Dimension of the Cyprus Conflict*, 10 TEX. INT'L L.J. 227, 238 (1975).

137. *Id.* at 228 & n.1.

138. BENVENISTI, *supra* note 83, at 177.

139. *Id.* at 177-78.

140. *Id.* at 177.

141. *Id.* at 178.

142. *Id.*

143. *Id.* at 179.

144. G.A. Res. 37/253, ¶¶ 7-8, U.N. Doc. A/RES/37/253 (May 13, 1983).

145. S.C. Res. 541, ¶ 2, U.N. Doc. S/RES/541 (Nov. 18, 1983).

146. *Id.* ¶ 7.

147. *UK Renews Offer over Cyprus Island*, *supra* note 135.

IV. METHODS OF INTERNATIONAL LAWMAKING

As stated at the outset, the purpose of this Note is not to opine on the proper scope of the right to external self-determination as applied to remedial secession but to recommend a method for articulating and implementing the scope of this right. This Part analyzes the juridical qualities of the international authorities that could potentially provide rules for external self-determination.

A. State Practice

The Statute of the International Court of Justice (the Statute), Article 38(1)(b) instructs the ICJ to apply “international custom, as evidence of a general practice accepted as law” to disputes properly brought before it.¹⁴⁸ Thus, general state practices accepted as law constitute a body of law that binds states.¹⁴⁹ The substance of this law must be ascertained primarily from actual practice and from *opinio juris* of states.¹⁵⁰

The ICJ has discussed how to discover *opinio juris* in several cases and advisory opinions. In *Legality of the Threat or Use of Nuclear Weapons*, the General Assembly asked the ICJ for an advisory opinion on the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”¹⁵¹ Several states argued that nuclear weapon nonuse since 1945 demonstrated an expression of *opinio juris* in the negative by any state that could have used nuclear weapons.¹⁵² Advocates on the other side replied that no state had used a nuclear weapon since 1945 because the circumstances had not warranted their use, not because they believed they were prohibited from doing so.¹⁵³ The Court sided with the latter position.¹⁵⁴ This reasoning demonstrates that customary international law is created not by states acting in a certain way for a long period of time alone, but also by states doing so because they believe they are required to by law. The Court originally articulated this requirement for *opinio juris* in *North Sea Continental Shelf* when it stressed that a subjective belief by states that a particular settled practice is legally obligatory is necessary for the creation of customary international law.¹⁵⁵

148. ICJ Statute, *supra* note 45, art. 38(1)(b).

149. See DAMROSCH ET AL., *supra* note 1, at 59.

150. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 64 (July 8).

151. *Id.* ¶ 1.

152. *Id.* ¶ 65.

153. *Id.* ¶ 66.

154. *Id.* ¶ 67.

155. North Sea Continental Shelf (Ger. v. Den.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).

There are reasons for preferring customary international law as evidenced by state practice to flesh out the scope of international law. States are the primary units of the international legal system.¹⁵⁶ The Statute expressly recognizes state practice as a proper source of international law for the ICJ to apply.¹⁵⁷ The United Nations is based on the principle of sovereign equality for all its members.¹⁵⁸

However, state practice as a source of international law is not without limitations. First, it is slow. The international community must wait for controversies to arise concerning a particular area of international law in order for clarification to take place.¹⁵⁹ The process cannot make rules prospectively.¹⁶⁰ There is no guarantee that a sufficiently uniform consensus can be defensibly identified from what is bound to be variance in state practice on a particular issue. Finally, the subjective belief requirement is difficult to prove. As discussed above, judges deciding *Legality of the Threat or Use of Nuclear Weapons* threw up their hands after they concluded there were multiple plausible explanations for the nonuse of nuclear weapons and simply ruled that there was not *opinio juris* regarding the practice.¹⁶¹ Judicial processes that include a determination of subjective belief involve a great amount of discretion. Standards like these allow a judge to assert a personal policy preference under the guise of a legally reasoned conclusion.

