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David Sloss
Santa Clara University School of Law, dlsloss@scu.edu

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USING INTERNATIONAL COURT OF JUSTICE ADVISORY OPINIONS TO ADJUDICATE SECESSIONIST CLAIMS

David Sloss*

I. INTRODUCTION

Hardly a week passes without news of deaths attributable to a violent conflict between a group demanding "autonomy" or "independence" and a national government resisting those demands. For example, in a single week in March 2001, "[t]hree bombs in southern Russia, blamed on Chechen rebels, killed a score of civilians," and there were "three Palestinian bomb explosions in Israel, one of which killed two teenagers." The previous week, the "ETA, the Basque separatist terror group, killed the deputy mayor of a small town in the Basque region a week after setting off two car-bombs in Mediterranean resorts." Clearly, the international community has a substantial interest in promoting peaceful resolution of secessionist disputes.

The International Court of Justice ("I.C.J.") advisory opinion procedure is a potentially useful mechanism, heretofore under-utilized, for the settlement of disputes between recognized states and secessionist groups within those states. This is not to say that all or even most secessionist disputes can be solved by I.C.J. adjudication. Rather, there are two distinct benefits to be gained from international adjudication

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* Assistant Professor of Law, St. Louis University School of Law. J.D., Stanford Law School; M.P.P., Harvard University; B.A., Hampshire College. This paper was initially presented at a conference at Santa Clara Law School.

of secessionist claims. First, case-by-case adjudication of secessionist claims is likely to be a better mechanism than adoption of United Nations ("U.N.") Declarations or conventions\(^4\) for clarifying the international legal rules governing the relationship between the right of peoples to self-determination and the right of states to preserve their territorial integrity.\(^5\) Second, international adjudication may, in some cases, facilitate political resolution of secessionist disputes.

At the outset, it is important to comment briefly on terminology. This article refers in some places to a right of self-determination, and elsewhere to a right of secession. The two are not synonymous. International law clearly establishes that "[a]ll peoples have the right of self-determination."\(^6\) In contrast, there is no international treaty or declaration that clearly establishes a right of secession.\(^7\) Nevertheless, there are persuasive arguments, firmly rooted in international law, for recognizing a remedial right of secession in certain cases involving flagrant violations of peoples’ self-determination rights.\(^8\) Hence, this article uses the phrase “right of secession” to denote a remedial right, bearing in mind that peoples’ self-determination rights can be achieved, in most cases, by means other than secession.\(^9\)

Part II of this essay discusses the potential benefits to be gained by adjudication of secessionist claims. Part III briefly surveys a range of possible procedural mechanisms for international adjudication of secessionist claims. Part IV examines in detail the procedural obstacles to using the I.C.J.’s

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\(^4\) For discussion of relevant U.N. Declarations, see infra text accompanying notes 11-15.

\(^5\) See U.N. CHARTER art. 2, para. 4 (prohibiting the threat or use of force against the territorial integrity of any state).


\(^7\) See Hurst Hannum, Rethinking Self-Determination, 34 VA. J. INT’L L. 1, 42 (1993) ("Secession is not presently recognized as a right under international law, nor does international law prohibit secession.").

\(^8\) See infra notes 19-20, 136-37 and accompanying text.

contentious jurisdiction\textsuperscript{10} as a mechanism for international adjudication of secessionist claims. In light of the procedural obstacles, the use of the I.C.J.'s contentious jurisdiction will rarely, if ever, be a viable option. Part V advocates use of the I.C.J.'s advisory jurisdiction as a mechanism for adjudicating some (but not all) secessionist claims and uses the Tibetan example as a case study to illustrate the potential difficulties and benefits of utilizing I.C.J. advisory opinions to adjudicate secessionist claims.

II. WHY ADJUDICATION?

International adjudication of secessionist claims can provide two important benefits. First, adjudication may help to clarify the scope of an international legal right of secession. Second, adjudication may help to facilitate political resolution of some secessionist disputes.

A. Adjudication as a Tool for Clarifying the Scope of a Right of Secession

Virtually every author who has written about the topic agrees that there is a need to clarify the international legal rules governing the right of a sub-national group to secede from a recognized state.\textsuperscript{11} Yet international attempts to clarify those rules have been notoriously unsuccessful.

For example, the U.N. Charter establishes that one of the main purposes of the organization is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."\textsuperscript{12} The Charter also affirms the right of states to preserve their territorial in-

\textsuperscript{10} The term "contentious jurisdiction" refers to the I.C.J.'s jurisdiction to adjudicate disputes between states. In contrast, the term "advisory jurisdiction" refers to the I.C.J.'s jurisdiction to issue an advisory opinion in response to a request from a U.N. body.


\textsuperscript{12} U.N. CHARTER art. 1, para. 2.
The Charter says nothing, though, about the circumstances in which a state’s right to territorial integrity must yield to a group’s right to self-determination, or vice-versa.

Twenty-five years after adoption of the Charter, the United Nations attempted to clarify the relationship between groups’ rights to self-determination and states’ rights to preserve their territorial integrity. The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations ("1970 Declaration") affirms that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development." However, the 1970 Declaration adds:

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

The 1970 Declaration makes clear that no group has a right to secede from a state that conducts itself in accordance with "the principle of equal rights and self-determination of peoples." However, the 1970 Declaration left two important questions unresolved. First, it is unclear whether a group has an international legal right to secede from a state whose conduct violates the principle of equal rights and self-determination. Second, assuming that such a remedial right exists, it is unclear which violations of the principle of equal rights and self-determination give rise to a remedial right of secession.

Recent U.N. Declarations have not clarified these ambiguities. The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in 1993,

13. See id. art. 2, para. 4.
15. Id.
16. Id.
essentially repeats the formula from the 1970 Declaration.\textsuperscript{17} So, too, does the 1995 Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.\textsuperscript{18}

There are at least three reasons to be skeptical about the prospects for utilizing U.N. Declarations to help clarify the legal rules governing the right of a sub-national group to secede from a recognized state. First, when one considers the variety of factual situations in which groups assert a right of independence, it is apparent that each situation is characterized by unique historical, geographical, political and other factors. In light of the wide variety of factual situations that must be considered in attempting to craft generally applicable legal principles, it is not surprising that the legal principles that have been proposed are rather vague. Indeed, even good faith attempts by scholars who have no political agenda other than to clarify the applicable legal rules tend to yield general principles that are so malleable that it is difficult to predict how they will apply in any particular factual situation.\textsuperscript{19}

Second, U.N. Declarations are an imperfect tool for clarifying the law because such declarations are the product of a negotiation process that necessarily involves compromise among states with competing interests. Insofar as states disagree about how best to reconcile the competing norms of self-determination and territorial integrity, use of ambiguous language helps to facilitate agreement on a final document that

\begin{footnotesize}
\begin{itemize}
\item[17.] \textit{The Vienna Declaration and Programme of Action}, World Conference on Human Rights, U.N. Doc. A/CONF.157/23 (1993). Paragraph 2 of Part I affirms that “[a]ll peoples have the right of self-determination.” \textit{Id.} at pt.1, para. 2. However, the same paragraph states that this right shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

\textit{Id.}


\end{itemize}
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allows all competing factions to declare victory. Indeed, this appears to offer at least a partial explanation for the tortured language quoted above from the 1970 Declaration. In sum, the process of compromise undermines the utility of U.N. Declarations as a tool for clarification of legal principles.

