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Self-Determination and Secession Under International Law: The New Framework

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SELF-DETERMINATION AND SECESSION UNDER INTERNATIONAL LAW: THE NEW FRAMEWORK

*Milena Sterio**

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I. INTRODUCTION

Salman Rushdie, the famous novelist, wrote in “Shalimar the Clown”:
“Why not just stand still and draw a circle round your feet and name that
Selfistan?”¹ Any legal analysis of a group’s right to secede from its mother
state involves a determination of whether the group is randomly—and thus
illegitimately—drawing a circle around its claimed territory and calling it a
“Selfistan,” or whether the group has a legitimate claim to a defined
territory at the expense of the mother state’s borders and territorial integrity.
International law has been inadequate in addressing the legality of
secessionist claims. While it recognizes the right of colonial peoples to
self-determination, as well as any state’s right to the respect of its territorial
integrity, international law is silent on the issue of whether a non-colonized
minority group ever accrues the positive right to remedially secede from its
mother state.²

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1. SALMAN RUSHDIE, *SHALIMAR THE CLOWN* 102 (Random House 2005).

2. The United Nations Charter espouses the right of peoples to self-determination, as well as
the states’ right to territorial integrity. Specifically, it enumerates as one of the purposes of the United
Nations, “To develop friendly relations among nations based on respect for the principle of equal rights
and *self-determination of peoples*.” U.N. Charter art. 1, para. 2 (emphasis added) (this portion of the
Charter has been interpreted to apply in the colonial context: that only colonized peoples would have
the right to self-determination). U.N. Charter art. 2, para. 4 announces that Member States “shall refrain
in their international relations from the threat or use of force against the territorial integrity or political
independence of any state.” See MILENA STERIO, *THE RIGHT TO SELF-DETERMINATION UNDER
INTERNATIONAL LAW* 10 (Routledge 2013) (noting that World War II, the right to self-determination did

This Article will argue toward the necessity to develop a new international law framework on secession. The development of such a normative framework is necessary in order to address various secessionist situations around the globe, and to replace the resolution of secessionist struggles through politics of the Great Powers with true legal norms.³

This Article will first analyze several examples of successful and failed secessions in recent history. Then, it will focus on existing international law on the subject-matter of secession, and will conclude that existing norms are insufficient and indefinite. Finally, it will develop a new proposed framework on secession, which attempts to adequately reconcile the mother state's right to the respect of its territorial integrity with the secessionist entity's claim for independence.

II. EXAMPLES OF SECESSIONS THROUGHOUT HISTORY

Examples of successful secessions in recent history include the Kosovar secession from Serbia, the South Sudanese secession from Sudan, and the Crimean secession from Ukraine.⁴ More remote successful secessions include the separation of Eritrea from Ethiopia in 1993, and Bangladesh from Pakistan, in 1971.⁵ Examples of unsuccessful or

not necessarily extend to the non-decolonization paradigm). Compare Diane Orenlichter, *International Responses to Separate Claims Are Democratic Principles Relevant?*, in SECESSION AND SELF-DETERMINATION 19, 38–39 (Stephen Macedo and Allen Buchanan eds., 2003) (“Emerging norms recognizing a right to self-government lend support to separatist claims principally when those same norms have already been profoundly, irremovably breached.”) with James Crawford, *State Practice and International Law in Relation to Secession*, BRIT. Y.B. OF INT’L L 114 (Clarendon Press 1999) (“State practice since 1945 shows very clearly the extreme reluctance of States to recognize or accept unilateral secession outside the colonial context.”).

3. See STERIO, *supra* note 2, at 44–45. The term “Great Powers” refers to the most powerful states economically, militarily, and politically, such as veto-holding members of the United Nations Security Council (United States, United Kingdom, France, China, and Russia), and other economic powerhouses such as Germany, Italy, and Japan.

