

**SHIFTING BORDERS, SUBMERGED STATES, AND NOVEL
HUMAN RIGHTS CLAIMS: HOW CLIMATE CHANGE
IMPACTS COULD HELP REMEDIAL SECESSION
CRYSTALLIZE INTO CUSTOMARY INTERNATIONAL LAW
AND BRING OPPRESSED PEOPLES CLOSER TO
INDEPENDENCE**

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ABSTRACT

Whether the right to self-determination provides oppressed peoples with the ability to secede under a remedial theory remains a controversial and unsettled issue. To date, it appears that remedial secession has not yet crystallized into customary international law. However, one of the plausible outcomes of the climate crisis is that the myriad impacts on human and planetary health could eventually lead to bold new interpretations of international law. This paper assesses the likelihood of that possibility and explains how certain oppressed peoples on the frontlines of the climate crisis could then argue that their human rights have been sufficiently violated by the parent state to bolster their case for secession under a remedial theory. Additionally, this paper explores how that discourse might materialize in practice using case studies from Kenya and Sri Lanka, while also highlighting potential obstacles that could complicate fulfilling the relevant remedial secession requirements.

INTRODUCTION

The right to self-determination has crystallized over the last century into international law as an obligation *erga omnes*, but whether this right provides a people with the ability to secede remains unsettled.¹ Scholars have referred to the concept of secession as “the most controversial” issue with respect to self-determination.² However, some states have argued that interpreting the right to self-determination as connoting the ability to secede would be “tantamount to international anarchy.”³ Although the theory of remedial secession is a particularly contentious model of secession, it has “received the greatest attention from courts and jurists.”⁴ This theory treats secession as a remedy of last resort when a parent state has completely frustrated a people’s attempts at internal self-determination and egregiously violated their human rights.⁵

There is no shortage of scholarly debate as to whether customary international law (CIL) currently supports remedial secession.⁶ This paper

1. SIMONE F. VAN DEN DRIEST, REMEDIAL SECESSION: A RIGHT TO EXTERNAL SELF-DETERMINATION AS A REMEDY TO SERIOUS INJUSTICES? 34–35 (2003).

2. *Id.* at 84.

3. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 39–40 (1995).

4. Thomas W. Simon, *Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo*, 40 GA. J. INT’L & COMPAR. L. 105, 108 (2011).

5. *Id.*

6. See generally Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST. ANTHONY’S INT’L REV. 37, 37 (2010) (arguing that the theory of remedial secession has

will investigate those positions in Part I to ascertain the extent to which remedial secession is a CIL norm. After concluding that remedial secession has not fully crystallized into CIL, Part II will first examine how climate change could erode the principle of territorial integrity, thereby leading to new interpretations of international law. Part II will then highlight how oppressed peoples could rely on recent climate jurisprudence to show that their human rights have been sufficiently violated by the parent state and fulfill a crucial remedial secession requirement. Finally, that Part explores the theoretical impact of these conceivable developments using relevant case studies from Kenya and Sri Lanka. This paper concludes that climate change has the potential to help remedial secession become a CIL norm and assist certain oppressed people pursue independence.

I. REMEDIAL SECESSION UNDER CUSTOMARY INTERNATIONAL LAW

There are several positions on the right to secede under international law: that people do or should have the right to secede (the permissive view);⁷ that people do not have the right to secede (the prohibitive view);⁸ and that the right to secede is neither legal nor illegal (the non-regulated view).⁹ The theory of remedial secession is a qualified right that represents another potential position best supported by CIL.¹⁰ Under Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), CIL norms are reflected in (1) the general practice of states (2) accepted by law (*opinio juris*).¹¹ Accordingly, the following discussion will examine relevant sources of international law, judicial decisions, and state practice to highlight how the right to remedial secession appears to be in a stage of development, or *de lege ferenda*.¹²

A. Friendly Relations Declaration

United Nations General Assembly (UNGA) declarations are soft-law instruments that are evidence of state practice and can also influence state

little foundation in international law and lacks state practice); DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION ix (2002) (discussing the right to secession under international law and practice).

7. See, e.g., David Gauthier, *Breaking Up: An Essay on Secession*, 24 CANADIAN J. PHIL. 357 (1994) (describing the normative view that peoples should have the right to secede).

8. JUAN FRANCISCO ESCUDERO ESPINOSA, SELF-DETERMINATION AND HUMANITARIAN SECESSION IN INTERNATIONAL LAW OF A GLOBALIZED WORLD: KOSOVO V. CRIMEA 38 (2017).

9. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 390 (2d ed. 2006).

10. See VAN DEN DRIEST, *supra* note 1, at 103 (discussing that a qualified right to unilateral secession does exist under contemporary international law standards).

11. U.N. Charter art. 38, ¶ 1.

12. See VAN DEN DRIEST, *supra* note 1, at 311 (discussing how the traces of the qualified right to remedial secession found in international law can be developed).

action.¹³ Although scholars have argued that several landmark declarations indicate a remedial right to secede,¹⁴ the theory is most closely associated with paragraph seven of Principle V of the Declaration on Principles of International Law Concerning Friendly Relations (Friendly Relations Declaration).¹⁵ UNGA unanimously adopted the Declaration in 1970 and two years later, the International Commission of Jurists heralded it as “the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity.”¹⁶ Otherwise known as the “Saving Clause,” it reads:

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.¹⁷

The Saving Clause has generated considerable academic debate. Proponents of the remedial secession theory rely on an inverse reading of the text to argue against the supremacy of the principle of territorial integrity,¹⁸ which is commonly viewed as a “significant limitation” on the ability of peoples to secede.¹⁹ Under this interpretation, the principle of territorial integrity will prevail over the right to self-determination only if the parent state has a government that represents all of its citizens “without distinction

13. *See id.* at 194 (explaining how documents without binding legal force, such as governmental declarations, reflect State practice).

14. Miriam McKenna argues that the reference to “alien subjugation, domination and exploitation” in the Declaration on the Granting of Independence to Colonial Countries and Peoples “presupposes a certain remedial quality inherent in decolonisation” because it “links the furtherance of independence with the breach of a people’s self-determination under colonial regimes, and can therefore seem analogous to the case for remedial secession.” Miriam McKenna, *Remedial Secession: Emerging Right or Hollow Rhetoric?* 23 (2010) (Master thesis, University of Copenhagen) (on file with Lund University). Antonio Cassese recognizes—but ultimately refutes—the temptation to read Article 1 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (which are identical) together with Article 27 of the ICCPR such that the provisions are interpreted “cumulative[ly],” thereby granting minorities the ability to “free themselves” from sovereign states. CASSESE, *supra* note 3, at 61.