In addition, the right to remedial secession presents a case where state practice may be a particularly inappropriate method for articulating international law. First, a state is, by definition, dealing with an entity that is not currently a state but is seeking to become one. The question at issue is how the law should classify the entity or group of people. If a group of people has a meritorious claim for a right to secede, these people do not quite constitute a state. They are not the original state's own citizens any longer, and it is not clear that they are citizens of a new state at this point. The ICJ hinted at this argument when it stated that the principle of territorial integrity (a right only applicable against other states) did not prohibit the people of Kosovo from declaring independence because, at that time, they were uncontestedly not a state.¹⁶²

156. See *supra* note 2 and accompanying text.

157. ICJ Statute, *supra* note 45, art. 38(1)(b).

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

159. See Oscar Schachter, *The UN Legal Order: An Overview*, in THE UNITED NATIONS AND INTERNATIONAL LAW 3, 6 (Christopher C. Joyner ed., 1997) (arguing that the typical "case-by-case process of customary international law" is ill-suited to meet the needs of an increasingly complex and globalized world).

160. See *id.*

161. See *supra* text accompanying notes 152–54.

162. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 80 (July 22).

Second, the group seeking to secede is challenging the very sovereignty that states claim entitle them to deny the group's independence. Put another way, it is not clear that the bundle of rights conferred by sovereignty includes the competence to decide whether sovereignty trumps a people's right to self-determination in a particular situation. Even if sovereignty entails this right, the point is moot because a group seeking secession is implicitly arguing that the sovereign's authority is invalid as applied to the group.¹⁶³ Thus, the very ability of a state to claim the protections of its statehood is in dispute, and having a state arbitrate the scope of this right therefore creates an existential conflict of interest.¹⁶⁴

Third, a lesson from history applies here: both the Bangladesh and Cyprus examples demonstrate the tendency of states to use ethnic minorities as pawns to serve their geopolitical interests.¹⁶⁵ Under the guise of promoting human rights, history demonstrates that the political motivations of an individual state can distort applications of the law of occupation, a well-defined form of external self-determination.¹⁶⁶ The need for a third party to resolve disputes of this kind is readily apparent.

B. *The General Assembly*

The General Assembly has no formal ability to bind members of the United Nations.¹⁶⁷ Under the Charter, it is not a legislative body with ongoing rulemaking authority,¹⁶⁸ and the Charter's framers did not intend it to be one.¹⁶⁹ However, new demands on the international community have produced a need for such a supranational legislative body in some contexts.¹⁷⁰ The General Assembly has been able to partially fill this void by use of its norm creation power.¹⁷¹ The General Assembly has frequently been able to

163. See *supra* note 4 and accompanying text.

164. See Schachter, *supra* note 159, at 9 (asserting that the positions governments have taken when interpreting the right to self-determination have "nearly always been linked to their political views and alignments").

165. See BENVENISTI, *supra* note 83, at 176 ("India gained important strategic advantages from these developments, which significantly weakened its longtime rival [Pakistan].").

166. See *supra* Part III.B.

167. Christopher C. Joyner, *Conclusion: The United Nations as International Law-Giver*, in *THE UNITED NATIONS AND INTERNATIONAL LAW*, *supra* note 159, at 432, 440. There are two exceptions to this rule: budgetary questions and membership questions. See *supra* note 131 (describing an example of the General Assembly's role in the admission of new states into the United Nations); see also U.N. Charter art. 17(1) ("The General Assembly shall consider and approve the budget of the Organization.").

168. Joyner, *supra* note 167.

169. Schachter, *supra* note 159, at 3.

170. *Id.* at 3-4.

171. See Hurst Hannum, *Human Rights*, in *THE UNITED NATIONS AND INTERNATIONAL LAW*, *supra* note 159, at 131, 145 (stating that while formally

clarify existing international law and, in some cases, to set the stage for creating entirely new rights.¹⁷² One example already discussed is the right to self-determination as applied to colonization.¹⁷³ In these contexts, the General Assembly exhibits a quasi-legislative character.¹⁷⁴