Third, attempts to utilize U.N. Declarations to help clarify the relevant legal rules are also hampered by the fact that many of the states involved in drafting the declarations have political interests that conflict with the goal of clarifying the legal rules. A clear, unambiguous legal rule prohibiting secession in all circumstances would be unacceptable to states that have an interest in promoting, or in being perceived as promoting, the goal of self-determination, because a flat prohibition would be inconsistent with that interest. In contrast, a clear, unambiguous legal rule prescribing secession as a remedy for specified violations of self-determination rights would be equally unacceptable to many states, because they have a political interest in not tying their hands by determining in advance the consequence of prohibited conduct. In short, many states do not want to clarify the legal rules related to secession, because any clarification of the rules limits their flexibility.

Of the three factors cited above that make it difficult to produce unambiguous U.N. Declarations—divergent factual situations, the value of ambiguity in building consensus, and conflicting political interests—only the first applies with equal force to adjudicatory bodies. International judges, unlike diplomats, are not motivated primarily by a desire to advance their countries' political interests. Granted, any judi-

20. As a junior government officer involved in multilateral negotiations, I learned that my efforts to clarify ambiguous language, which I thought would help produce a "better" document, were viewed with suspicion by my senior colleagues, who wanted to retain the ambiguous language precisely because it helped facilitate agreement.


22. The statement that states are reluctant to clarify rules in ways that unnecessarily limit their flexibility can be seen as a corollary of Professor Henkin's famous maxim that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979). Since states generally have an interest in observing international legal obligations, they are reluctant to endorse international legal rules with which they may not wish to comply.

23. I concede that no judges are entirely apolitical, and that some judges
cial body composed of more than one judge, like political bodies, faces pressure to compromise for the sake of arriving at a majority opinion. But judges are far less prone than diplomats to use ambiguity as a consensus-building tool. Thus, the main obstacle to utilizing case-by-case adjudication to clarify the legal relationship between peoples' self-determination rights and states' territorial integrity rights is that general legal principles must necessarily be somewhat vague if they are to be applied to a wide variety of different factual circumstances.

Aside from the above considerations, one additional factor gives international adjudication a distinct advantage over U.N. Declarations as a tool for clarifying the law: judges must apply general legal principles to a specific set of facts. By applying law to fact, judges can help clarify the law. The Canadian Supreme Court's recent decision in Reference Re: Secession of Quebec\(^2\) illustrates the comparative advantage of adjudication as a tool for clarifying the scope of the international legal right of secession.

In the Quebec case, the Canadian Supreme Court was asked to decide the following question:

Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?\(^2^5\)

In a very thoughtful and scholarly opinion, the Court analyzed various sources of international law.\(^2^6\) Based on that analysis, the Court identified three types of circumstances in which a group could make a plausible claim for an international legal right of secession: (1) situations involving former colonies; (2) cases involving foreign military occupation; and (3) situations where "a people is blocked from the meaningful exercise of its right to self-determination inter-

\(^{24}\) Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

\(^{25}\) Id. at 218.

\(^{26}\) See id. at 277-88.
nally."\textsuperscript{27} The Court then analyzed the Quebec situation and concluded that Quebec did not have an international legal right to secede from Canada because the facts of the Quebec case did not fit within any of these three categories.\textsuperscript{28} Since the Judges on the Canadian Supreme Court acted in their individual capacity, not as political representatives, and since they were not compelled to adopt ambiguous phraseology in the interest of promoting consensus, the Court was able to articulate a clear statement of the general principles governing the international legal right of secession, far clearer than any statement contained in any U.N. Declaration. Moreover, the Court did not merely articulate general principles, but it applied those principles to a specific set of facts. The process of applying law to fact helped the court to clarify the general legal principles.

In sum, there are compelling reasons to believe that a common law method of case-by-case adjudication of secessionist claims is likely to be a better tool than U.N. Declarations for clarifying the international legal rules governing the relationship between peoples’ self-determination rights and states’ territorial integrity rights.

B. Adjudication as a Tool for Dispute Resolution

One possible objection to the preceding argument is that it misconceives the function of international adjudication. The purpose of international adjudication, one might argue, is not to clarify the law, but rather to resolve concrete disputes. Hence, the objector persists, the proper test for determining the value of international adjudication of secessionist disputes is whether adjudication will resolve the dispute, not whether adjudication will help clarify the law.

This objection, though not without merit, is overstated in two respects. First, it sets too high a standard to demand that adjudication, by itself, should achieve a final resolution of a highly charged political dispute.\textsuperscript{29} The proper test for

\textsuperscript{27} Id. at 285. For further discussion of the Canadian Supreme Court opinion, see infra notes 121-46 and accompanying text.

\textsuperscript{28} See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 286-88 (Can.).

\textsuperscript{29} Indeed, the same is true for domestic adjudication. If a judicial decision is a failure unless it achieves, by itself, a final resolution of a dispute, then \textit{Brown v. Board of Education}, 347 U.S. 483 (1954), would have to be deemed a failure, because the Supreme Court decision, by itself, did not put an end to school desegregation. 
success, in any given case, is whether international adjudication provides a key link in a chain of events that ultimately leads to a political settlement of the dispute. If so, the adjudication should be deemed a success. Second, although dispute resolution is one important function of international adjudication, the value of clarifying the legal rights and responsibilities of the parties to a dispute should not be underestimated. If, in a particular case, adjudication helps clarify those legal rights and responsibilities, but the dispute remains unresolved, the adjudication can still be considered a partial success. Adjudication should be deemed a failure only in cases where the legal judgment or opinion actually hinders a political settlement of the dispute.

There are two cases in which the I.C.J. has adjudicated disputes involving a conflict between a group’s self-determination rights and a state’s territorial sovereignty claim: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), and Western Sahara. Analysis of these two cases illustrates the preceding approach to evaluating adjudication as a tool for dispute resolution.

In 1971, the I.C.J. issued an advisory opinion on the situation in Namibia. The I.C.J. opinion explicitly held that South Africa’s military occupation of Namibia (South West Africa) was illegal. The I.C.J. advisory opinion on Namibia did not, by itself, persuade South Africa to recognize Namibia’s right of independence. However, the I.C.J. opinion was one of a protracted series of steps that enabled the international community eventually to persuade South Africa to recognize Namibia’s claim to independence. The Namibian

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33. See id. at 58.
34. Between 1950 and 1971, the I.C.J. issued four advisory opinions and two judgments concerning Namibia. See Thomas D. Musgrave, Self-Determination and National Minorities 80-85 (1997). After the I.C.J. advisory opinion in 1971, it took another seven years of political dialogue before South Africa accepted a plan that outlined a specific plan for Namibian in-
adjudication should be deemed a success, not because it achieved a final resolution of the dispute, but because it was an important link in a chain of events that ultimately led to a political settlement of the conflict between South Africa's asserted right of territorial sovereignty and Namibia's asserted right of self-determination.35

In 1975, the I.C.J. issued an advisory opinion on the situation in Western Sahara.36 The I.C.J. opinion rejected Morocco's and Mauritania's claims to sovereignty over the territory of Western Sahara,37 and affirmed the Sahrawi people's right of self-determination.38 More than twenty-five years later, Morocco continues to control a significant portion of the territory of Western Sahara.39 Thus, one is tempted to conclude that the Western Sahara adjudication was a complete failure. However, closer examination shows that the Western Sahara adjudication is properly characterized as a partial success.

Approximately four years after the I.C.J. issued its advisory opinion, Mauritania renounced its claim to sovereignty over the territory of Western Sahara.40 Since the I.C.J. opinion deprived Mauritania of any legal basis for its territorial claim, it seems likely that the opinion was, at a minimum, one of several factors that ultimately persuaded Mauritania to abandon its territorial claim.41 Mauritania's renunciation of its claim simplified the dispute by eliminating one major party.