15. G.A. Res 2625 (XXV), at 124 (Oct. 24, 1970).

16. INT’L COMM’N JURISTS, EAST PAKISTAN STAFF STUDY 44 (1972).

17. G.A. Res. 2625, *supra* note 15.

18. The principle of territorial integrity states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, ¶ 4.

19. CRAWFORD, *supra* note 9, at 390.

as to race, creed[,] or colour.”²⁰ Conversely, Katherine Del Mar posits that the entire purpose of the Saving Clause is to “safeguard the territorial integrity of States.”²¹ Other scholars, including James Crawford and Karl Doehring, assert that the Saving Clause represents evidence of a qualified right to secede under international law.²² As the following subsection will illustrate, this discourse has occasionally made its way into judicial decisions as *obiter dictum*.²³

B. Judicial Decisions

Judicial opinions are examples of *opinio juris* and can therefore help determine whether remedial secession is a CIL norm.²⁴ The following case law reveals various degrees of acknowledgment of a remedial right to secede as a last resort, provided the parent state denies a people’s internal self-determination and commits flagrant human rights abuses against them. However, no independence movement has succeeded under the theory in any judicial system, and there remains little clarity as to the specific threshold of human rights abuse that would implicate a remedial right to secede.²⁵

1. League of Nations

The idea that an oppressed people could have a right to secede under international law was first examined in the 1920 *Åland Islands* case.²⁶ The

20. Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENVER J. INT’L L. & POL’Y 373, 382 (2003) (quoting G.A. Res. 2625 (XXV), at 124 (Oct. 24, 1970)). Interestingly, a virtually identical clause was included in the 1993 Vienna Declaration and Programme of Action, save for the omission of the phrase “race, creed, or colour.” See World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 2, U.N. Doc. A/Conf.157/23 (June 25, 1993). The Vienna Declaration’s status as a policy document means that it is not legally binding, but the fact that it was adopted by all UN member states indicates that “distinctions based on religion, ethnicity, language or other factors” could help “trigger the right to secede” for oppressed peoples. Scharf, *supra* note 20. Note that the UN has also referenced remedial secession in the 1993 Report of the Rapporteur to the U.N. Sub-Commission Against the Discrimination and the Protection of Minorities on Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, and General Recommendation XXI, which was adopted by the Committee on the Elimination of Racial Discrimination in 1996. Scharf, *supra*.

21. KATHERINE DEL MAR, *THE MYTH OF REMEDIAL SECESSION*, in *STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW* 94 (Duncan French ed., 2013).

22. *Id.* at 93.

23. *Obiter dictum* refers to language in a judicial decision that is not central to the holding of the case. Although it is not legally binding, courts can still rely on the language as persuasive authority in other legal disputes. *obiter dictum*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/obiter_dictum.

24. VAN DEN DRIEST, *supra* note 1, at 203.

25. Vidmar, *supra* note 6, at 40.

26. See Milena Sterio, *On the Right to External Self-Determination: “Selfistans,” Succession, and the Great Powers’ Rule*, 19 MINN. J. INT’L L. 137, 143 (2010) (discussing the origin of remedial secession through the *Åland Islands* case).

dispute focused on the Swedish-speaking Ålanders' efforts to secede from Finland and become part of Sweden based on the principle of self-determination.²⁷ The Commission of Rapporteurs, who were appointed by the League of Nations to oversee the case, noted that "separation"²⁸ might be justified when a people can no longer preserve their language, religion, and culture within the parent state:

The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as *an altogether exceptional solution*, a last resort when the State lacks the will or the power to enact and apply just and effective guarantees.²⁹

Over the last century, the development of international law and evolving jurisprudence on secession has led to a rediscovery of sorts for the *Åland Islands* case, with the dictum above serving as evidence that "remedial secession has always constituted part of the right of ('external') self-determination."³⁰

2. Supreme Court of Canada

After Quebec held a secession referendum in 1995, the Supreme Court of Canada examined, *inter alia*, whether there is a right to unilateral secession under international law in *Reference re Secession of Quebec*.³¹ The Court pointed out that self-determination is "normally fulfilled" internally,³² but a right to external self-determination can still arise in "the most extreme of cases."³³ Such cases include (1) colonial people under "imperial" rule;³⁴ (2) "people subject to alien subjugation, domination or exploitation outside a colonial context;"³⁵ and, potentially, (3) "when a people is blocked from the meaningful exercise of its right to self-determination internally."³⁶ (Even

27. Report Presented to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc B.7.21/68/106 (1921).

28. *Id.* at 4.

29. *Id.* (emphasis added). This bit of dicta was not relevant to the dispute since Finland provided "satisfactory guarantees" regarding the preservation of the Ålanders' heritage, *id.* at 5.

30. DEL MAR, *supra* note 21, at 92.

31. *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 (Can.).

32. *Id.* ¶ 126. External self-determination refers to the right of a people to separate from an existing state to form a new independent state, while internal self-determination refers to a people's ability to exercise their rights within the existing state. *See also* Sterio, *supra* note 26, at 145 (discussing the Canadian Supreme Court's analysis of whether Quebec had the right to secede from Canada).

33. *Id.*

34. *Id.* ¶ 132.

35. *Id.* ¶ 133.

36. *Id.* ¶ 134.

then, the right arises only as “as a last resort.”³⁷). The Court noted that the remedial third scenario “parallels” the first two but emphasized that it “remains unclear” whether it “actually reflects an established international law standard” and declined to elaborate since the facts had not “approach[ed] such a threshold.”³⁸

The Court’s willingness to at least consider remedial secession has generated considerable scholarly discussion based on the assumption that if Canada had “denied [the Québécois] any such right of democratic self-government and respect for human rights, unilateral secession from Canada would have been permissible under international law.”³⁹ Such optimism, which relies heavily on dicta, should be somewhat tempered as the decision does not identify facts that would justify unilateral secession or seriously analyze the relevant international law. Even if the Court had done so, it would only have persuasive weight in the international legal system as a domestic court decision.