Perhaps the best example of the General Assembly leadership resulting in a rule of international law is *Filártiga v. Peña-Irala*. There, the United States Court of Appeals for the Second Circuit considered the legal effects of a General Assembly Resolution.¹⁷⁵ The case arose when two Paraguay nationals brought suit in the United States District Court for the Eastern District of New York against another Paraguay national for the torture and wrongful death of their relative.¹⁷⁶ Jurisdiction was based on 28 U.S.C. § 1350, also known as the "Alien Tort Statute."¹⁷⁷ This statute gives federal district courts original jurisdiction over a civil action in tort committed "in violation of the law of nations or a treaty of the United States."¹⁷⁸ The district court had previously dismissed the suit for lack of subject matter jurisdiction.¹⁷⁹ On appeal, the Second Circuit reversed.¹⁸⁰ The parties agreed that the action did not arise under a treaty of the United States and, thus, jurisdiction had to be based on the "law of nations."¹⁸¹ The Second Circuit then noted that an express treaty provision is not necessary for a violation of the law of nations to take place under *The Paquete Habana*¹⁸² when "general assent of civilized nations" has led to a "settled rule of international law."¹⁸³ The court considered the general assent requirement to be "stringent."¹⁸⁴

To determine whether torture was an act in violation of the law of nations, the court first consulted the Charter.¹⁸⁵ It stated that the Charter provides a "broad mandate" for states to achieve respect and observance of "human rights and fundamental freedoms."¹⁸⁶ The court recognized that this vague language has led to disputes over the scope and contours of various human rights, but found that the

nonbinding, General Assembly resolutions can have an impact in creating international law).

172. Joyner, *supra* note 167, at 446; see Hannum, *supra* note 171, at 145–47.

173. See *supra* Part III.A.

174. Joyner, *supra* note 167, at 440.

175. *Filártiga v. Peña-Irala*, 630 F.2d 876, 882–83 (2d Cir. 1980).

176. *Id.* at 877–78.

177. *Id.* at 879.

178. 28 U.S.C. § 1350 (2006).

179. *Filártiga*, 630 F.2d at 880.

180. *Id.*

181. *Id.* at 880.

182. *The Paquete Habana*, 175 U.S. 677 (1900).

183. *Filártiga*, 630 F.2d at 881.

184. *Id.*

185. *Id.* at 882.

186. *Id.* at 881–82.

particular right at issue—the right to be free from torture—is undisputedly a part of international law.¹⁸⁷ As evidence, the court cited the Universal Declaration of Human Rights and General Assembly Resolution 2625 (XXV).¹⁸⁸ Additionally, the court found General Assembly Resolution 3452, titled Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of particular relevance.¹⁸⁹ That resolution defines the term “torture,” expressly prohibits a state from engaging in any torturous acts, and declares that victims of torture are afforded a remedy.¹⁹⁰ The court found this resolution important because it “specif[ies] *with great precision* the obligations of member nations under the Charter.”¹⁹¹ The court found General Assembly resolutions to be “formal and solemn instrument[s], suitable for rare occasions when principles of great and lasting importance are being enunciated.”¹⁹² Finally, the court noted that the declaration was adopted without dissent.¹⁹³ The court concluded that prohibition of torture is a part of the law of nations and remanded the case to the district court.¹⁹⁴

Because the solution in this Note advocates for the General Assembly to take a central role in making international law, the advantages and disadvantages of making law via the General Assembly are discussed in Part V.

C. *The International Court of Justice*

The ICJ is the principle judicial organ created by the Charter,¹⁹⁵ but it is not the final interpreter of the Charter.¹⁹⁶ A decision produces binding effects on only those parties before the Court, and¹⁹⁷ it therefore does not have a *stare decisis* effect.¹⁹⁸ The ICJ may not create law but may apply law already created.¹⁹⁹ Notwithstanding these formal limitations on its power, many international lawyers consider the Court’s decisions to be highly persuasive authority.²⁰⁰ Its

187. *Id.* at 882.

188. *Id.*

189. G.A. Res. 3452 (XXX), U.N. Doc. A/10408 (Dec. 9, 1975).

190. *Filártiga*, 630 F.2d at 882–83 (quoting G.A. Res. 3452 (XXX), *supra* note 189, arts. 1, 3, 11).

191. *Id.* at 883 (emphasis added).

192. *Id.* (citation omitted) (internal quotations marks omitted).

193. *Id.* (citing M. G. Kaladharan Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT’L L.J. 813, 816 n.18 (1978)).

194. *Id.* at 884.