35. I do not wish to overstate the significance of the 1971 I.C.J. advisory opinion. That opinion was merely one small step in a political process that spanned forty years. See supra note 34. Even so, by lending the weight of its legal authority to the political movement for Namibian independence, the I.C.J. made a small, but significant contribution to the process.


37. See id. at 68.

38. See id.


41. Another key factor was that continued fighting between Polisario and Mauritanian forces proved quite costly for Mauritania. See Hearing.
Additionally, the I.C.J. advisory opinion arguably made a modest contribution to promoting the political dialogue between the Kingdom of Morocco and Polisario, which represents the Sahrawi people. In 1990, the U.N. Security Council approved a peace plan, previously agreed between Polisario and the Kingdom of Morocco, which called for a cease-fire and a referendum to allow the Sahrawi people to choose between independence or integration with Morocco. Although violations of the cease-fire have occurred, the level of violence declined significantly after the cease-fire agreement. And although the promised referendum has still not taken place, it is questionable whether Morocco would have agreed to a referendum in the first place if the I.C.J. advisory opinion had not clearly affirmed the Sahrawi peoples' right to self-determination.

In sum, by rejecting Morocco's and Mauritania's territorial claims, and by affirming the Sahrawi peoples' right to self-determination, the I.C.J. advisory opinion shifted the political balance slightly in favor of the Sahrawi people, and thereby contributed to the political pressure that ultimately persuaded Mauritania to abandon its claim, and persuaded Morocco to accept, in principle, the idea of a referendum.

There may be cases, however, where a decision reached by means of international adjudication could actually hinder efforts to negotiate a political settlement of a secessionist dispute. For example, in some cases a clear judicial decision in favor of one party may embolden that party to harden its stance, thereby making political settlement more difficult. If, in a particular case, there is a sound basis to fear that adjudications could have such an effect, the decision may not be in the public interest. For example, if it is feared that the decision would embolden one of the parties to harden its stance, the decision may be counterproductive.

42. See id. at 3.
43. Compare id. ("Polisario estimates that roughly 13,000 people died from the fighting" prior to the cease fire agreement.) with Hearing, supra note 39, at 6 (statement of Allen L. Keiswetter, Deputy Assistant Secretary of State for Near Eastern Affairs) (stating that the U.N. peacekeeping force has provided a "safety net" and that "it helps monitor and keep the cease-fire.").
44. See Hearing, supra note 39 at 2-4 (statement of Allen L. Keiswetter, Deputy Assistant Secretary of State for Near Eastern Affairs).
45. The Sahrawi peoples' right to self-determination has been backed not only by the I.C.J., but also by various Security Council and General Assembly resolutions. See, e.g., G.A. Res. 3458, U.N. GAOR, 30th Sess., Supp. No. 34, at 116, U.N. Doc. A/Res/3458 (1975); S.C. Res. 621, U.N. SCOR, 43rd Sess., U.N. Doc. S/Res/621 (1988). It is possible that these resolutions by themselves would have persuaded Morocco to agree to a referendum. If, in any event, the I.C.J. opinion contributed to the overall political pressure on Morocco that ultimately induced the Moroccan government to accept the idea of a referendum.
cation is likely to hinder the process of political settlement, then adjudication should be avoided. More broadly, the decision whether to submit a particular secessionist dispute to an international adjudicatory body is a political decision that should be made only after careful consideration of the likely impact of a judicial decision on efforts to achieve a political settlement of that particular dispute.\footnote{In evaluating the likely impact of a judicial decision on a particular secessionist dispute, the roles and interests of third parties must be considered. Virtually every secessionist group that resorts to armed force to press its claim is dependent upon one or more outside arms suppliers. One likely benefit of a judicial decision rejecting a secessionist claim is that such a decision would increase pressure upon outside arms suppliers to cease supplying arms to the secessionist group. Indeed, in cases where armed conflict is present, the restraining impact on third-party arms suppliers of a judicial decision rejecting an asserted right of secession may be one of the principal benefits of international adjudication.}

**III. OVERVIEW OF PROCEDURAL OPTIONS FOR INTERNATIONAL ADJUDICATION**

Broadly speaking, there are three types of existing fora that could be used to adjudicate secessionist claims: domestic courts, international human rights bodies, and the International Court of Justice. The Canadian Supreme Court's decision in the Quebec case notwithstanding, domestic courts will generally not be a viable option for adjudication of most secessionist claims.\footnote{Most secessionist groups would not accept the legitimacy of a decision by a domestic court denying the validity of their secessionist claims, because the heart of any secessionist claim is a challenge to the state's right to control the secessionist group, and a domestic court is an organ of the state whose authority the group is challenging.} Moreover, international human rights bodies have generally declined to entertain petitions asserting a right to self-determination on the grounds that the petition mechanism is available only to individuals, not groups, whereas the right of self-determination belongs to "peoples," not individuals.\footnote{Dinah Shelton, Self-Determination and Secession: The Jursiprudence of International Human Rights Tribunals (Mar. 5, 2001) (unpublished manuscript, on file with the Santa Clara Law Review).} Since domestic courts and international human rights bodies are generally not viable options in most cases, this paper focuses on procedural options for adjudicating secessionist claims before the I.C.J.

Under the current I.C.J. Statute, there are essentially two procedural mechanisms for bringing a claim before the
court. First, one state can bring a claim against another state utilizing the procedure for "contentious jurisdiction."49 Second, "the court may give an advisory opinion on any legal question" when requested to do so by a competent U.N. body.50 Note that neither mechanism permits a secessionist group itself to bring a claim before the I.C.J. The I.C.J., therefore, can entertain a secessionist group's claim only if a state or a U.N. body brings the claim to the court. Thus, although peoples' right to self-determination is well-established under international law,51 international law does not provide a remedial mechanism that enables a group seeking to vindicate its right to self-determination to bring a claim before the I.C.J.

This gap between rights and remedies raises the question of whether it would be feasible to amend the I.C.J. Statute to accord standing to "peoples" who allege violations of their self-determination rights. That question must be answered in the negative because the five permanent members of the Security Council each have the power to veto any proposed amendment to the I.C.J. Statute.52 Given the numerous minorities problems that both Russia and China confront, they would presumably veto any proposed amendment to the I.C.J. Statute that would accord standing to groups who assert violations of their self-determination rights.

Another option for closing the gap between groups' self-determination rights and their lack of remedial rights would be to establish a new adjudicatory body, an "International Court of Self-Determination," in which groups alleging violations of their self-determination rights would have standing to bring such claims. Although this option should not be excluded as a long-term possibility, it is clearly not a near-term option. Hence, the remainder of this essay focuses on two specific procedural options: Part IV discusses the I.C.J.'s contentious jurisdiction, and Part V addresses the I.C.J.'s advisory jurisdiction.

49. See I.C.J. Statute, supra note 3, art. 34, para. 1 ("Only states may be parties in cases before the Court.").
50. I.C.J. Statute, supra note 3, art. 65, para. 1.
51. See supra note 6.
52. See I.C.J. Statute, supra note 3, art. 69 ("Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter."); U.N. CHARTER art. 108 (requiring ratification by all the permanent members of the Security Council before an amendment enters into force).
IV. THE I.C.J.'S CONTENTIOUS JURISDICTION

Suppose that group G is the dominant ethnic group in a defined territory located within the boundaries of state S. Group G claims that state S is violating its right to self-determination. Group G seeks international recognition of its asserted right to secede from state S and establish its own state. Group G cannot bring a claim against state S before the I.C.J. because "[o]nly states may be parties in cases before the Court." Suppose, though, that state P (the petitioner), which is sympathetic to group G's cause, brings a claim on behalf of group G against state S. There are two main procedural obstacles to adjudication of P's claim. First, P must establish that S has consented to I.C.J. adjudication of the claim. Second, P must establish that it has standing to bring the claim on behalf of Group G. Let us consider each in turn.