4. See generally, Christopher J. Borgen, *Is Kosovos a Precedent? Secession, Self-Determination and Conflict Resolution*, WILSON CENTER (June 13, 2008), available at <http://www.wilsoncenter.org/publication/350-kosovo-precedent-secession-self-determination-and-conflict-resolution#> (last visited Jan. 23, 2015); Jeffrey Gettleman, *After Years of Struggle, South Sudan Becomes a New Nation*, N.Y. TIMES (July 9, 2011), available at <http://www.nytimes.com/2011/07/10/world/africa/10sudan.html?pagewanted=print> (last visited Jan. 23, 2015); David M. Herszenhorn, *Crimea Votes to Secede From Ukraine as Russian Troops Keep Watch*, N.Y. TIMES (Mar. 16, 2014), available at http://www.nytimes.com/2014/03/17/world/europe/crimea-ukraine-secession-vote-referendum.html?_r=0 (last visited Jan. 23, 2015).

5. See Bereket H. Selassie, Comment, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91 (1997) (this Article will briefly discuss the first three more recent secessions, but will not focus on the latter two remote secessions). See RICHARD SISSON & LEO E. ROSE, WAR AND SECESSION PAKISTAN, INDIA, AND THE CREATION OF

attempted secessions include the so-called “frozen conflicts” in Georgia, involving two break-away provinces of South Ossetia and Abkhazia, in addition to the recent secession attempt of Scotland from Great Britain through a popular referendum.⁶ Other more remote attempted secessions involve Republika Srpska and Northern Cyprus, as well as Quebec.⁷

On February 17, 2008, the Kosovar Parliament unilaterally declared independence from Serbia.⁸ The declaration of independence had followed a lengthy conflict first in the former Yugoslavia, and later against Serbia, Kosovo’s ruler.⁹ Within a few days, Kosovo was recognized as a new state by the United States, as well as by many other powerful western nations.¹⁰ While Kosovo is still not a member of the United Nations (it has not applied yet, in light of the probable veto by Russia and/or China) and while many nations have yet to recognize it as a new state, its secession from Serbia is a *fait accompli*.¹¹ To date, Kosovo has been recognized by 110 states; twenty-three out of twenty-eight European Union states have recognized its independence; those who have not include Spain, Greece, Romania, Slovakia, and Cyprus.¹² Kosovo is a member of several

BANGLADESH (University of California Press 1990), for a discussion of the Bangladeshi secession from Pakistan.

6. See Dan Bilefsky, *Kosovo Declares Its Independence From Serbia*, N.Y. TIMES (Feb. 18, 2008), available at http://www.nytimes.com/2008/02/18/world/europe/18kosovo.html?pagewanted=all&_r=0 (last visited Jan. 16, 2015).

7. See generally Louise Arbour, *Self-Determination and Conflict Resolution: From Kosovo to Sudan*, INTERNATIONAL CRISIS GROUP (Sep. 22, 2010), available at <http://www.crisisgroup.org/en/publication-type/speeches/2010/Louise-Arbour-self-determination-and-conflict-resolution-from-kosovo-to-sudan.aspx> (last visited Jan. 29, 2015).

8. Bilefsky, *supra* note 6 (noting both that Kosovar Parliament unilaterally declared independence from Serbia on February 17, 2008, and that major world powers, such as the United States, Great Britain, Germany, and France, were expected to recognize Kosovo as an independent state within days).

9. See STERIO, *supra* note 2, at 116–26, for a discussion of Kosovo.

10. *Who Recognized Kosova as an Independent State?*, KOSOVO THANKS YOU (Jan. 16, 2015), available at <http://www.kosovothanksyou.com/> (last visited Jan. 16, 2015) (noting that 110 countries have recognized Kosovo as an independent state; noting also that the United States, the United Kingdom and France recognized Kosovo as an independent state on February 18, 2008, one day after its unilateral declaration of independence, that Germany recognized Kosovo’s independence on February 20, 2008, three days after its unilateral declaration of independence).

11. See Ivana Sekularac, *Kosovo pitches peace treaty, recognition to old master Serbia*, REUTERS (Oct. 23, 2014), <http://www.reuters.com/article/2014/10/23/us-serbia-kosovo-visit-idUSKCN0IC1B220141023> (last visited Jan. 22, 2015) (noting that Russia, Serbia’s long-time ally, has blocked Kosovo’s potential United Nations’ membership through its veto power within the Security Council) (observing also that Kosovar foreign minister, Enver Hoxhaj, recently visited Serbia to negotiate a peace treaty whereby Serbia would also recognize Kosovo’s independence).