195. U.N. Charter art. 92.

196. Doehring, *supra* note 2, at 54.

197. ICJ Statute, *supra* note 45, art. 59.

198. DAMROSCH ET AL., *supra* note 1, at 134.

199. ICJ Statute, *supra* note 45, art. 38.

200. DAMROSCH ET AL., *supra* note 1, at 134–35.

authority is diminished, however, when the decision involves politicized matters.²⁰¹

The Court has jurisdiction in two instances: contentious cases and requests for advisory opinions.²⁰² Only judgments made by the Court in contentious cases are binding on states.²⁰³ States must consent to jurisdiction before the Court can rule on the merits of a dispute, and that consent can be ad hoc or based on a prior agreement.²⁰⁴ Additionally, states may consent to compulsory jurisdiction over a number of broad categories enumerated in the Statute.²⁰⁵

The ICJ is permitted to consult sources such as international covenants, international custom as evidenced by state practice, and judicial decisions and teachings of various nations.²⁰⁶ This limited power to apply but not create international law explains why the ICJ has never articulated a precise definition of the right to self-determination as applied to remedial secession.²⁰⁷ However, when the contours of a particular aspect of the right have been debated and articulated by an authoritative political body or a group of states, the ICJ has not hesitated to apply that law. In the decolonization context, for example, the ICJ has found that it has a duty to enforce the development of the right to self-determination because it has been "considerably enriched" by the General Assembly.²⁰⁸ The Court articulated this process in *North Sea Continental Shelf*, accepting in principle an argument that provisions of a multilateral convention can have norm-creating effects which, if accepted by *opinio juris*, can become part of customary international law and bind states not party to the convention.²⁰⁹ It cautioned, however, that the Court should not "lightly" find that such a process has occurred.²¹⁰

The reasons for the ICJ's hesitation are familiar to those acquainted with basic social and political philosophy but are worth repeating. They are the same concerns that come with any lawmaking done by a politically insulated body with limited access to facts. The Supreme Court of the United States stated them succinctly in *Sosa v. Alvarez-Machain*.²¹¹ Again, a federal court was faced with a

201. *Id.* at 135.

202. *Id.* at 857.

203. U.N. Charter art. 94, para. 1.

204. DAMROSCH ET AL., *supra* note 1, at 857.

205. ICJ Statute, *supra* note 45, art. 36(2).

206. *Id.* art. 38.

207. Doehring, *supra* note 2, at 54–55.

208. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶¶ 52–54 (June 21).

209. *North Sea Continental Shelf* (Ger. v. Den.), 1969 I.C.J. 3, ¶ 71 (Feb. 20).

210. *Id.*

211. 542 U.S. 692, 726–28 (2004).

claim brought under the U.S. Alien Tort Statute, and the Supreme Court took the opportunity to provide guidance as to what evidence is needed in order to allow a court of the United States to hear a tort claim based on a violation of the law of nations.²¹²

The Supreme Court's analysis emphasized the shifting paradigm concerning the proper role of judges in a democratic society. In the late eighteenth century, it was generally accepted that common law was discovered by judges, not created by them.²¹³ However, by 1881, Oliver Wendell Holmes explained:

[I]n substance the growth of the law is legislative . . . [t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of which is expedient for the community concerned.²¹⁴

The Supreme Court concluded that determining whether an international norm exists will inevitably involve a degree of discretion on the part of the judge.²¹⁵ Creating a new rule of international law or new cause of action is better left to a legislative body because there are issues that are beyond the competence of a court—with its necessarily limited access to facts—that a legislative body can better resolve.²¹⁶ However, the Supreme Court recognized that some actions are unambiguously prohibited under international law, and instructed lower federal courts to permit actions to go forward when the claim “rests on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized.”²¹⁷ The Supreme Court struck a balance between the desire to avoid the creation of new law and the duty of a judiciary to apply the law already created.

The ICJ is ill-placed to create the scope of the right of self-determination as applied to remedial secession, but is in an ideal position to apply rules already created by the General Assembly to UN member states because those states must abide by ICJ decisions and because the ICJ is politically independent.

212. *Id.* at 724–28.

213. *Id.* at 725.

214. *Id.* at 725–26 (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 31–32 (Mark De Wolfe Howe ed., 1963)).

215. *Id.* at 726.

216. *Id.*

217. *Id.* at 725.