A. The Requirement of Consent

For the I.C.J. to adjudicate a case under its contentious jurisdiction, the states who are parties to the dispute must agree to submit the case to the court. That agreement can take one of several different forms. The states could agree on a one-time basis to submit a particular dispute to the court. Or, if the states concerned are parties to a treaty that provides for I.C.J. jurisdiction over treaty-related disputes, accession to the treaty constitutes agreement to submit such disputes to the court. Finally, sixty-three states have submitted unilateral declarations pursuant to article 36(2) of the I.C.J. Statute, accepting the "compulsory jurisdiction" of the court over a wide range of international disputes.

53. I.C.J. Statute, supra note 3, art. 34, para. 1.
54. See I.C.J. Statute, supra note 3, arts. 34-36.
55. See I.C.J. Statute, supra note 3, art. 36, para. 1 ("The jurisdiction of the Court comprises all cases which the parties refer to it . . .").
56. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, art. IX, 78 U.N.T.S. 277, 282 ("Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.").
57. I.C.J. Statute, supra note 3, art. 36, para. 2 ("The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court" over specified types of legal disputes.).
58. See INTERNATIONAL COURT OF JUSTICE: DECLARATIONS RECOGNIZING AS
It is difficult to conceive of many cases where a state would consent on a one-time basis to I.C.J. jurisdiction over a claim involving a group's asserted right to secede from that state. Although there may be isolated examples where I.C.J. jurisdiction over a secessionist claim could be based on a treaty, this author has been unable to identify any such example. Therefore, the most plausible basis for establishing consent would be a unilateral declaration pursuant to article 36 of the I.C.J. Statute.

Unfortunately for those advocating secession, the majority of groups with potential secessionist claims live in states that do not have current article 36 declarations on file with the I.C.J. The Unrepresented Nations and Peoples Organization ("UNPO") is an international non-profit group whose membership consists of "peoples" that seek to vindicate their self-determination rights. UNPO currently has fifty-two members, only ten of which live wholly or partially in states that have current article 36 declarations. The other forty-two UNPO members live in states that have not filed article 36 declarations. Therefore, those forty-two groups cannot in-
voke a unilateral declaration under article 36 to establish their host states' consent to the I.C.J.'s contentious jurisdiction.

Even the groups that live in states that have filed article 36 declarations will find it difficult to utilize those declarations to establish the states' consent to adjudication of a claim involving an alleged right of secession, because most states' article 36 declarations are subject to provisos that might well be interpreted to preclude adjudication of secessionist claims. Consider two examples. First, suppose that a sympathetic state filed a claim against Yugoslavia on behalf of the Kosovars, asserting that Kosovo has a right to secede from Yugoslavia. Although Yugoslavia has filed an article 36 declaration accepting the court's compulsory jurisdiction, its declaration specifically excludes I.C.J. jurisdiction over "territorial disputes." The court might well find that a claim asserting that Kosovo has a right to secede from Yugoslavia is a "territorial dispute" over which the I.C.J. could not exercise jurisdiction.

Alternatively, suppose that a sympathetic state filed a claim against Spain on behalf of the Basques, asserting that the Basques have a right to secede from Spain. Although Spain has filed an article 36 declaration accepting the court's compulsory jurisdiction, its declaration specifically excludes I.C.J. jurisdiction over "[d]isputes arising prior to the date on which this Declaration was deposited with the Secretary-General of the United Nations or relating to events or situations which occurred prior to that date, even if such events or situations may continue to occur or to have effects thereafter." Inasmuch as Spain deposited its declaration on October 29, 1990, and the dispute with the Basques arguably relates to events or situations which occurred prior to that date, it is uncertain whether the I.C.J. would be prepared to


63. See INTERNATIONAL COURT OF JUSTICE, supra note 58.


65. DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE, supra note 62, at 753.

66. See id. at 752.

67. See HANNUM, supra note 64, at 263-79.
assert jurisdiction over a claim against Spain involving an alleged Basque right of secession.

Finally, even assuming that there is a state S that has filed an article 36 declaration without any provisos that would preclude adjudication of secessionist claims, and assuming that there is a group G that wants to secede from that state S, the only state that could bring a claim on behalf of group G would be a state that has filed an article 36 declaration itself, because the I.C.J. Statute limits the Court’s compulsory jurisdiction under article 36(2) to disputes between states that have both filed article 36 declarations.68

In light of the above, it is uncertain whether any secessionist group could successfully argue that the state from which it wants to secede has consented to the I.C.J.’s exercise of contentious jurisdiction over its secessionist claim. Moreover, even assuming that group G could establish that state S had consented to the I.C.J.’s contentious jurisdiction, the petitioner state (P) would still have to show that it had standing to bring a claim on behalf of group G.

B. The Requirement of Standing

In the hypothetical case in which state P brings a claim against state S to vindicate group G’s right to self-determination, there are three distinct theories P could advance to establish its standing to bring the claim. P could bring the claim as an actio popularis; it could bring the claim as parens patriae for group G; or P could assert a particular legal interest in conducting economic and/or political relations with group G. All three are problematic. Consider each in turn.

1. Actio Popularis

Actio popularis can be defined as “an action brought by a plaintiff before a court in the general interest, without any need to show an individual interest in pursuing the claim.”69

In the South West Africa cases, the I.C.J. explicitly stated

68. See I.C.J. Statute, supra note 3, art. 36, para. 2 (authorizing states to file declarations stating that “they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court . . . .” (emphasis added)).

that a plaintiff's asserted right to bring an *actio popularis* "is not known to international law as it stands at present."  

However, four years later, the I.C.J. stated in the *Barcelona Traction* case that international law does recognize the concept of obligations *erga omnes*. The court defined obligations *erga omnes* as "obligations of a State towards the international community as a whole," and distinguished them from obligations "vis-à-vis another State." Importantly, the court stated that "all States can be held to have a legal interest in" the protection of obligations *erga omnes*.

In the *East Timor* case, the Court explicitly recognized "that the right of peoples to self-determination ... has an *erga omnes* character." Moreover, in the *Nicaragua* case, Judge Schwebel commented that the court's earlier statement (in the *Southwest Africa* cases) about the inadmissibility of an *actio popularis* "was rapidly and decisively replaced" by the court's dictum in *Barcelona Traction* to the effect that all states have a legal interest in the protection of obligations *erga omnes*. Thus, in the preceding hypothetical, state P could plausibly argue (1) that state S has an *erga omnes* obligation to respect group G's right to self-determination (as explicitly recognized by the court in the *East Timor* case), and (2) that the *erga omnes* character of that obligation gives state P a right to bring an *actio popularis* against state S on behalf of group G (as suggested by Judge Schwebel in the *Nicaragua* case).