3. African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights (ACHPR) indicated that remedial secession may be possible in *Katangese Peoples’ Congress v. Zaire*.⁴⁰ In that dispute, the President of the Katangese Peoples’ Congress sought the Commission’s support for its secessionist movement. The movement was based on a violation of the right to self-determination under Article 20 of the African Charter on Human and Peoples’ Rights (Banjul Charter).⁴¹ The President, however, failed to offer evidence that the Katangese qualified as a people, that Zaire had committed severe human rights violations against them, or had frustrated their right to internal self-determination.⁴² Accordingly, the Commission held the following:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination

37. *Id.*

38. *Id.* ¶ 135.

39. Scharf, *supra* note 20, at 383.

40. *See Katangese Peoples’ Congress v. Zaire*, Afr. Comm’n on Hum. & Peoples’ Rts., Commc’n No. 75/92, ¶ 3 (1995) (describing the independence and possible secession of Katanga under the African Charter on Human and Peoples’ Rights).

41. *Id.* ¶¶ 1, 2.

42. *Id.* ¶¶ 3, 6.

that is compatible with the sovereignty and territorial integrity of Zaire.⁴³

The above passage notably mirrors the Saving Clause and thus highlights the notion that remedial secession could be supported under international law in the presence of severe human rights violations and a lack of internal self-determination. Moreover, the fact that the Commission includes this language seemingly *sua sponte* underscores the tantalizing potential of the theory for aggrieved people.

In 2003, the ACHPR reinforced this jurisprudence in *Kevin Mgwanga Gunme v. Cameroon*, which was filed by 14 individuals on behalf of the Southern Cameroon people.⁴⁴ The applicants argued that a 1961 UN plebiscite denied the possibility of an independent Southern Cameroon and thereby violated their right to self-determination.⁴⁵ Although the Commission recognized the Southern Cameroonians as a “people,”⁴⁶ their secession would only be justified if they were able to “meet the test set out in the *Katanga* case.”⁴⁷ As in *Katanga*, this was not possible since the applicants did not demonstrate proof of a “massive violation of human rights” or the denial of their right to internal self-determination.⁴⁸ Despite its holding, *Mgwanga Gunme* remains significant because the Commission “showed some traces of a qualified right to unilateral secession” and “recognized the existence of such a right with more conviction” than in *Katanga* through its “positive phraseology.”⁴⁹

4. International Court of Justice

The most recent case relevant to this discussion is the ICJ Advisory Opinion on Kosovo’s 2008 unilateral declaration of independence.⁵⁰ Many scholars anticipated that this opinion would definitively shed light on the uncertain criteria of remedial secession, particularly since the Kosovar Albanians seemingly fulfilled the theoretical requirements based on the “grave humanitarian situation”⁵¹ they suffered at the hands of Yugoslav

43. *Id.* ¶ 6.

44. *Kevin Mgwanga Gunme v. Cameroon*, Afr. Comm’n on Hum. & Peoples’ Rts., Commc’n No. 266/03, ¶ 1 (2009).

45. *Id.* ¶ 3.

46. *Id.* ¶ 179.

47. *Id.* ¶ 194.

48. *Id.* ¶ 199.

49. VAN DEN DRIEST, *supra* note 1, at 140.

50. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep 2010 [hereinafter Kosovo Advisory Opinion].

51. *Id.* ¶ 58.

forces during the Kosovo War.⁵² The ICJ instead took up the “narrow and specific”⁵³ question of whether Kosovo’s declaration of independence was in accordance with international law, rather than considering if international law confers upon people a positive right to secede.⁵⁴

Despite the limited scope of the ICJ’s majority opinion, the separate opinions of Judges Abdulqawi Yusuf and Antônio Augusto Cançado Trindade acknowledge the relevance of remedial secession to the Kosovo situation (and others like it). Judge Yusuf declared that in “exceptional circumstances”—such as when people are subjected to “discrimination, persecution and egregious violations of human rights or humanitarian law”—the right to self-determination “may support a claim to separate statehood provided it meets the conditions prescribed by international law.”⁵⁵ Judge Yusuf then cited the Saving Clause and the *Katanga* and *Quebec* decisions for support.⁵⁶ However, his remedial secession discussion remains largely speculative since he did not elaborate on whether the Kosovar Albanians’ experience (or other instances of historical oppression) would satisfy the requirements for such “exceptional circumstances.”⁵⁷

Judge Trindade’s separate opinion similarly calls for a flexible version of contemporary international law that could accommodate a right to remedial secession.⁵⁸ According to him, the principle of self-determination currently faces “new and violent manifestations of systematic oppression of peoples.”⁵⁹ To Judge Trindade, it is “immaterial” whether “self-determination is given the qualification of “remedial” or some other title.⁶⁰ Rather, tyrannical states should not be able to simply “invoke territorial integrity in order to commit atrocities” against peoples or “perpetrate them on the assumption of State sovereignty.”⁶¹

C. State Practice

The above case law indicates limited support for the right to remedial secession and a lack of clarity regarding the precise type and intensity of

52. See HUM. RTS. WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO 3 (2001) (reporting the human rights abuses committed by Yugoslav forces against Kosovar Albanians in 1999).

53. Kosovo Advisory Opinion, ¶ 51.

54. The ICJ held by a ten-to-four vote that the declaration did not violate international law, *id.* ¶ 123.

55. Kosovo Advisory Opinion, Separate Opinion of Judge Abdulqawi Yusuf, ¶ 11.

56. *Id.* ¶¶ 12, 14–15.

57. *Id.* ¶ 11.

58. Kosovo Advisory Opinion, Separate Opinion of Judge Antônio Augusto Cançado Trindade at ¶ 175.

59. *Id.*

60. *Id.*

61. *Id.* ¶ 176.

human rights violations that a people must suffer to properly invoke it. Accordingly, the next step is to consider whether remedial secession is supported by state practice. The international community has historically been unkind to secessionist movements, which have received “virtually no international support or recognition” when the parent state maintains its opposition to secession.⁶² Nevertheless, the outlier experiences of oppressed peoples in Bangladesh, Croatia, and Kosovo are particularly relevant given that they seemingly satisfied the criteria for remedial secession and attracted widespread support from the international community.