V. PRESCRIPTION FOR THE UNITED NATIONS

A. *Summary of the Issues*

The conflict between the principles of territorial integrity and the right to self-determination involves questions of the most fundamental nature of the international law system. The system views states as the primary objects of regulation.²¹⁸ As such, it might seem logical to use state practice, as aggregated through the behavior of individual states, as the proper method to ascertain the criteria for permissive uses of the right. However, this method is problematic. The terms under which a new state may be created, or, conversely, the terms under which a state will be required to relinquish sovereign control, cannot be exclusively created via state practice for obvious reasons. In any individual circumstance, a state would be tempted to favor a strong right to territorial integrity, and this temptation creates a bias toward indefinite curtailment of the right to self-determination. To mitigate this concern, the rules should be created by a group that represents the world's nations as a whole, acting prospectively. Based on these observations, the General Assembly is ideally placed to set down such a set of rules.

At the same time, history demonstrates that geopolitical interests can distort or even paralyze the UN political organs when the time comes for implementing and applying already created rules to a specific situation.²¹⁹ In addition, the General Assembly has no formal ability to provide legally binding resolutions on member states, and thus, is in a poor position to enforce the rules it promulgates.²²⁰ Naturally, the ICJ's independence from the political organs and its ability to bind parties before it in contentious cases makes it well suited to implement the right in a particular situation.²²¹ However, as the *Kosovo* advisory opinion demonstrates, the ICJ's usefulness will only go as far as the robustness of the General Assembly's resolutions.

B. *Signal and Affirm*

With these considerations in mind, the United Nations should use the signal and affirm method—the method the United Nations utilized when it created international prohibitions on colonization and torture—to articulate the specific contours of the right to external self-determination as applied to remedial secession. Under

218. See *supra* note 2 and accompanying text.

219. See *supra* Part III.B.

220. See *supra* note 102.

221. See U.N. Charter art. 94, para. 1 (requiring member states to comply with the ICJ's decisions in contentious cases to which it is a party).

this method, the General Assembly would adopt, by resolution, a set of rules for determining where a state's sovereign right to territorial integrity ends and a peoples' right to remedial secession begins. Those rules would then be applied to specific situations by the ICJ in contentious cases under its jurisdiction.

In order to satisfy various political and legal concerns, the General Assembly's resolution should have the following attributes. First, like Resolution 3452—relied on by the Second Circuit in *Filartiga*—it should provide definitions of relevant terms. A definition is especially needed for the term “peoples.”²²² The resolution should outline a procedure under which a group of people may peacefully exercise the right to secession. It should state that the principles announced in the resolution are based on the right to self-determination enshrined in the Charter. It should provide jurisdiction to the ICJ over cases arising under the right, declare that all member states in the UN consent to the Court's jurisdiction over them in cases arising under it, and include a waiver for any sovereign immunity. It should state that where a group's right to remedial secession has been violated, international law affords a remedy. But the General Assembly should refrain from adopting such a resolution absent a unanimous vote of all members.

For remedial secession, the signal and affirm method takes advantage of each organ's advantages but avoids their disadvantages. The General Assembly—the most politically accountable UN organ—sets down the governing rules.²²³ Thus, this process places policy judgments in the hands of the group most apt to deal with them. The General Assembly is able to make uniform rules that apply prospectively. The General Assembly's ability to consider the full consequences of the rules it adopts while having unbridled access to relevant facts satisfies the concerns levied by the ICJ and the Supreme Court of the United States in *North Sea Continental Shelf* and *Sosa v. Alvarez-Machain*, respectively.²²⁴ This preliminary move by the General Assembly allows the ICJ to legitimately adjudicate

222. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 123 (Can.) (“However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of ‘peoples,’ the result has been that the precise meaning of the term ‘people’ remains somewhat uncertain.”).

223. I consider the General Assembly to be the most politically accountable organ because its membership includes the greatest percentage of UN members. Compare U.N. Charter art. 9, para. 1 (“The General Assembly shall consist of all the Members of the United Nations.”), with *id.* art. 23, para. 1 (“The Security Council shall consist of eleven Members of the United Nations.”), and *id.* art. 61, para. 1 (“The Economic and Social Council shall consist of eighteen Members of the United Nations elected by the General Assembly.”).