P's chances of winning this argument are uncertain, at best. The I.C.J.'s statement in the *East Timor* case that the right of self-determination has an *erga omnes* character must be viewed in context. *East Timor* was once a Portuguese colony, and later became a non-self-governing territory under Chapter XI of the U.N. Charter. Since the right of self-

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72. Id.
73. Id.
74. See id.
77. See Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 95-96 (June
determination outside the colonial context is less firmly entrenched in international law than the right of colonial peoples' to self-determination, there is reason to doubt whether the I.C.J. would hold that the right of non-colonial peoples to self-determination has an *erga omnes* character. Moreover, even assuming that states have an *erga omnes* duty to respect the right of non-colonial peoples to self-determination, it does not necessarily follow that every state can bring an *actio popularis* to vindicate those self-determination rights. Judge Schwebel's comment in the *Nicaragua* case notwithstanding, the dominant view is that "the concept of obligations *erga omnes* does not necessarily imply the existence of a sort of *actio popularis*."  

2. Parens patriae

As an alternative to an *actio popularis*, $P$ could attempt to bring a claim as *parens patriae* for group $G$. *Parens patriae* is "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of . . . someone who is under a legal disability to prosecute the suit." The theory is that, since group $G$ has an established right to self-determination under international law, but group $G$ lacks the legal capacity to bring its own claim because it is not a "state," the court should allow state $P$ to bring the claim on behalf of group $G$. Article 38 of the I.C.J. Statute authorizes the court to adjudicate disputes by applying "the general principles of law recognized by civilized nations." Thus, $P$ could argue that the doctrine of *parens patriae* is a "general principle of law recognized by civilized nations," which the court is authorized to apply under article 38.

Not surprisingly, there are several cases in which a state has litigated a claim before the I.C.J. as *parens patriae* on behalf of its own citizens. There are even a few cases in which

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78. See generally CASSESE, supra note 11, at 126-33.
79. RAGAZZI, supra note 69, at 212. See also 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1966, at 1203 (1997) (noting that the Court "has not introduced the conception of . . . *actio popularis* into international law, even for the protection of what are sometime regarded as obligations *erga omnes*.").
80. BLACK'S LAW DICTIONARY 1137 (7th ed. 1999).
81. I.C.J. Statute, supra note 3, art. 38, para. 1(c).
82. See, e.g., Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. &
a state has litigated a claim before the I.C.J. as *parens patriae* "on behalf of a semi-independent political unit which it is arguable enjoys some recognizable international personality as a State even though not as an independent State." Professor Rosenne has identified four such cases: the *U.S. Nationals in Morocco* case, where France was proceeding "both on its own account and as Protecting Power in Morocco", the *Minquiers and Ecrehos* case, where the United Kingdom "was esposing the claim of the Island of Jersey", the *Jan Mayen* case, where Denmark was litigating on behalf of Greenland's interests; and the *Request for Examination* case, where "the Government of New Zealand expressly stated that it was also representing the dependent territories of the Cook Islands, Niue and Tokelau."

The first two cases, *U.S. Nationals in Morocco* and *Minquiers and Ecrehos*, may support the proposition that a state can bring a *parens patriae* claim on behalf of individuals who are not, strictly speaking, citizens of that state. However, in

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83. ROSENNE, supra note 79, at 612.
85. ROSENNE, supra note 79, at 612.
86. Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17).
87. ROSENNE, supra note 79, at 612.
90. ROSENNE, supra note 79, at 612. The Court did not use the term "*parens patriae*" in any of these cases, but the Court was effectively allowing the states to litigate as *parens patriae* on behalf of the "semi-independent" political units.
91. In *U.S. Nationals in Morocco*, the I.C.J. noted that, although Morocco was a protectorate of France, Morocco "retained its personality as a State in international law." 1952 I.C.J. 176, 185. Thus, it is unclear whether, at that time, the Moroccan nationals whom France was representing were deemed to be French citizens or Moroccan citizens. In *Minquiers and Ecrehos*, the United Kingdom was espousing the claim of the Island of Jersey, which is part of the Channel Islands. The Channel Islands are "not part of the United Kingdom, though in some legal contexts the term "United Kingdom" is deemed to include
each of the four cases cited in the previous paragraph, the political unit that Professor Rosenne describes as "semi-independent" could also be described as "semi-dependent." Thus, there is no case in which the I.C.J. has allowed a state to bring a *parens patriae* claim on behalf of a group that did not have some type of dependency relationship with the state bringing the claim.

In the hypothetical case discussed above, state *P* seeks to bring a claim against state *S* to vindicate the self-determination rights of group *G*, and the members of group *G* are citizens of state *S*. Thus, not only is state *P* attempting to represent individuals who are not citizens of state *P*: it is attempting to represent them in a claim against the state where they are citizens! In this type of circumstance, it is unlikely that the I.C.J. would allow state *P* to bring a claim as *parens patriae* on behalf of group *G*.

Even so, there are two types of cases where *P* may be able to bring a *parens patriae* claim on behalf of group *G*. First, if *P* is a former colonial power, and *G* is its former colony, *P* may have standing to bring a claim on behalf of *G*. This was the basis for Portugal's asserted standing to bring a claim against Australia on behalf of East Timor's right to self-determination. For similar reasons, Spain might have

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92. For a discussion of the relationship between Greenland and Denmark, see HANNUM, supra note 64, at 341-46. For a discussion of the relationship between Cook Islands, Niue, Tokelau and New Zealand, see id. at 384-89. On the relationship between the Island of Jersey and the United Kingdom, see Farron et al., supra note 91, at 80-83. With respect to Morocco and France, see Concerning Rights of Nationals of the United States in Morocco (Fr. v. U.S.), 1952 I.C.J. 175, 185-86.

93. See Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 94 (June 30) (Portugal asked the Court to declare that "the duties, powers and rights of Portugal as the administering Power of the Territory of East Timor are opposable to Australia," and that Australia "has infringed and is infringing the right of the people of East Timor to self-determination"). The Court did not reach the issue of Portugal's standing, because it dismissed the case on the grounds that it "could not rule on the lawfulness of the conduct" of Australia "when its judgment would imply an evaluation of the lawfulness of the conduct of" Indonesia, which was not a party to the case. Id. at 102.
standing to bring a claim against Morocco on behalf of the Sahrawis’ right to self-determination. 94 Second, where group G is an ethnic minority in state S, and group G has a common ethnic heritage with the majority ethnic group in state P, the I.C.J. might hold that P has standing to bring a claim on behalf of group G. 95 Thus, for example, it is possible that the I.C.J. might recognize Albania’s standing to bring a claim against Yugoslavia on behalf of Kosovo’s right to self-determination. 96

3. Special Economic or Political Interest

If the actio popularis and parens patriae theories both fail, state P could assert that it has a special economic and/or political interest in establishing a relationship with group G, which is being frustrated because state S has imposed unwarranted restrictions on group G’s self-determination rights. Suppose, for example, that the political leadership of group G has negotiated a deal with the XYZ company, a company based in state P, to invest in the mining industry in the area occupied by group G. State S refuses to allow the foreign investment because state S wishes to assert control over the mineral resources at issue. Group G claims that state S is restricting its right to self-determination: in particular, the right to “freely dispose of [its] natural wealth and resources.” 97 State P brings a claim against state S. State P alleges that, by imposing unwarranted restrictions on group G’s self-determination rights, state S has harmed state P’s interest (and the XYZ company’s interest) in foreign investment. State P brings the claim to represent the legal interests of XYZ company, but the remedy it seeks includes greater self-

94. Note, though, that Spain’s claim would fail for lack of Moroccan consent, because Morocco does not have a current article 36 declaration. See INTERNATIONAL COURT OF JUSTICE, supra note 58.