12. See generally *Who Recognized Kosova as an Independent State?*, *supra* note 10.

international organizations, including the International Monetary Fund, the World Bank, and the International Bar Association.¹³

In 2011, South Sudan seceded from Sudan.¹⁴ The secession followed decades of civil wars and violence within Sudan, and was orchestrated through peace negotiations and a public referendum.¹⁵ The people of South Sudan overwhelmingly voted in favor of independence and pursuant to such referendum results, South Sudan became a new independent state on July 9, 2011.¹⁶ Following its declared independence, South Sudan has been recognized by the majority of states and has become a member of the United Nations.¹⁷

In February 2014, Russian troops occupied the Crimean peninsula, which had, until then, been part of Ukrainian territory.¹⁸ The Crimean Parliament organized a referendum in May 2014, the result of which proclaimed that Crimea would secede from Ukraine in order to join Russia.¹⁹ The move was condemned by many as an illegal exercise of Russian military power and an illegitimate land grab by the Kremlin, but factually speaking, Crimea seceded from Ukraine.²⁰ A total of five states have recognized the new “status” of Crimea as forming a part of Russian

13. *Organizations that have admitted Kosovo*, KOSOVO THANKS YOU (Jan. 22, 2015), available at <http://www.kosovothanksyou.com/organizations> (last visited Jan. 22, 2015).

14. STERIO, *supra* note 2, at 161.

15. *Id.* at 164.

16. Jon Lee Anderson, *A History of Violence*, THE NEW YORKER (July 23, 2012), available at <http://www.newyorker.com/magazine/2012/07/23/a-history-of-violence-4> (last visited Jan. 22, 2015).

17. South Sudan was introduced as a new member of the United Nations on July 14, 2011. See *UN Welcomes South Sudan as 193rd Member State*, UN NEWS CENTRE (July 14, 2011), available at <http://www.un.org/apps/news/story.asp?NewsID=39034#.VFKEhWd0x9A> (last visited Jan. 22, 2015); see also *Foreign Relations of South Sudan*, SOUTH SUDAN INFO, http://www.southsudaninfo.com/Foreign_Relations_of_South_Sudan (last visited Jan. 20, 2015).

18. *Foreign Relations of South Sudan*, *supra* note 17. See also *Ukraine Crisis: 'Russians' Occupy Crimea Airports*, BBC.COM (Feb. 28, 2014), <http://www.bbc.com/news/world-europe-26379722> (last visited Jan. 22, 2015). It should be noted that Crimea, until 1954, formed part of Russia, within the former Soviet Union; in 1954, Crimea was transferred to Ukraine.

19. *Crimea Referendum: Voters 'Back Russia Union'*, BBC NEWS (Mar. 16, 2014), <http://www.bbc.com/news/world-europe-26606097> (last visited Jan. 22, 2015) (reporting that 95.5% of voters were in favor of Crimea joining Russia, but that many Ukrainian voters boycotted the referendum).

20. *Id.* (noting that the European Union and the United States condemned the referendum as illegal); see also David Adesnik, *How Russia Rigged Crimean Referendum*, FORBES (Mar. 18, 2014), available at <http://www.forbes.com/sites/davidadesnik/2014/03/18/how-russia-rigged-crimean-referendum/> (last visited Jan. 22, 2015) (arguing that Russian leader, Vladimir Putin, has both rigged the referendum and abused and intimidated the Crimean population).

territory, including Russia itself, Nicaragua, Afghanistan, Syria, and Venezuela.²¹

In August 2008, war broke out in Georgia, the former Soviet republic, when Russian troops entered the territory of two break-away provinces, South Ossetia and Abkhazia, to “protect” them from Georgia.²² These provinces function *de facto* independently from Georgia, and the Georgian central government has no effective control over their territory.²³ Over the recent years, South Ossetia and Abkhazia have become Russian puppet states—supported and almost entirely controlled by Moscow. While these provinces have not been recognized as sovereign states by most countries around the world (the few countries which have recognized them include Russia, Nicaragua, Venezuela, and Nauru), they have *de facto* seceded from Georgia.²⁴