224. See *supra* Part IV.C.

disputes concerning this politically thorny issue, much like the Court did in its *Namibia* advisory opinion.²²⁵

Additionally, as opposed to many interpretations that would result from state practice, the General Assembly is more likely to produce a single, uniform interpretation of this area of international law. Various courts parsing through situation after situation of state practice invariably leads to inconsistent rules, whereas, by definition, a resolution or declaration is a single statement on the particular rule of international law at issue.

Rules made prospectively are valuable for avoiding the use of armed force. Because avoiding armed conflict is a primary goal of the United Nations,²²⁶ this attribute is particularly desirable. With the rights of peoples and states described and agreed upon before a conflict over sovereignty arises, a state will be less willing to suppress a legitimate claim to secession, both because it has participated in the shaping of the rules governing it and because of the credible threat of enforcement by other members of the United Nations, especially the Security Council.²²⁷

Some might object and argue that when a state is oppressing its people, it will be no more likely to acquiesce to the resolution adopted by the General Assembly, even if the ICJ has ruled in favor of secession. The point is well taken. However, in the event that the ICJ rules in favor of secession, the virtue of this system is that it *authoritatively* demonstrates to the world that there is a human rights violation clearly in progress. This international transparency and clarity makes the application of various enforcement tools more politically viable and increases the probability of a peaceful and lawful resolution to the conflict. Indeed, history demonstrates that the relative vagueness of the right to self-determination in the context of armed occupation allowed states to exploit vulnerable countries in an effort to accomplish their geopolitical goals.²²⁸ With an independent body adjudicating disputes, the opposite will be true. As the number of cases decided by the ICJ increases, so will the effectiveness of these deterrence mechanisms.²²⁹

225. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21).

226. U.N. Charter art. 1, para. 1.

227. *See id.* art. 94, para. 2 (giving the winning party of a judgment of a contentious case before ICJ recourse to the Security Council in an effort to enforce its judgment).

228. *See supra* Part III.B.

229. Although the ICJ is not bound by the principle of *stare decisis*, scholars have found that the Court often attempts to give reasons for a departure from past jurisprudence or distinguishes the case before it on the facts. DAMROSCH ET AL., *supra* note 1, at 135–36.

The value of the ICJ applying the rules set forth by the General Assembly cannot be overstated. As a threshold matter, the initial application of the resolution will confirm that the resolution rises to the level of customary international law. As Justice Cardozo, speaking for the U.S. Supreme Court, once famously stated,

International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests to its jural quality.²³⁰

Thus, if the highest court in the world affirms the resolution put forth by the General Assembly, it will crystalize the rules stated therein and increase the resolution's authority from persuasive to binding. Once a state or a people realize that the rights described in the resolution are enforceable in a court of law, they will be much more likely to follow those rules.

The second benefit of the ICJ applying rules to a specific instance is the ICJ's independence from politics. The fifteen judges on the ICJ are elected for nine-year terms by the Security Council and the General Assembly,²³¹ and thus, the Court is not absolutely independent. However, the Court's Statute requires staggered terms for judges such that it would take six years to completely replace the bench.²³² It would be practically impossible for a group of countries to "stack the deck" with judges biased in their favor.

With this independence from politics comes the imprimatur of legitimacy and of a chance for both sides to be fully heard. If a people is ultimately judged not entitled to exercise the right of self-determination, the likelihood of future violence decreases because a world forum has provided a meaningful opportunity to present the case before a neutral decision maker. In addition, the insulation from politics also allows the Court to apply the rules impartially, and without pressure from various states not party to the litigation. By preventing politics from clouding the application of the right in a specific circumstance, the use of the ICJ ensures that judgments are faithful to the rules agreed upon by all states. Finally, the insulation of politics allows the Court to avoid the paralysis that has plagued the political organs of the United Nations time and time again, such as the particularly evident paralysis in the Kosovo situation itself and the Bangladesh example.²³³

Some might argue that such a robust role of the General Assembly and of the United Nations in general is undesirable because it departs from the original intent of the UN framers. Relatedly, they

230. *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934).

231. ICJ Statute, *supra* note 45, arts. 3(1), 4(1), 13(1).

232. *See id.* art. 13(1).