95. There is some precedent for this type of claim in decisions of the Permanent Court of International Justice (“P.C.I.J.,” the predecessor to the present court) interpreting the so-called “minorities treaties.” See MUSGRAVE, supra note 34, at 48-55. However, those decisions were taken in the context of specific treaty regimes, and it is uncertain whether the P.C.I.J.’s standing analysis would apply to claims that are not based on the minorities treaties.

96. As noted above, it is unclear whether Yugoslavia would be deemed to have consented to such a suit under its article 36 declaration. See supra text accompanying note 63.

97. ICESCR, supra note 6, art. 1, para. 2; ICCPR, supra note 6, art. 1, para. 2.
determination rights for group G.

In this type of case, state P would almost certainly have standing to bring the claim.\textsuperscript{98} Note, however, that the facts described are very unlikely to give rise to a judgment ordering secession as a remedy. Even if the I.C.J. held that state S violated group G's right of self-determination, and even if the I.C.J. held that group G, not state S, had the right to exercise control over the mineral resources, there is no reason to believe, based on these facts, that secession would be the appropriate remedy. At most, the I.C.J. might order state S to grant group G greater control over the natural resources in its region.

In sum, there are likely to be very few, if any, cases in which the I.C.J. would recognize state P's standing to bring a claim against state S asserting group G's right to secede from state S. Moreover, even assuming that there are some cases in which state P could establish its standing, the claim would probably be barred on the ground that state S had not consented to the exercise of the I.C.J.'s contentious jurisdiction over the claim. Therefore, attempts to invoke the I.C.J.'s contentious jurisdiction to adjudicate secessionist claims are unlikely to succeed.

V. I.C.J. ADVISORY OPINIONS AND THE CASE OF TIBET

Part V addresses the use of I.C.J. advisory opinions as a mechanism for adjudicating secessionist claims. The discussion refers to the Tibetan situation to illustrate various issues that will arise in any attempt to obtain an I.C.J. advisory opinion on a secessionist claim. The analysis is divided into three sections: (a) the request for an advisory opinion; (b) the advisory opinion as a tool for clarifying the scope of legal rights; and (c) the advisory opinion as a tool for facilitating political resolution of disputes.

A. The Request for an Advisory Opinion

The I.C.J. Statute authorizes the court to "give an advisory opinion on any legal question at the request of whatever

\textsuperscript{98} See ROSENNE, supra note 79, at 1215 ("[I]t is accepted that the right of diplomatic protection of a national is sufficient to justify an international claim in respect of injuries suffered by that national."). Note that the conclusion that P has standing to bring the claim says nothing about the merits of P's claim, or whether state S has consented to jurisdiction.
body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” The U.N. Charter specifically authorizes the General Assembly and the Security Council to request advisory opinions. Additionally, other organs of the United Nations and specialized agencies may request advisory opinions “on legal questions arising within the scope of their activities,” but only if they are specifically authorized to do so by the General Assembly. The U.N. Charter does not authorize member states to request I.C.J. advisory opinions.

The question arises which “other organs” are authorized to request an I.C.J. advisory opinion concerning Tibet’s asserted right to secede from China. In addition to the General Assembly, the Security Council, and the I.C.J., the U.N. Charter establishes three other “principal organs” of the United Nations: the Trusteeship Council, the Secretariat and the Economic and Social Council (“ECOSOC”). The Secretariat is not authorized to request advisory opinions from the court, and the Trusteeship Council is now defunct. However, a 1946 General Assembly resolution granted ECOSOC a general authorization to request I.C.J. advisory opinions on legal questions arising within the scope of ECOSOC’s activities.

The question of a right of secession is clearly within the scope of ECOSOC’s activities, because the Commission on Human Rights, which is a subsidiary organ of ECOSOC, was responsible for drafting the Human Rights Covenants, and the legal argument for Tibet’s right to secede derives, at least in part, from the right to self-determination codified in common article 1 of those Covenants. Therefore, ECOSOC could request an I.C.J. advisory opinion on Tibet’s asserted right to secede from China.

99. I.C.J. Statute, supra note 3, art. 65, para. 1.
100. See U.N. Charter art. 96, para. 1.
101. See id. art. 96, para. 2.
102. See id. art. 7, para. 1.
103. See ROSENNE, supra note 79, at 333-35.
104. See id. at 332.
105. See id. at 327-28.
107. See supra note 6 and accompanying text.
108. In this regard, it is noteworthy that ECOSOC has requested only two advisory opinions from the Court, and both requests were made in response to
The "principal organs" created by the Charter have in turn created numerous "subsidiary organs." The General Assembly has authorized only two subsidiary organs to request I.C.J. advisory opinions: the Interim Committee for the General Assembly and the Committee for Applications for the Review of Judgments of the Administrative Tribunal. Those two organs cannot request advisory opinions pertaining to an alleged right of secession because they are authorized to request opinions only "on legal questions arising within the scope of their activities." 

The General Assembly has also authorized several specialized agencies to request advisory opinions. However, the court has strictly interpreted the requirement that specialized agencies may request advisory opinions only "on legal questions arising within the scope of their activities." Since the legal question of an asserted right of secession does not appear to arise within the scope of activity of any specialized agency, the court would probably not give an advisory opinion on that question in response to a request from a specialized agency.

Thus, as a practical matter, any group that wished to obtain an I.C.J. advisory opinion on an alleged Tibetan right of secession would have to persuade either the General Assembly or ECOSOC to approve the request. In principle, the I.C.J. has the discretion to refuse to give an advisory opinion,
even after ECOSOC or the General Assembly has requested it. However, the court has emphasized that "[a] reply to a request for an [advisory] opinion should not, in principle, be refused." Indeed, the court has never refused to give an advisory opinion when requested to do so by a principal U.N. organ.

Given the court's strong bias in favor of giving advisory opinions when requested to do so, the need to obtain a majority vote in either ECOSOC or the General Assembly is the only significant procedural hurdle inhibiting I.C.J. adjudication of secessionist claims. The magnitude of that hurdle

114. See ROSENNE, supra note 79, at 1013-29.
115. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 19 (May 28). The Court has stated, it is well settled in the Court's jurisprudence that when a request is made under Article 96 of the Charter by an organ of the United Nations or a specialized agency for an advisory opinion by way of guidance or enlightenment on a question of law, the Court should entertain the request and give its opinion unless there are "compelling reasons" to the contrary.
116. In one case the Court refused to give an advisory opinion when requested by a specialized agency. See supra note 112. In the Eastern Carelia case, Eastern Carelia, 1923 P.C.I.J. (ser B) No. 5 (July 23), the Permanent Court of International Justice refused to give an advisory opinion on the grounds that the request concerned a dispute between two states, and it could not adjudicate the dispute without their consent. See ROSENNE, supra note 79, at 1014. The present Court has not rejected the rationale of Eastern Carelia, but it has construed the holding narrowly, and has rendered several advisory opinions despite states' attempts to invoke Eastern Carelia in support of arguments that the Court should refuse to render a requested advisory opinion. See id. at 1013-29.
117. All ECOSOC decisions are "made by a majority of the members present and voting." U.N. Charter art. 67, para. 2. ECOSOC has fifty-four members. Id. art. 61, para. 1 (as amended). General Assembly resolutions require a two-thirds majority for "important questions," and a simple majority for other questions. Id. art. 18. In both cases, the majority requirements are determined on the basis of members "present and voting." Id. arts. 18 and 67. According to Professor Rosenne, "[p]ractice does not permit a clear answer" to the question of whether a request for an advisory opinion requires a simple or a two-thirds majority. See ROSENNE, supra note 79, at 301.
118. In theory, one could circumvent that hurdle by obtaining a favorable vote in the Security Council. However, Russia and/or China would probably veto any Security Council resolution requesting an I.C.J. advisory opinion on an alleged right of secession, even if the particular secessionist group did not reside in Russia or China, because both countries have significant concerns about their own secessionist groups, and they would not want to fuel their own secessionist movements by voting in favor of a resolution related to a secessionist group in some other country.
should not be underestimated. Even in the case of a pariah state, such as Iraq, there would likely be significant political opposition to a resolution requesting an advisory opinion on a secessionist claim,¹¹⁹ because states might well fear that a decision to approve one such resolution would lead to a multitude of similar claims. In the case of Tibet, the political obstacles are even greater, because many states that do not care about offending Iraq would be reluctant to offend China by voting in favor of a resolution requesting an advisory opinion on Tibetan secession.¹²⁰