In September 2014, the people of Scotland voted in a public referendum on the issue of whether Scotland should become an independent nation.²⁵ Had the vote resulted in a “yay,” Scotland would have likely seceded from Great Britain (British Prime Minister, David Cameron, had pledged to respect any results of the referendum).²⁶ Many will remember that a similar situation played out in Canada in 1995, when the Quebecois voted in a referendum on the issue of whether to secede from Canada; the

21. Matthew Rosenberg, *Breaking with the West, Afghan Leader Supports Russia's Annexation of Crimea*, N.Y. TIMES (Mar. 23, 2014), available at <http://www.nytimes.com/2014/03/24/world/asia/breaking-with-the-west-afghan-leader-supports-russias-annexation-of-crimea.html> (last visited Jan. 22, 2015); Interfax-Ukraine, *Nicaragua Recognizes Crimea as part of Russia*, KYIVPOST (Mar. 27, 2014), available at <http://www.kyivpost.com/content/ukraine/nicaragua-recognizes-crimea-as-part-of-russia-341102.html> (last visited Jan. 22, 2015).

22. See Will Englund, *Comparing the Crimea conflict with the Georgia-Russia situation of 2008*, WASH. POST (Mar. 2, 2014), available at http://www.washingtonpost.com/world/europe/crimea-crisis-may-seem-like-georgia-russia-situation-of-2008-but-its-really-not/2014/03/02/39db1890-a242-11e3-a5fa-55f0c77bf39c_story.html (last visited Jan. 22, 2015). Georgia had used force in South Ossetia first, and Russia used this move as justification for its use of military force in both South Ossetia and Abkhazia.

23. *Id.*

24. See Gerard Toll & John O'Loughlin, *How People in South Ossetia, Abkhazia, and Transnistria feel about annexation by Russia*, WASH. POST (Mar. 20, 2014), available at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/20/how-people-in-south-ossetia-abkhazia-and-transnistria-feel-about-annexation-by-russia/> (last visited Jan. 22, 2015).

25. *Scottish referendum: Scotland votes 'No' to independence*, BBC NEWS (Sept. 19, 2014), available at <http://www.bbc.com/news/uk-scotland-29270441> (last visited Jan. 22, 2015).

26. *Id.*

secession proposal was defeated by an incredibly narrow margin.²⁷ Shortly after the Scottish independence referendum, the Catalans, relying on the Scottish precedent, announced that they would also hold a referendum, to ask the Catalan people whether they wanted to secede from Spain.²⁸ The Spanish government rejected the referendum idea, arguing that it would be unconstitutional, and the Spanish Constitutional Court backed the government.²⁹ The Catalans have thus far not been able to secede from Spain, but it is reasonable to assume that they will continue their secessionist efforts in the near future.

Going back in history, one can find other examples of *de facto* secessions: situations where a secessionist entity successfully orchestrates a separation from its mother state, but where the international community, typically for a variety of geo-political reasons, refuses to recognize the seceded territory as a new sovereign nation. In 1974, Turkish forces invaded northern Cyprus; this part of the island nation has essentially functioned as a separate entity and over the years, has *de facto* seceded from Cyprus.³⁰ A similar situation exists in Republika Srpska, the Serbian-populated part of Bosnia, which, although formally incorporated in the territory of the Bosnian-Croat Federation, has functioned as a *de facto* state since the 1990s and has *de facto* seceded from the Federation.³¹ Other *de*

27. Gerald L. Gall, *Quebec Referendum (1995)*, THE CANADIAN ENCYCLOPEDIA (Aug. 21, 2013), available at <http://www.thecanadianencyclopedia.ca/en/article/quebec-referendum-1995/> (last visited Jan 22, 2015).

28. *Spain's constitutional court bans Catalonia's 'independence consultation' vote*, RT.COM (Nov. 4, 2014), <http://rt.com/news/202099-independence-catalonia-referendum-vote/> (last visited Jan. 22, 2015).