1. Bangladesh

The 1971 creation of Bangladesh most closely “demonstrates a model case for what a remedial right to secession should have looked like.”⁶³ After Pakistan gained independence from India in 1947, the state divided into East and West Pakistan.⁶⁴ In the following decades, the Bengali majority in East Pakistan was severely underrepresented in the military and government, forced to speak the Urdu language, and denied access to economic resources.⁶⁵ In December 1970, the Awami League, a pro-autonomy Bengali party, secured an absolute majority of the National Assembly.⁶⁶ This prompted West Pakistan to annul the general election and install martial law in East Pakistan.⁶⁷ Military forces subsequently killed millions of Bengalis, and 10 million refugees fled to India.⁶⁸ In an apparent act of last resort, the Awami League declared Bangladesh’s independence in April 1971.⁶⁹ On December 3, 1971, India’s armed forces directly intervened.⁷⁰ The international community quickly acknowledged Bangladesh after a December 17 ceasefire.⁷¹ By September 1973, over 100 states granted Bangladesh recognition, and the UN admitted the state in 1974.⁷²

Given the obvious denial of the Bengalis’ internal self-determination and the significant human rights violations they suffered, it is not difficult “to characterize the secession of East Pakistan as the most convincing instance

62. James Crawford, *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT’L L. 85, 108 (1999).

63. Simon, *supra* note 4, at 139.

64. CRAWFORD, *supra* note 9, at 140.

65. Simon, *supra* note 4, at 139.

66. CRAWFORD, *supra* note 9, at 139–40.

67. *Id.*

68. Simon, *supra* note 4, at 139–40.

69. *Id.*

70. CRAWFORD, *supra* note 9, at 141.

71. Rokas Levinskas, *Whether There Is a Right to Remedial Secession Under International Law?*, 20 TEISES APZVALGA L. REV. 44, 52 (2019).

72. *Id.*

of state practice in favour of a remedial right to secession.”⁷³ One could then argue that “the more a situation resembles the plight of East Pakistan, the stronger its case for secession.”⁷⁴ However, Bangladesh was not presented as a secession at the time. Accordingly, there are dangers in using it as an *ex post facto* model.⁷⁵ Another established perspective interprets the creation of Bangladesh as a *fait accompli*, which states “had no alternative but to accept” in the wake of India’s intervention.⁷⁶ The fact that most states only recognized Bangladesh *after* Pakistan, and not following earlier reports of human rights abuse, further supports this position.⁷⁷

2. Croatia

The case of Croatia parallels Bangladesh and indicates that, with respect to the requirements of remedial secession, the threshold level of human rights abuse may be lower than the extreme harm suffered by the Bengalis in East Pakistan.⁷⁸ Croatia was one of six republics, along with Slovenia, Serbia, Bosnia-Herzegovina, Macedonia, and Montenegro, that comprised the Socialist Federal Republic of Yugoslavia (SFRY) and shared power in a rotating presidency.⁷⁹ In June 1991, Croatia and Slovenia declared independence after Serbia blocked the installation of Croatia’s presidential candidate.⁸⁰ As tensions flared and the Serb-dominated Yugoslav National Army (YNA) invaded both territories, the European Community (EC) intervened, negotiating a ceasefire as well as the postponement of independence declarations under the Brioni Accord.⁸¹ Still, a civil war erupted in which Serbia carried out a political coup and the YNA engaged in an ethnic cleansing campaign against the Croats.⁸² After the three-month moratorium ended, Croatia and Slovenia again declared independence (seemingly as a last resort), followed by Macedonia and Bosnia-Herzegovina.⁸³

73. Tamara Jaber, *A Case for Kosovo? Self-Determination and Secession in the 21st Century*, 15 INT’L J. HUM. RTS. 926, 939 (2010).

74. Simon, *supra* note 4, at 140.

75. *See id.* (arguing that Bangladesh represents a “factual precedent—a kind of situation where the international community should have recognized a legal right to secession”).

76. CRAWFORD, *supra* note 9, at 393.

77. VAN DEN DRIEST, *supra* note 1, at 278.

78. McKenna, *supra* note 14, at 44.

79. Jaber, *supra* note 73, at 937.

80. VAN DEN DRIEST, *supra* note 1, at 285. Slovenia is not presented as a case study as its secession was “more equivocal” given that the SFRY “may be said to have acquiesced in its separation,” *id.* at 287.

81. *Id.* at 285.

82. *Id.*

83. *Id.* at 286.

The EC ultimately appointed the Badinter Arbitration Commission (Commission) to provide legal advice on the crisis.⁸⁴ In Opinion No. 1, the Commission seemingly supported the remedial secession theory by noting that the SFRY “no longer [met] the criteria of participation and representatives inherent in a federal state.”⁸⁵ However, the Commission concluded that the SFRY was “in the process of dissolution.”⁸⁶ As such, opponents of the remedial secession theory maintain that “Croatia’s claim to remedial secession was not explicitly accepted by the international community.”⁸⁷

Although dissolution is legally separate from secession, “it is exceedingly difficult to maintain” this distinction in practice,⁸⁸ especially when dissolution originates from a series of unilateral secession attempts. The timeline of events is also relevant here: the EC granted Croatia recognition in January 1992,⁸⁹ but Serbia and Montenegro were not established as a state (the Federal Republic of Yugoslavia) until April 1992, and the SFRY’s dissolution was not final until July 1992.⁹⁰ Therefore, the recognition of Croatia by a significant number of states before the SFRY’s complete disintegration, all while the SFRY actively resisted such independence efforts “suggests that recognition could have been extended on the basis of the validity of Croatia’s secession according to the remedial criteria.”⁹¹ However, similar to the case of Bangladesh, the contention that the irreversible nature of the SFRY’s dissolution led to early international support for Croatia counters this perspective. The fact that the UN did not admit Croatia until after Serbia and Montenegro announced their willingness to recognize it as a new state further supports this notion.⁹²

3. Kosovo

The recent case of Kosovo also provides evidence of state practice supporting a right to remedial secession. As described earlier, Kosovar Albanians experienced a denial of their internal self-determination and endured an ethnic cleansing campaign in the late 1990s.⁹³ Kosovo is

84. Jaber, *supra* note 73, at 938.

85. E.C. Conference on Yugoslavia, Arbitration Commission, Opinion No. 1, ¶ 2(b), 92 I.L.R. 162, (Nov. 29, 1991).

86. *Id.* ¶ 3.

87. Vidmar, *supra* note 6, at 47.

88. Jaber, *supra* note 73, at 938.

89. *Id.*

90. *Id.* at 939.