In addition to these political factors, the ECOSOC and/or the General Assembly would have to consider two other important factors before deciding to request an I.C.J. advisory opinion on a secessionist claim. First, to what extent would an advisory opinion help clarify the scope of a legal right of secession? Second, to what extent would an advisory opinion promote or hinder the process of political dialogue? The following two sections address these questions in the context of the Tibetan case.

B. An Advisory Opinion on Tibet Would Help Clarify the Scope of a Legal Right of Secession

In its decision on the Quebec secession issue,¹²¹ the Canadian Supreme Court identified three categories of cases in which a group could make a plausible legal claim for an international right of secession: (1) situations involving former colonies; (2) cases involving foreign military occupation; and (3) situations where "a people is blocked from the meaningful exercise of its right to self-determination internally."¹²² As the Canadian Supreme Court noted, "[t]he right of colonial peoples to exercise their right of self-determination by breaking

¹¹⁹. Iraq faces a potential secessionist threat from the Kurds. See generally HANNUM supra note 64, at 178-202.

¹²⁰. China's success in blocking unfavorable resolutions in the Commission on Human Rights does not bode well for any attempt to pass an ECOSOC or General Assembly resolution requesting an I.C.J. advisory opinion on Tibet. See Michael J. Dennis, The Fifty-Fifth Session of the UN Commission on Human Rights, 94 AM. J. INT'L L. 189, 196 (2000) (stating that China successfully blocked a U.S. resolution condemning "severe" restrictions on human rights in China, and that "[t]he defeat marked China's eighth escape from censure since its assault on unarmed protesters at Tiananmen Square in 1989").


¹²². Id. at 285.
away from the ‘imperial’ power is now undisputed.\textsuperscript{123} Hence, there is little need to clarify the scope of that legal right.\textsuperscript{124} However, an I.C.J. advisory opinion could help clarify the scope of an international legal right of secession, if any, under the latter two categories.

The Canadian Supreme Court’s second category, foreign military occupation, derives from the 1970 Declaration on Friendly Relations, which stated that “subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle” of equal rights and self-determination of peoples.\textsuperscript{125} The phrase “alien subjugation, domination and exploitation” has been repeated in subsequent U.N. Declarations.\textsuperscript{126} Unfortunately, neither the General Assembly nor any other international political or judicial body has clarified the precise meaning of that phrase.\textsuperscript{127}

There are few places in the world today where a group can plausibly claim to be the victim of “alien subjugation,” but Tibet is certainly one of them.\textsuperscript{128} The history of Chinese-Tibetan relations is hotly contested,\textsuperscript{129} but it is clear that China had no significant political or military presence in Tibet from 1913, when the Dalai Lama declared Tibet independent, until 1950, when Chinese troops invaded Tibet.\textsuperscript{130} Since 1950, China has maintained a substantial military presence and has exercised effective political control over Ti-

\textsuperscript{123} Id.

\textsuperscript{124} As a practical matter, virtually all colonial peoples have exercised their right to choose independence from the colonial power. For a summary of situations where colonial peoples’ right to self-determination has not been fully exercised, see CASSESE, supra note 11, at 79-88.

\textsuperscript{125} G.A. Res. 2625, supra note 14, at 121.

\textsuperscript{126} See Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, supra note 18, at 13; Vienna Declaration and Programme of Action, supra note 17.

\textsuperscript{127} See CASSESE, supra note 11, at 90-99 (analyzing the scope and content of the right to be free from alien, subjugation, domination and exploitation).


\textsuperscript{129} See \textit{MICHAEL VAN WALT VAN PRAAG, THE STATUS OF TIBET} (1987) (presenting a detailed argument in favor of Tibetan independence and rebutting various Chinese claims).

\textsuperscript{130} See Kolodner, supra note 128, at 185-88; W. Gary Vause, \textit{Tibet to Tienanmen: Chinese Human Rights and United States Foreign Policy}, 42 VAND. L. REV. 1575, 1577 n.8 (1989).
China insists that Tibet is not a victim of foreign military occupation, or "alien subjugation," because "China considers Tibet to be among those regions justifiably within China's historical claims of sovereignty." However, in 1961, the General Assembly approved a resolution calling on China to cease "practices which deprive the Tibetan people of their... right to self-determination." Thirty years later, the United States Congress "determined that Tibet is an occupied sovereign country under international law."

An I.C.J. advisory opinion on Tibet would provide a unique opportunity for the court to help clarify the law in this area. The question whether Tibet was an independent state prior to the 1950 Chinese invasion is a legal question to which international law can provide a legal answer. Moreover, the I.C.J. has particular expertise in the type of legal and historical analysis required to answer this question. If the court determined that Tibet was an independent state prior to 1950, it would then have to decide whether the Tibetan people have a right to secede from China, or whether events since 1950 have legitimated Chinese territorial sovereignty over Tibet. Regardless of how the court answered these questions, the answers would invariably help clarify the meaning of the phrase "alien subjugation, domination and exploitation." In addition, the court's opinion could also help clarify whether, and under what circumstances, international law grants a right of secession to the victims of foreign military occupation.

The Canadian Supreme Court's third category includes cases where "a people is blocked from the meaningful exercise of its right to self-determination internally," i.e., within the

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131. According to one estimate, there are 400,000 Chinese troops permanently housed in Tibet. Kolodner, supra note 128, at 187. The troops "are there not only to counter perceived threats from without by states like India, but also to suppress opposition from within." Vause, supra note 130, at 1579.
132. Vause, supra note 130, at 1580.
135. This statement assumes that if Tibet was independent before 1950, then the 1950 invasion constitutes "alien subjugation, domination and exploitation."
established state. The Court acknowledged that "it remains
unclear whether this third proposition actually reflects an es-
established international law standard." Regardless, several
commentators have espoused the underlying principle that
international law should recognize a remedial right of seces-
sion in cases where a state refuses to "cease serious injustices
it is perpetrating against the seceding group."

Even if the I.C.J. concludes that Tibet is not a victim of
foreign military occupation, Tibet can plausibly claim a right
of secession under the "serious injustices" category. There is
extensive documentation of Chinese human rights abuses in
Tibet. Throughout the 1950s and 1960s, China imple-
mented a systematic policy to destroy Tibetan Buddhist cul-
ture; by 1976, "only thirteen of Tibet's 6,254 monasteries re-
main standing." In 1960, the International Commission
of Jurists "found that acts of genocide had been committed in
Tibet in an attempt to destroy the Tibetans as a religious
group."