29. *Id.*

30. Dan Bilefsky, *For Crimea, Secession Is Only as Good as Recognition*, N.Y. TIMES (Mar. 15, 2014), available at <http://www.nytimes.com/2014/03/16/world/europe/for-crimea-secession-is-only-as-good-as-recognition.html> (last visited Jan 22, 2015)

In 1983, after Turks in northern Cyprus declared independence from Cyprus and created the Turkish Republic of Northern Cyprus, the Security Council passed two resolutions calling the declaration illegal, and requesting that no other states should recognize it. That effectively isolated the north and deprived it of international legitimacy, as well as much-needed foreign investment. To this day, Turkey remains the only country to have recognized Northern Cyprus.

31. Petr Bohacek, *Is Republika Srpska About to be the Next Crimea?*, VICE (Mar. 26, 2014), http://www.vice.com/en_uk/read/secession-serbia-bosnia-hrzegovina (last visited Jan. 22, 2015) (noting that the Bosnian Federation and Republika Srpska 'have independent constitutions, laws, parliaments, borders, police forces, postal systems and even foreign policy' and that '[t]he Bosnian political system is completely decentralised – divided into two independent entities.').

facto states include so-called “frozen conflicts” of the Post-Soviet Union, including Nagorno-Karabakh and Transnistria.³²

In sum, multiple *de facto* secessions and attempted secessions, have occurred in recent history. Most of such secessions occurred outside of the decolonization paradigm. As it will be discussed below, international law has proved inefficient and uncertain at resolving these secessionist conflicts because it does not embrace the possibility of secession outside of the decolonization, and perhaps occupation, paradigms.

III. INTERNATIONAL LAW ON SECESSION

International law is mostly neutral on the issue of secession. While international law embraces the right to self-determination for all people, and while this right can effectively translate into remedial secession, international law positively allows for this outcome only in the case of decolonization and, perhaps, occupation.³³ Other than these two relatively rare instances, international law does not affirmatively authorize groups to seek secession.³⁴ Secession inherently undermines the territorial integrity of the mother state, and international law has for centuries espoused the principles of state sovereignty and territorial integrity. Embracing the right of secession would jeopardize the above-mentioned principles and could, as critics assert, potentially lead to global chaos caused by an incessant redrawing of boundaries.³⁵

The International Court of Justice (ICJ) has on occasion discussed the issue of secession. However, the ICJ has failed to develop a normative framework on secession, as it will be demonstrated below.

In the East Timor case, Portugal, East Timor’s last colonizer, sued Australia, claiming that the latter did not have a legal right to enter into a treaty with Indonesia over East Timorese natural resources, because

32. Jeffrey Mankoff, *Russia’s Latest Land Grab*, FOREIGN AFFAIRS (May/June 2014), available at <http://www.foreignaffairs.com/articles/141210/jeffrey-mankoff/russias-latest-land-grab> (last visited Jan. 22, 2015) (noting the existence of four “frozen conflicts” in the former Soviet Union: South Ossetia and Abkhazia (within Georgia), Transnistria (within Moldova) and Nagorno-Karabakh (disputed between Azerbaijan and Armenia)).

33. See STERIO, *supra* note 2, at 29.

34. *Id.* at 12 (“[A]s of the early 1970s, the right to self-determination existed for all peoples, but was limited in its scope with respect to non-colonized peoples, and was limited in its application to colonized people . . .”).

35. See *Frontier Dispute (Burk. Faco v. Mali)*, 1986 I.C.J. ¶¶ 20–26 (Dec. 22, 1986). This view was expressed by the International Court of Justice in the *Mali v. Burkina Faso* case, where the world court reaffirmed the *uti possidetis* principle (the respect of colonial borders and their elevation to the status of international frontiers), recognizing its potential unfairness, but warning that a contrary solution could lead to chaos and violence.