233. *See supra* Parts II.B, III.B.

might also argue that state practice culminating in customary international law is the only method of lawmaking that respects a sovereign state's dignitary interests. Such a role would be inappropriate, an objector might argue, because states had no notice of this possibility when they entered the United Nations. The Charter lists only two instances where a UN body's decision is binding on a member state.²³⁴ What is more, in one of those circumstances, the state who has not submitted to the compulsory jurisdiction of the Court must first accept the jurisdiction of the ICJ *in a particular case* before it will be bound by the decision.²³⁵

The response to these arguments is threefold. First, statements made by the General Assembly may represent evidence of customary international law.²³⁶ General Assembly resolutions or recommendations on "important questions" must be decided by a two-thirds vote.²³⁷ These resolutions often "attract" practice.²³⁸ In the case of remedial secession, this Note argues that a resolution should only be adopted by a unanimous vote because of the supreme importance of the right in question. Thus, by definition, this solution involves the assent of all UN members before any one member is presented with a particular group attempting to secede.

Second, it is simply not accurate to assert that states had no notice that the General Assembly can produce resolutions that may eventually become part of customary international law. A member state need only look to the history of the United Nations to observe this phenomenon of resolutions becoming law.²³⁹ By remaining members of the United Nations, member states tacitly consent to the legitimacy of this authority. Indeed, if states follow General Assembly resolutions because they feel bound, it may now be customary international law that the General Assembly has some limited authority to bind member states.²⁴⁰ The more resolutions the General Assembly passes that become customary international law, the more likely it is that a rule that states must follow General Assembly resolutions generally *is itself* customary international law.

Third, a General Assembly *interpretation* of the Charter may, in fact, be binding on member states. In 1945, when the San Francisco Conference drafted the Charter, a committee report stated that the

234. U.N. Charter art. 25 (decisions by the Security Council); *id.* art. 94, para. 1 (decisions made by the ICJ to which the state is a party).

235. See ICJ Statute, *supra* note 45, art. 36 (outlining a state's choice of whether to accept jurisdiction *ipso facto* or on a case-by-case basis).

236. See *supra* Part IV.B.

237. U.N. Charter art. 18, para. 2.

238. Schachter, *supra* note 159, at 5.

239. Hannum, *supra* note 171, at 131.

240. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 64 (July 8) ("As the Court has stated, the substance of that law must be 'looked for primarily in the actual practice and *opinio juris* of States.'").

General Assembly might have this power.²⁴¹ According to this report, if the General Assembly's interpretation of the Charter is "generally accepted," then it is binding on the members of the United Nations.²⁴² Because this proposed resolution would interpret the right to self-determination enshrined in Article 1 of the Charter,²⁴³ this rule would apply to the resolution in question. Thus, it may *not* be the case that a quasi-legislative General Assembly contravenes the intent of the Charter's framers.

Finally, in the field of human rights, the General Assembly has long been in the practice of interpreting vague provisions of the Charter, distilling rights from it, and crystalizing those rights into international law.²⁴⁴ The number of human rights instruments created by the United Nations is at least greater than sixty.²⁴⁵ General Assembly resolutions make up the bulk of these instruments.²⁴⁶ The others were adopted by lesser bodies such as the Economic and Social Council or other specialized agencies.²⁴⁷ The United Nations is, therefore, in the business of articulating and clarifying human rights. Having any UN body other than the General Assembly lay down rules defeats the legitimacy associated with having every member of the United Nations meaningfully participating.²⁴⁸

An objector might argue that this proposed solution is not legally possible because only states can be parties in a case before the ICJ.²⁴⁹ The ICJ will thus be powerless to adjudicate secession cases, and the cases will be relegated to national courts. Yet, whether or not the entity before the Court is in fact a state is precisely the question the Court must adjudicate. Thus, in order to answer whether the Court can properly exercise jurisdiction over the party before it, the Court would inquire as to whether it is a state.²⁵⁰ If the party before it has properly exercised the right to remedial secession, it would have achieved state status and thus properly be before the Court. The fact that the new state is not a member of the United Nations is likewise not a bar to the Court exerting jurisdiction because the Statute contemplates the possibility that a nonmember state might be party

241. DAMROSCH ET AL., *supra* note 1, at 147 n.4.

242. *Id.*

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

244. Hannum, *supra* note 171, at 131.

245. *Id.*

246. *Id.* at 131-32.