91. *Id.*

92. CRAWFORD, *supra* note 9, at 401.

93. HUM. RTS. WATCH, *supra* note 52, at 3.

currently recognized by close to 100 countries,⁹⁴ with many states seemingly basing their recognition on remedial secession factors.⁹⁵ For example, the United States and the United Kingdom both referenced the human rights crisis in Kosovo and the failure of negotiations with Serbia in their written ICJ submissions.⁹⁶ Although some states argued that Kosovo's unique, or *sui generis*, nature prevents it from serving as a precedent,⁹⁷ this stance goes against the idea that international law should be applied equally to accommodate paradox and avoid "blatant unfairness."⁹⁸

The arguments against Kosovo serving as a remedial secession model vary. One position is that it did not secede as a matter of last resort.⁹⁹ This is supported by the fact that the 2008 declaration of independence occurred roughly a decade after the Kosovo War and at a time when there was no human rights crisis.¹⁰⁰ Some states, like Russia, have also argued that the conflict could have been resolved internally, but for Kosovo's insistence on independence during negotiations.¹⁰¹ Interestingly, this perspective could point to the existence of *opinio juris*, as "one of the fundamental divergences of opinion seems to rest on whether an essential criterion of a right to remedial secession—whether it was invoked as a last resort—has been satisfied."¹⁰² Finally, other critics maintain that Kosovo does not have the ability to enter relationships with other nations due to the continued presence of the UN Interim Administration Mission in Kosovo Force and thus fails to meet the criteria for statehood under the Montevideo Convention on the Rights and Duties of States.¹⁰³

II. CLIMATE CHANGE AND ITS POTENTIAL IMPACT ON REMEDIAL SECESSION

As the above section illustrates, international law provides limited support for remedial secession. Nevertheless, evolving jurisprudence on the subject, combined with notable evidence of state practice—particularly with respect to the broad recognition of Kosovo's independence—indicates some

94. *Countries that Recognize Kosovo 2023*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/country-rankings/countries-that-recognize-kosovo> (last visited Oct. 20, 2023).

95. Jaber, *supra* note 73, at 942.

96. *Id.*

97. VAN DEN DRIEST, *supra* note 1, at 261.

98. THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 160 (1995).

99. Vidmar, *supra* note 6, at 49, 50.

100. *Id.* at 49.

101. Jaber, *supra* note 73, at 942.

102. *Id.*

103. See Upendra Acharya, *ICJ's Kosovo Decision: Economical Reasoning of Law and Question of Legitimacy of the Court*, 12 CHIC-KENT J. INT'L & COMP. L. 1, 26 (2012) (explaining why Kosovo does not meet the requisite requirements to achieve statehood).

momentum towards the development of a CIL norm. Against this backdrop, climate change will inevitably confront the ability of people across the globe to realize their rights to self-determination.¹⁰⁴ The remainder of this paper will focus on an intriguing sub-issue: how climate change could represent the paradigm shift necessary to help remedial secession crystallize into law.

A. Principle of Territorial Integrity

This paper has emphasized that the principle of territorial integrity represents a significant impediment to remedial secession. However, that may no longer be the case in the future as state borders shift or vanish entirely due to climate change.¹⁰⁵ Climate-induced sea level rise will seriously affect about 70% of the world's coastlines,¹⁰⁶ especially small island states like Kiribati, Tuvalu, and the Maldives, which will likely disappear within decades.¹⁰⁷ These developments could conceivably “challenge the principle of territorial integrity” and raise serious questions regarding sovereignty and statehood.¹⁰⁸ Accordingly, the interpretation of international law under such novel conditions will demand “open-mindedness” and “flexibility” from the international community.¹⁰⁹

The potential evolution of the territorial integrity principle could play an important part in helping remedial secession develop into a CIL norm. For instance, judges and states may consider territorial integrity from a more nuanced perspective and realize that borders have historically “changed hands innumerable times.”¹¹⁰ Even today, minor territorial shifts occur regularly in contested areas but fail to capture global attention.¹¹¹ It is thereby possible that courts adjudicating remedial secession issues—particularly in jurisdictions impacted by sea level rise—will give less weight to the principle, which would likely move jurisprudence more favorably towards

104. *Understanding Human Rights and Climate Change*, OFF. U.N. HIGH COMM'R HUM. RTS., UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE 1, 14 (2015), <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf>.

105. See Mark P. Nevitt, *On Environmental, Climate Change & National Security Law*, 44 HARV. ENV'T L. REV. 321, 348 (2020) (discussing how climate change threatens territorial integrity and state sovereignty).

106. JANE MCADAM ET AL., INTERNATIONAL LAW AND SEA-LEVEL RISE: FORCED MIGRATION AND HUMAN RIGHTS 5–6 (2016).

107. Joachim Wündisch, *Territorial Loss as a Challenge for World Governance*, 48 PHIL. PAPERS 155, 156 (2019).

108. Eleanor Doig, *What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?*, 21 TILBURG L. REV. 72, 86 (2016).

109. *Id.* at 93.

110. Nick Routley, *Animation: How the European Map Has Changed Over 2,400 Years*, VISUAL CAPITALIST (Oct. 28, 2021), www.visualcapitalist.com/2400-years-of-european-history.

111. See Cathrine Brun, *Living with Shifting Borders: Peripheralisation and the Production of Invisibility*, 24 GEOPOLITICS 878, 879 (2019) (discussing a geopolitical practice of gradual shifts in borders that largely go unnoticed by the general public).

claimants. Should the territorial integrity principle weaken, the international community may be more inclined to sympathize with oppressed peoples and recognize new states created under a remedial theory.

Conversely, as the above section revealed, state recognition is heavily influenced by geopolitical factors, and the more closely a secession attempt seems likely to cause significant international conflict, the more likely it will fail.¹¹² Climate change will not only decrease the planet's habitable territory, it will also cultivate numerous socio-political issues, such as food and water scarcity, transnational migration, and internal displacement.¹¹³ These developments will collectively test states' "capacity to govern"¹¹⁴ and "increase risks of violent conflicts in the form of civil war and inter-group violence."¹¹⁵ Amidst this uncertainty, states may be more hesitant to recognize remedial secession attempts and crystallize a CIL norm that could pose a threat to their existence.