Portugal was the true sovereign of East Timor, whereas Indonesia had illegally occupied East Timor.³⁶ The ICJ refused to resolve the dispute, because this would have involved announcing a legal proclamation on the status of East Timor (whether the people of East Timor had the right to self-determination, and which state was its legitimate “owner”), which at the time was controlled by Indonesia.³⁷ The World Court dismissed the case, by invoking the so-called indispensable third party doctrine, thereby missing an opportunity to develop normative law on self-determination and possibly secession.³⁸

In the now infamous Kosovo case, the ICJ was asked for an advisory opinion on the issue of whether the Kosovar unilateral declaration of independence was in accordance with international law.³⁹ The World Court answered in the affirmative, but somewhat curiously or opportunistically decided not to devote any significant space to the issue of self-determination and secession (it devoted only two paragraphs to these issues).⁴⁰ In its holding, the World Court stated:

[T]he Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.⁴¹

Instead, the ICJ concluded that “[i]t follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law.”⁴² The ICJ concluded that it was not, because international law does not prohibit declarations of independence.⁴³ It is interesting to note that the Security Council had condemned unilateral declarations of independence in other contexts—in Southern Rhodesia, Northern Cyprus, and Republika Srpska—because, according to the ICJ, these declarations of independence had been

36. See *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90 (June 30).

37. See *STERIO*, *supra* note 2, at 73–78, for a full discussion of the East Timor ICJ case.

38. *Id.* at 78–86.

39. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), available at <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited Feb. 4, 2015) [hereinafter *Kosovo*].

40. See *STERIO*, *supra* note 2, at 78–86, for a full discussion of the Kosovo Advisory Opinion.

41. *Kosovo*, *supra* note 39 (emphasis added).

42. *Id.*

43. *Id.* at ¶ 81.

linked to some unlawful use of force by the independence-proclaiming entity.⁴⁴ The ICJ distinguished all of the above situations from Kosovo, where the Security Council had never taken the position that the Kosovar declaration of independence was procured through an illegal use of force.⁴⁵ Additionally, the ICJ addressed self-determination in the decolonization paradigm in the Western Sahara Advisory Opinion, by determining whether the people of Western Sahara, colonized by Spain and territorially claimed by both Morocco and Mauritania, had a right to self-determination.⁴⁶ The World Court determined that the people of Western Sahara had a right to self-determination, while refusing to rule on the legality of the Moroccan and Mauritanian territorial claims to this region.⁴⁷ This advisory opinion is significant because in it, the World Court implied:

[T]hat the principle of territorial integrity could prevail over self-determination, in instances where there is solid evidence of the existence of a territorial claim over a particular region, despite the fact that the people of that region do not want to be governed by the entity asserting such a territorial claim.⁴⁸

However, many have criticized the World Court judges for not pushing their legal reasoning enough, in order to reconcile territoriality with self-determination.⁴⁹

Finally, in the “Wall” case, the ICJ was requested to issue an advisory opinion on the issue of what the legal consequences were arising out of Israel’s construction of a security fence or “wall” around the West Bank.⁵⁰ In this case, the ICJ reaffirmed the existence of self-determination rights for the Palestinian people, citing its previous precedent and notably the East Timor case, discussed above.⁵¹ The World Court determined that the Israeli

44. *Id.*

45. *Id.*

46. Western Sahara, 1975 I.C.J. 12 (Oct. 16).

47. *Id.*; see also STERIO, *supra* note 2, at 89–93, for a full discussion of the Western Sahara Advisory Opinion.

48. STERIO, *supra* note 2, at 91.

49. See generally ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 218 (1995) (Antonio Cassese criticized the Advisory Opinion by arguing that it would have been logical to hold a referendum for the people of Western Sahara, to determine whether they preferred allegiance to Morocco or Mauritania); see also Thomas Franck, *The Stealing of the Sahara*, 70 AM. J. INT’L L. 694 (1976) (Thomas Franck argued that the Sahara case was “monumentally mishandled”).

50. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9).

51. *Id.* at ¶ 88.

construction of the wall in its location was contrary to Israel's legal obligations under international law, and that Israel was bound to respect the Palestinians' right to self-determination.⁵² This case is significant because the ICJ appears willing to proclaim its respect for the principle of self-determination outside of the decolonization paradigm.