Chinese human rights abuses in Tibet continued
throughout the 1990s. As recently as 1996, commentators
concluded that Chinese family planning policies, as applied to
Tibetans, "are a form of ethnic cleansing" and "may constitute
a violation of" the Genocide Convention. Another commen-
tator has argued that China's population transfer policy, i.e.,
the policy of encouraging ethnic Chinese to move to Tibet, so

137. Id.
138. BUCHANAN, supra note 11, at 152. See also CASSESE, supra note 11, at
359 (supporting a right of secession where "the central authorities of a multi-
national State are irremediably oppressive and despotie, persistently violate the
basic rights of minorities and no peaceful and constructive solution can be en-
visaged").
139. See JOHN AVEDON, IN EXILE FROM THE LAND OF SNOWS (1984). See also
infra notes 140-43.
140. Kolodner, supra note 128, at 186.
141. LEGAL INQUIRY COMM. ON TIBET, INT'L COMM'N OF JURISTS, TIBET AND
THE CHINESE PEOPLE'S REPUBLIC 3 (1960).
142. See U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS
PRACTICES 2000 (Tibet addendum to China report) available at
government authorities continued to commit numerous serious human rights
abuses in Tibet, including instances of torture, arbitrary arrest, detention with-
out public trial, and lengthy detention of Tibetan nationalists for peacefully ex-
pressing their political or religious views.").
143. See Eva Herzer & Sara B. Levin, China's Denial of Tibetan Women's
that Chinese now outnumber Tibetans in the region is motivated by discriminatory intent and violates the Tibetan peoples' right to self-determination.

An I.C.J. advisory opinion on Tibet could enable the court to provide an authoritative legal opinion as to whether, and if so under what conditions, serious injustices perpetrated by a state against a minority group can give rise to a remedial right of secession. There are numerous minority groups in the world today that are victims of state-sanctioned oppression. Since many of them claim a right of secession on that basis, and some are willing to back that claim with force of arms, there is an urgent need to clarify the law in this area. For the reasons discussed above, the goal of clarifying the law is likely to be better served by an I.C.J. advisory opinion than by a U.N. Declaration.

C. An Advisory Opinion on Tibet Might Help Facilitate Political Dialogue Between Chinese and Tibetan Leaders

For the past two decades, there have been intermittent efforts to initiate negotiations between the Dalai Lama and the Chinese leadership concerning the future status of Tibet. In 1998, Chinese President Jiang Zemin said "that the door to dialogue and negotiation is open as long as the Dalai Lama publicly affirms that Tibet is an inalienable part of China." Since then, former President Clinton and Secretary of State Madeline Albright "continued to urge the Chinese leadership to enter into a substantive dialogue with the Dalai Lama or his representatives." In the spirit of compromise, the Dalai Lama has repeatedly expressed "his willingness to accept Tibetan autonomy within China." Even so, "Beijing

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144. See Kolodner, supra note 128, at 187-88.
145. See id. at 192-225.
146. See supra Part I.A.
147. See, e.g., VAN WALD VAN PRAAG, supra note 129, at 197-98 (describing the political dialogue between Tibet and China during the period from 1979 to 1984); Vause, supra note 130, at 1588-89 (describing a five-point plan that the Dalai Lama presented to the U.S. Congress in 1987).
149. Id.
refuses to negotiate with [the Dalai Lama] or his representatives.\textsuperscript{151} There are some indications that the Chinese strategy is simply to wait for the Dalai Lama to die, hoping that "[w]hen he dies, the issue of Tibet is resolved for ever."\textsuperscript{152}

The question arises whether an I.C.J. advisory opinion on Tibet might induce China to begin serious negotiations with the Dalai Lama about the future status of Tibet. Broadly speaking, there are three possible outcomes of an I.C.J. advisory opinion on Tibet: (1) the I.C.J. could affirm a Tibetan right to independence; (2) the I.C.J. could reject Tibetan independence; or (3) the I.C.J. could adopt a middle position, neither explicitly affirming nor rejecting a Tibetan right to independence.\textsuperscript{153} It is unlikely that any of the three possible outcomes would actually harm the prospects for a dialogue between China and the Tibetan government-in-exile, because China does not currently show any signs of willingness to engage in a dialogue.\textsuperscript{154}

However, there is some chance that either of the first two outcomes might break the current stalemate and spark serious negotiations between Chinese and Tibetan leaders. If the I.C.J. ruled that Tibet does have a right to secede from China, pressure would mount on the Chinese government to begin direct negotiations with the Dalai Lama. In the alternative, a clear I.C.J. ruling that Tibet does not have a right to secede from China might also help promote negotiations between China and the Dalai Lama, because such an I.C.J. decision would help alleviate Chinese fears that negotiations over "autonomy" would be the first step on a slippery slope to secession. In contrast, a decision that neither affirmed nor rejected a Tibetan right of independence would be unlikely to

\textsuperscript{151} Id. See also U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000 (Tibet addendum to China report), supra note 142 ("Both central government and local officials often insist that dialog with the Dalai Lama is essentially impossible.").

\textsuperscript{152} Lodi Gyaltsen Gyari, Don't Shut Out the Dalai Lama, FAR EASTERN ECONOMIC REVIEW (January 20, 2000) (quoting an unidentified "senior Chinese official").

\textsuperscript{153} The nature and content of an I.C.J. ruling would depend, in part, on how the request for an advisory opinion is formulated. If either ECOSOC or the General Assembly decided to request an I.C.J. advisory opinion on Tibet, careful consideration would be necessary to frame the question properly.

\textsuperscript{154} Sources report that the Dalai Lama sent his brother to Beijing in December 2000 in an effort to initiate a dialogue with the Chinese government. See Regional Briefing, FAR EASTERN ECONOMIC REVIEW (December 14, 2000). There are no signs of a Chinese response.
spark a political dialogue between Chinese and Tibetan leaders; such a decision would neither increase pressure on China to address Tibetan grievances, nor allay China's fears about Tibet's secessionist aspirations. Therefore, a "middle" outcome would probably perpetuate the status quo.

Initiation of direct negotiations between China and the Dalai Lama would be a significant positive step. The result of such a dialogue is difficult to predict. Barring unforeseen circumstances, China will almost certainly not agree to Tibetan independence. However, direct negotiations between China and the Dalai Lama might lead to a political settlement that would offer Tibet increased autonomy within a unified China. Regardless of the outcome, though, an I.C.J. advisory opinion would be a success if it helped spark a political dialogue between China and the Dalai Lama, thereby ending the current stalemate.

VI. CONCLUSION

There is no panacea that will lead to a prompt, negotiated settlement of all the violent, or potentially violent, secessionist disputes currently brewing around the world. However, the I.C.J. advisory opinion mechanism is an underutilized tool that may be helpful in promoting political settlement of some secessionist disputes. Moreover, an I.C.J. advisory opinion concerning a specific secessionist claim would help clarify the legal relationship between the right of peoples to self-determination and the right of states to preserve their territorial integrity. Therefore, ECOSOC or the General Assembly should identify an appropriate test case for requesting an I.C.J. advisory opinion concerning a particular secessionist claim.

155. U.S. government officials have indicated that they believe this may be a workable solution. See Tibet: Hearing Before the House International Relations Committee, 106th Cong. (2000) (statement of Julia V. Taft, Special Coordinator for Tibetan Issues) ("The Dalai Lama has shown enormous courage in accepting the impracticality of insisting on independence and calling for 'genuine autonomy' within Chinese sovereignty. Chinese spokesmen have responded by stating their willingness to engage in a dialogue with the Dalai Lama if he renounces independence and pro-independence activities. The problem appears to be solvable. Ultimately it comes down to a question of will, especially on Beijing's side.").