247. *Id.*

248. *Cf.* U.N. Charter art. 61, para. 1 (stating that the members of the Economic and Social Council shall be eighteen members of the UN elected by the General Assembly).

249. *See* ICJ Statute, *supra* note 45, art. 34(1) ("Only states may be parties before the Court.").

250. *See id.* art. 36(6) ("In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.").

to a case adjudicated by the Court.²⁵¹ If this reasoning is rejected by the ICJ, the UN member states should amend the Charter and Statute to allow an entity seeking to become a state to be a party in a case before it.²⁵²

VI. CONCLUSION

The ICJ's advisory opinion on the Kosovo declaration of independence disappointed many international commentators.²⁵³ The Court declined the opportunity to address an area of international law of fundamental importance.²⁵⁴ The existence of the right to external self-determination is not in dispute; however, the contours of that right as applied to remedial secession have never been codified by any organ of the United Nations.²⁵⁵ History demonstrates that outside the colonial context, the application of the external right to self-determination has been uneven and controversial.²⁵⁶ The relative clarity and ease of application in the colonial context resulted partially from the leadership of the General Assembly.²⁵⁷ Through consistent and frequent affirmations that the right to self-determination prohibits colonization, the General Assembly signaled to the ICJ that international law recognizes this right. In affirmation of the General Assembly's efforts, the ICJ responded with a liberal interpretation of the right and many countries gained independence as a result of that interpretation.²⁵⁸ This signal and affirm process is not unique to the right to self-determination, and, in fact, has been the practice of the United Nations with respect to many other human rights.²⁵⁹

251. See *id.* art. 35(3) (stating that the Court should fix the amount of funding for court expenses to be borne by a state not a member of the United Nations that is nevertheless a party in a case before it).

252. Amendments to the Charter and the Statute must be passed by a two-thirds majority of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all permanent members of the Security Council. U.N. Charter art. 108; ICJ Statute, *supra* note 45, art. 69. Obviously, this is a lengthy and difficult process to complete. However if all members of the United Nations are already in agreement on a resolution outlining the right to remedial secession that includes a role for the ICJ, these hurdles should not pose a problem.

253. See *supra* notes 63–69 and accompanying text.

254. See *supra* note 66 and accompanying text.

255. DAMROSCH ET AL., *supra* note 1, at 273 (“The international instruments referring to a right of self-determination of ‘peoples’ do not make clear whether the right applies outside the decolonization context . . .”).

256. See *supra* Part III.B.

257. See *supra* text accompanying notes 96–98.

258. See CASSESE, *supra* note 12, at 75 (stating that seventy territories achieved independence from 1945 to 1979).

259. See *supra* text accompanying notes 236–40.

The ICJ passed up an opportunity to apply the right in the *Kosovo* advisory opinion, whereas it did not hesitate to do so in the colonial context after the right had been fully fleshed out by the General Assembly.²⁶⁰ Many commentators have heavily criticized this recent hesitation as nonsensical and hence disingenuous.²⁶¹ The Court's opinion is so esoteric and vague that it has allowed both sides to claim victory, and hence, has created the possibility for future disputes that may be settled by the use of force. Since one of the primary purposes of the United Nations is to maintain international peace and security, it has a duty to lay down rules and provide a peaceful method for their application.

While remaining agnostic as to the substantive contours of a right to external self-determination as applied to the case of remedial secession, this Note argues that the signal and affirm method of international law creation is the best method for the United Nations to articulate this right. This method allows the initial policy decisions to be made by a body representing the entire United Nations, while leaving specific application of these policies to a politically insulated organ. By providing that the initial policy decision be made only by a unanimous vote, the fundamental principle of international law, state consent, is preserved.

*John R. Ablan**

260. See *supra* Part III.A.

261. See *supra* notes 63–69 and accompanying text.

*J.D. Candidate 2012, Vanderbilt University Law School; MSc. 2009, The London School of Economics and Political Science; A.B. 2008, Washington University in St. Louis. The author would like to thank the editorial staff of the *Vanderbilt Journal of Transnational Law* as well as his parents and brother for all their support.