The Wall case thus represents a legal proclamation by the world court about the existence of the right to self-determination in the non-colonial context. The opinion is tremendously significant as it demonstrated the judges' willingness to develop a legal rule for the first time (the existence of a non-colonial right of self-determination)⁵³

It should be noted, however, that the Palestinian case involves a situation of occupation, which may be another recognized instance where the occupied people are afforded the right to external self-determination through remedial secession. It is unclear whether the ICJ would have been willing to affirm the existence of the right of self-determination outside of the decolonization and occupation paradigms.

This type of ambiguous attitude by international law vis-à-vis the right of secession is unhelpful at best, and perhaps dangerous. It is unhelpful because critics of secessions are able to point to the fact that international law does not contain an affirmative right of secession, while secessionists themselves can claim that international law does not explicitly prohibit secession. Victory here may be in the eye of the beholder. It is dangerous because it leads to inconsistent results, entirely dominated by politics. Almost all secessionist entities which have been successful in their separatist quests have been supported by at least one world super-power, typically the United States or the Soviet Union/Russia.⁵⁴ Statehood in most instances of attempted secession truly depends on whether the majority of world countries, including the super-powers, are willing to recognize the seceding entity as a new sovereign state.⁵⁵ Almost all unsuccessful secessionist entities have been unable to garner such recognition. We all know that recognition is a purely political act which arguably has little to do with international law.⁵⁶ We all know that world super-powers often

52. *Id.* at ¶ 122.

53. STERIO, *supra* note 2, at 94.

54. *See generally* STERIO, *supra* note 2.

55. *Id.* at 63 (“[S]upport by the great powers of a self-determination-seeking entity plays a dispositive role in secessionist matters.”).

56. *See* William T. Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115, 128 (2009).

play backyard political games at the expense of smaller, weaker nations, including times when independence and/or secession is at stake. I argue that this is a dangerous game, often leading to inconsistent results which do not necessarily favor the interests of the relevant country and/or region.

IV. DEVELOPING A NORMATIVE INTERNATIONAL LAW FRAMEWORK ON SECESSION

We face two different options on the issue of secession. We can either continue the present state of affairs by allowing international law to remain neutral on secession and geo-politics, to determine outcomes of secessionist struggles; or we can attempt to develop a normative international law framework on secession, which could focus on several factors when assessing the legitimacy of a separatist quest. The latter approach seems preferable, because, as Harold Hongju Koh famously argued in the context of a proposed humanitarian action in Syria, “lawyers are not potted plants.”⁵⁷ It is our duty as lawyers to push for the development of new legal norms, when such norms are necessary to fill gaps and to provide binding guidelines to world leaders.

What would an international law framework on secession look like? First, absent oppression by the mother state, only secessions undertaken through a domestic constitutional framework, presumably with the consent of the mother states, should be legal. This factor would “bless” the proposed Quebecois and Scottish secessions, as well as the South Sudanese secession, but would condemn the Georgian provinces’ attempt at secession, as well as Northern Cypriot and Bosnian Serbs’ attempts at statehood, as the latter have all involved the use of force and have been conducted without the consent of the mother state. This rationale obviously does not work in instances where the mother state is governed by a dictatorship, does not have a democratic constitutional structure, and/or has been oppressive toward the secessionist minority. In such instances, one must look to other factors when evaluating the legality of a secessionist claim. Here, one could look to the existence of so-called internal self-determination rights. In other words, has the mother state respected the secessionist group’s rights to some sort of autonomy, such as the political right to form a provincial government, to be properly represented in the central government of the mother state, as well as other linguistic, cultural, ethnic, and religious rights (i.e., the right to have schools conducted in the minority group’s language, to have radio, television, and newspaper media

57. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part III – A Reply)*, JUST SECURITY (Oct. 12, 2013), <http://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-iii-a-reply/#more-9613> (last visited Jan. 20, 2015).

in the group's language, to freely practice its minority religion, to have respect for various cultural practices, et cetera)? This was the argument made pro-Kosovar independence, that the Serbian central government had denied Kosovars the respect of any meaningful internal self-determination rights, that they had been oppressed by the Serbian government, and that they could no longer exist within a larger Serbian state.⁵⁸