B. Climate Litigation and Human Rights

Recent climate litigation developments also have the capacity to help remedial secession become a CIL norm. Since 2015, there have been over 2,000 climate-related cases, 25% of which were filed between 2020 and 2022.¹¹⁶ Domestic courts worldwide have held states accountable for ineffective climate policies and fossil fuel expansion and are increasingly recognizing the ties between climate change and human rights.¹¹⁷ This trend is expected to intensify because courts appear to be more willing to assign liability to states based in part on attribution science, which is "rapidly advancing"¹¹⁸ to the point where national emissions can be reasonably linked to global greenhouse gas (GHG) increases and their effects.¹¹⁹

Several landmark cases illustrate how climate litigation is relevant to remedial secession with respect to human rights. In *Urgenda Foundation v. State of the Netherlands*, the Supreme Court of the Netherlands upheld a

112. McKenna, *supra* note 14, at 64.

113. Nevitt, *supra* note 105, at 332.

114. MCADAM ET AL., *supra* note 106, at 43.

115. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE WORKING GROUP II, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY 1, 3 (2014), www.ipcc.ch/site/assets/uploads/2018/03/WGIIAR5_SPM_Top_Level_Findings-1.pdf.

116. JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2022 SNAPSHOT I (2022).

117. *Id.* at 3–4.

118. Chelsea Harvey, *Attribution Science Linking Warming to Disasters Is Rapidly Advancing*, SCI. AM. (June 3, 2022), www.scientificamerican.com/article/attribution-science-linking-warming-to-disasters-is-rapidly-advancing/.

119. See *Source Attribution*, CLIMATE ATTRIBUTION (2022), <https://climateattribution.org/attribution/source/> (describing how attribution science helps trace a quantity of GHG emissions to a given source).

lower court ruling that required a state for the first time to reduce its GHG emissions to preserve its citizens' rights under Articles 2 (the right to life) and 8 (the right to respect for private and family life) of the European Convention on Human Rights (ECHR).¹²⁰ Likewise, the German Constitutional Court in *Neubauer v. Germany* held that the country's Federal Climate Protection Act violated the constitutionally protected human rights of future generations.¹²¹ Finally, in *PSB v. Brazil*, the Supreme Federal Court of Brazil became the world's first court to recognize the Paris Agreement as a human rights treaty.¹²² In doing so, the Court established that "there is no legally valid option of simply omitting to combat climate change."¹²³

If domestic climate policies can violate human rights, these policies are directly relevant to the remedial secession requirement that a people suffer egregious human rights violations attributed to the parent state. Combined with the prospect of a less authoritative territorial integrity principle, climate jurisprudence may soon compel more states to recognize remedial secession efforts. For instance, a secessionist unit hoping to prevail under such a theory in court could rely on climate jurisprudence and point to climate-related harms to bolster its claims against the parent state. The slate of pending climate cases at the European Court of Human Rights,¹²⁴ and advisory opinions at the ICJ, Inter-American Court of Human Rights,¹²⁵ and the International Tribunal for the Law of the Sea regarding state climate change obligations, may also strengthen the existing connection between human rights and climate change under international law. This jurisprudence may potentially apply in the remedial secession context and should be monitored closely for relevant supporting language.

120. See *Urgenda Found. v. State of the Neth.*, ECLI:NL:HR:2019:2007, Judgment (Dec. 20, 2019) (Neth.) (discussing the Netherlands' Supreme Court landmark ruling using the ECHR's Articles 2 and 8 requiring a state to reduce GHG emissions to preserve its citizens' rights).

121. *Neubauer v. Ger.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, ¶ 192, Mar. 24, 2021 (Ger.). The claimants based their case on Articles 2 and 8 of the ECHR, with the Court acknowledging the positive obligations placed upon the State. It nevertheless observed that the ECHR "does not lead to protection of greater scope than that afforded" under the German constitution, *id.* at ¶ 147.

122. Isabella Kaminski, *Brazilian Court World's First to Recognise Paris Agreement as Human Rights Treaty*, CLIMATE HOME NEWS (July 7, 2022), www.climatechangenews.com/2022/07/07/brazilian-court-worlds-first-to-recognise-paris-agreement-as-human-rights-treaty/.

123. *PSB v. Brazil*, S.T.F.J. ADPF 708, ¶ 17, July 1, 2022 (Braz.)

124. Helen Keller & Corina Heri, *The Future is Now: Climate Cases Before the ECtHR*, 40 NORDIC J. HUM. RTS. 153, 154 (2022).

125. Juan Auz & Thalia Viveros-Uehara, *Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights*, EJIL: TALK! (Mar. 2, 2023), <https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/>.

C. Case Studies

The following case studies illustrate how climate change could help aggrieved peoples realize a claim of remedial secession. The first case study examines Kenya's Endorois tribe, which gained scholarly attention after a landmark ACHPR decision in 2010.¹²⁶ This case study is relevant to the present discussion given the qualified support for remedial secession in the *Katanga* and *Mgwanga Gunme* opinions. The second case study considers Sri Lanka's Tamils, who endured a situation notably similar to the Bengalis in East Pakistan but failed to capture international support for their secession campaign.¹²⁷

1. Endorois

The Endorois represent an intriguing case study for remedial secession in Africa based on judicially recognized abuses. In the 1970s, the Kenyan government evicted the Endorois from the Lake Bogoria and the Monchongoi Forest areas to make way for lucrative tourism development.¹²⁸ The ACHPR ruled in 2010 that this eviction violated the Endorois' human rights under Articles 8, 14, 17, 21, and 22 of the Banjul Charter.¹²⁹ The Commission acknowledged the Endorois as a distinct "people"¹³⁰ with a way of life that is "intimately intertwined" with their ancestral lands.¹³¹ Without access to this resource-rich area, the Commission reasoned that the Endorois are "unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors."¹³²

Although Indigenous peoples such as the Endorois are not often interested in external self-determination, Kenya has a strong history of secessionist discourse, dating from the eve of its independence to the present.¹³³ Over 12 years have passed since the ACHPR decision, and the government has yet to compensate the Endorois or provide them with unrestricted access to their ancestral lands pursuant to the Commission's

126. Centre Minority Rts. Dev. ex rel. Endorois Welfare Council v. Kenya, Afr. Comm'n on Hum. & Peoples' Rts., Comm'n No. 276/03 (2010) [hereinafter Endorois case].