Second, any legal examination of secession has to look at the territorial claims of the separatist group versus the same claim by the mother state. Secession is always about territory and control of the land, and it is unhelpful to look at it in the abstract. But how does one evaluate the legitimacy of any territorial claim by any group? Lea Brilmayer wrote on the subjects more than two decades ago; I believe that she was right and would like to borrow from her.⁵⁹ When evaluating the legitimacy of a territorial claim by a secessionist group, one could look at the immediacy of the claim, as well as how vocal the secessionist entity has been about its claim. In other words, how long have the secessionists lived in the disputed area—have they recently resettled there, or have they, consistently throughout history, occupied the contested land? Have the secessionists been loud and vocal about their claim for territorial independence—have they consistently made this argument, throughout their existence within the boundaries of their mother state? Additionally, when evaluating the legitimacy of the secessionist territorial claim, one could look at the composition of the local population, to determine whether the secessionist ethnic group constitutes a significant majority. One could also look at this pragmatically, and wonder whether borders can be easily redrawn to allow the secessionist entity to form its own independent state, without completely undermining the territorial layout of the mother state. Here is where the Palestinian case for secession from Israel may run into trouble. How does one unify Gaza and the West Bank without undermining Israeli territorial stability?

Last but not least, any international law analysis of secession should embrace a fairness element. Is it fair to block a secessionist entity from exercising the right to form its own independent state? And, is it fair to allow a secessionist group to secede, thereby altering the territorial borders and stability of the mother state? The fairness element may be the most difficult one to properly apply. What does fairness mean? And fairness by whom? Fairness in international law, as in other contexts, connotes a

58. See Kosovo, *supra* note 39, at ¶ 82 (discussing issues of internal and external self-determination in the context of Kosovo).

59. See generally Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT'L L.* 177 (1991).

reasonable and rational behavior by relevant actors producing overall satisfactory outcomes from a neutral perspective. Fairness also implies a procedural component—that whatever change may be ultimately achieved is produced through neutral and unbiased processes, such as, in this instance, free and fair elections or public referenda. Fairness in the context of international law may imply a consensus, by the majority of states, that the result of a secessionist struggle was positive. This consensus may be best reflected in United Nations General Assembly resolutions, where all states vote on a neutral footing, as well as by decisions to admit, or not admit, secessionist entities as sovereign partners into the United Nations.

I recognize that states are often driven by politics and their own strategic interests in the global arena, and that looking at their practice does not necessarily reflect their understanding of the law. Yet, states often claim that their behavior is fully consistent with international law, and that, if they chose not to recognize secessionist entity X, such non-recognition was a result of some illegality by entity X. To the extent that international law could develop to embrace a normative framework on secession, we could expect to see that acts of recognition follow such a normative framework closely, and that only those secessionist entities whose claims are consistent with the proposed framework would be ultimately recognized as sovereign states. The development of any new norm of international law through custom, absent a treaty mechanism, is a circular endeavor. One must determine that states are acting out of a sense of legal obligation while one is trying to claim that such legal obligation already exists, because states believe in it. Here, in the context of secession and recognition, one runs into a similar circularity. Yet, I would argue that surmounting the circularity is not impossible, as has been the case with many customary norms of international law. It is possible to argue toward the development of a new norm of customary law on secession, while examining various states' behavior in world organizations and arguing that such behavior may be due to the evolving customary norms on secession.

V. CONCLUSION

Harold Koh recently argued that international law should evolve and adapt. “But why should the *per se* rule ‘remain the law’, particularly if it is so manifestly outmoded, and tolerant of gross human rights abuse?”⁶⁰ Within the context of secession, I argue that international law is “manifestly outmoded,” because it does not address secession outside the context of decolonization or foreign occupation. Most secessions in the modern-day era occur outside of these two paradigms, and it would be preferable to

60. Koh, *supra* note 57.

develop an international law framework to apply to such secessions, instead of letting politics dominate and determine secessionist outcomes.