127. ESPINOSA, *supra* note 8, at 38.

128. Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 THE AM. J. INT'L L. 60, 78-79 (2011).

129. Endorois case at ¶ 22.

130. *Id.* at ¶ 162.

131. *Id.* at ¶ 156.

132. *Id.*

133. See Reginald M.J. Oduor, *The Right to Secession in the Kenyan Context: Philosophical Reflections, with Special Reference to Non-Dominant Ethnic Groups*, POLITIKA 2 (2019), www.politika.io/en/notice/the-right-to-secession-in-the-kenyan-context-philosophical-reflections-with-special (pointing out Kenya's long history of engaging in secessionist discourse).

recommendations.¹³⁴ As a result, the Endorois live in “desolate and . . . extreme poverty,” and it is therefore not inconceivable that they would consider remedial secession as a last resort.¹³⁵

If the Endorois were to contemplate this pathway to independence, the injustices stemming from their displacement and continued government inaction may not be enough to meet the uncertain oppression criteria mentioned in *Katanga* and reaffirmed in *Mgwanga Gunme*. However, a consideration of recent climate change impacts would certainly push the Endorois closer to that threshold. For example, climate change has resulted in an alarming expansion of Lake Bogoria that has devastated villages, roads, schools, fish-handling facilities, arable land, prayer sites, and clean water springs.¹³⁶ This destruction has also caused the spread of deadly diseases such as visceral leishmaniasis, schistosomiasis, typhoid, malaria, and cholera.¹³⁷ Because rising lake waters have affected the area’s only healthcare dispensary, the Endorois must now walk several kilometers “to access even basic medicine,”¹³⁸ and as far as 24 kilometers to fetch water.¹³⁹ Such devastating climate impacts “cut across all the sectors of [Endorois] society”¹⁴⁰ and, accordingly, would be useful in any push for remedial secession.

There are nevertheless significant hurdles in the way of Endorois independence. First, it is unclear how the international community would perceive the climate effects endured by the Endorois given that analogous harms caused by soaring GHG emissions are expected to rise exponentially across the globe.¹⁴¹ Second, the tribe would need to establish that Kenya has sufficiently frustrated its right to internal self-determination. This is

134. See Nyang’ori Ohenjo, *Implement Endorois Decision 276/03: Report on the Impact of Non-Implementation of the African Commission’s Endorois Decision*, CTR. FOR MINORITY RTS DEV. 1–2 (Mar. 2022), <https://www.witness.org/wp-content/uploads/2022/04/Endorois-Report.pdf> (discussing how the Commission’s recommendations have never been fully implemented or realized for the Endorois people).

135. *New: Report on the Impact of Non-Implementation of the African Commission’s Endorois Decision*, WITNESS, <https://www.witness.org/our-work/regional-programs/africa/endorois-report/> (last visited Oct. 21, 2023).

136. See Melvine Anyango Otieno & Raphael Kimosop, *Climate Change Adaptation and Health by the Indigenous Community from Lake Bogoria, Kenya: An Interview with Raphael Kimosop*, PLANETARY HEALTH ALL. (June 13, 2022), <https://phalliance.medium.com/climate-change-adaptation-and-health-by-the-indigenous-community-from-lake-bogoria-kenya-an-7d5ad3c3930d> (describing the myriad of activities around Lake Bogoria that have been disrupted due to climate change).

137. *Id.*

138. Billy Rwothungeyo, *Climate-Linked Lake Rise Frustrates Indigenous Endorois Health Volunteers*, MINORITY RTS. GRP. (Sept. 6, 2022), <https://minorityrights.org/2022/09/06/climate-endorois>.

139. WITNESS, *supra* note 135.

140. Indigenous Rts. Radio, *Carson Kiburo on the Impact of Climate Change on the Endorois Peoples of Kenya*, CULTURAL SURVIVAL, at 4:28, (Nov. 2021), <https://rights.culturalsurvival.org/carson-kiburo-impact-climate-change-endorois-peoples-kenya>.

141. Nevitt, *supra* note 105, at 329. 105

complicated by the 2013 election of Grace Kipchoim as Minister of Parliament for the Baringo South constituency—the first Endorois member to hold the seat.¹⁴² The Endorois would likely need to argue that the 2014 task force dedicated to implementing the ACHPR ruling—which was not required to consult with the Indigenous community and did not contain a tribal representative—amounts to a denial of their internal self-determination.¹⁴³ This is not a far-fetched position if one recognizes that access to their ancestral lands is essential to the Endorois' survival.

Third, although climate change jurisprudence would help the Endorois make a more compelling case for remedial secession, any climate harms would need to be linked to the parent state. This argument would be weakened by the fact that Kenya has established a “robust legal and institutional framework to tackle matters relating to climate change.”¹⁴⁴ Accordingly, Kenya could argue that its development of the framework constitutes sufficient climate action and that any subsequent climate harms were not deliberate. The Endorois, however, could then point to the “significant” implementation problems that Kenya has had, which represent a “major threat” to the country’s climate ambitions and suggest that such policies are merely superficial in nature.¹⁴⁵

Finally, even if the Endorois were to put forth a convincing argument for remedial secession, their independence would likely have to conform to the principle of *uti possidetis juris*, which requires new states to uphold former colonial borders.¹⁴⁶ Despite scholarly debate regarding the extent to which *uti possidetis juris* applies to post-decolonization independence scenarios,¹⁴⁷ the principle has historically been relevant to African pan-independence.¹⁴⁸ The Endorois would thus have the difficult task of arguing that the principle is not pertinent in any push for secession.

2. Tamils

A case study of the Tamils represents a more likely candidate for remedial secession, given their prior independence efforts and Sri Lanka's

142. KTN News, *First Endorois Female MP Who Has Defied Odds*, YOUTUBE, at 0:57, (Mar. 24, 2013), www.youtube.com/watch?v=MAUfo7DsA-k.

143. *Kenya: Implementing 2010 Endorois Ruling*, HOUS. & LAND RTS. NETWORK: HABITAT INT'L COAL. (Sept. 29, 2014), www.hlrn.org/activitydetails.php?title=Kenya:-Implementing-2010-Endorois-Ruling&id=o3BqZQ==#.Y8pguOzP3a0.

144. Meissy Janet Naeku, *Climate Change Governance: An Analysis of the Climate Change Legal Regime in Kenya*, 22 ENV'T L. REV. 170, 182 (2020).

145. *Id.* at 183.

146. Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, 1986 I.C.J. Rep. ¶ 23 (Dec. 22) [hereinafter *Frontier Dispute*].

147. VAN DEN DRIEST, *supra* note 1, at 173–74.

148. *Frontier Dispute* at ¶ 25.

well-documented human rights abuses and denials of Tamil internal self-determination. After the country achieved independence from British rule in 1948, the Sinhalese majority entrenched themselves in high-ranking government positions, passed laws that prevented the minority Tamil people from practicing their language and culture, and limited their access to educational opportunities, government services, and public employment.¹⁴⁹ In response, the Tamils, who reside largely in the northern and eastern parts of the country, pushed for the creation of a separate state called Tamil Eelam.¹⁵⁰

The Liberation Tigers of Tamil Eelam eventually led the secessionist movement as the country fell into a civil war that officially lasted from 1983 to 2009.¹⁵¹ During that time, the Sri Lankan government killed roughly 70,000 to 140,000 Tamil civilians,¹⁵² while hundreds of thousands were internally displaced¹⁵³ or forced to flee the country as refugees.¹⁵⁴ After the war reached a bloody conclusion, some scholars posited that the alleged genocide, war crimes, and crimes against humanity suffered by the Tamils, combined with previous state denials of their internal self-determination, met the requirements for remedial secession.¹⁵⁵

Although the arguments in favor of remedial secession fell on deaf ears, Sri Lanka remains “as segregated as ever,”¹⁵⁶ and Tamils in the heavily militarized north and east regions continue to suffer many of the same abuses they endured throughout the civil war.¹⁵⁷ For instance, the country’s

149. See Nithyani Anandakugan, *The Sri Lankan Civil War and Its History, Revisited in 2020*, HARV. INT’L REV. (Aug. 31, 2020), <https://hir.harvard.edu/sri-lankan-civil-war/> (explaining that these laws included the Sinhala Only Act and the policy of standardization).

150. *Id.*

151. *Id.*

152. Anji Manivannan, *Emerging Voices: Sri Lanka’s Tamils Need Genocide Recognition and Innovative Justice Mechanisms*, OPINIO JURIS (Aug. 15, 2019), <http://opiniojuris.org/2019/08/15/emerging-voices-sri-lankas-tamils-need-genocide-recognition-and-innovative-justice-mechanisms/>.

153. Sonia Sarkar, *Sri Lankan Muslims Struggle to Belong After Civil War ‘Still Outsiders’*, S. CHINA MORNING POST (Sept. 19, 2022), www.scmp.com/week-asia/politics/article/3192787/sri-lankan-muslims-struggle-belong-after-civil-war-still.

154. Graeme Hugo & Lakshman Dissanayake, *The Process of Sri Lankan Migration to Australia Focusing on Irregular Migrants Seeking Asylum*, in *A LONG WAY TO GO: IRREGULAR MIGRATION PATTERNS, PROCESSES, DRIVERS AND DECISION-MAKING* 197, 210 (Marie McAuliffe & Khalid Koser eds., 2017).

155. See Thamil Venthan Ananthavinayagan, *Dum Vivimus Vivamus. The Tamils in Sri Lanka: A Right to External Self-Determination?*, 2 PEACE HUM. RTS. GOVERNANCE 23, 43 (2018) (arguing the Tamils have a potential case to seek remedial secessions based on previous denials of self-determination); see also P. Sivakumaran, *Remedial Sovereignty*, SRI LANKA GUARDIAN (Oct. 10, 2011), www.srilankaguardian.org/2011/10/remedial-sovereignty.html (discussing the right under article 1 of the CCPR providing all people, including the Tamils, with the right to self-determination).

156. Hannah Ellis-Petersen, *Tamils Fear Prison and Torture in Sri Lanka, 13 Years After Civil War Ended*, THE GUARDIAN (Mar. 26, 2022), <https://www.theguardian.com/world/2022/mar/26/tamils-fear-prison-and-torture-in-sri-lanka-13-years-after-civil-war-ended>.

157. *Id.*

Prevention of Terrorism Act, which the European Parliament recently declared to be a breach of “human rights, democracy[,] and the rule of law,”¹⁵⁸ has subjected Tamils to abductions, torture, harassment, surveillance, land grabs, and lengthy imprisonments without evidence.¹⁵⁹ These facts indicate that, despite the official conclusion of the civil war, the “roots of the conflict remain unresolved” and remedial secession—should the Tamil people wish to pursue it—may be necessary as a last resort.¹⁶⁰ If that is the case, the Tamils could have an even stronger claim to remedial secession than Kosovo, which unilaterally declared its independence nearly a decade after the state-sanctioned ethnic cleansing campaigns had ended.¹⁶¹ Furthermore, the principle of *uti possidetis juris* may not be as significant of an impediment to secession as in the Endorois case, given that Sri Lanka is divided by province, with the Tamils representing a majority in the northern and eastern provinces.¹⁶²

Amidst Sri Lanka’s continuing human rights abuses, the alarming impacts of climate change could help the Tamils make a compelling argument for remedial secession. Before the civil war, the Tamils’ lack of political representation prevented them from generating the “support of their communities when natural disasters struck.”¹⁶³ This trend continues today,¹⁶⁴ and, as climate-induced extreme weather events have increasingly hit Sri Lanka, the overlap of these natural disasters and civil strife has caused “vast destruction”¹⁶⁵ on the Tamils’ food production infrastructure along the climate crisis “frontlines.”¹⁶⁶ The government has instead focused its attention on developing more profitable agriculture and service industries,¹⁶⁷ while investing heavily in oil and gas projects that will significantly increase the country’s GHG emissions.¹⁶⁸ Sri Lanka recently announced a multi-phase

158. *Id.*

159. *Id.*

160. *Id.*

161. See *supra* notes 156–60 and accompanying text for a discussion weighing the likelihood of success between the Tamils and Kosovo for using remedial secession as a last resort.

162. Ellis-Petersen, *supra* note 156.

163. Connor Lawrence, *Climate Change and Conflict in East and North Sri Lanka*, MANDALA PROJS. (Dec. 2013), <http://mandalaprojects.com/ice/ice-cases/lanka-civil.htm>.

164. See Mahinda Senevi Gunaratne et al., *Climate Change and Food Security in Sri Lanka: Towards Food Sovereignty*, HUMANS. & SOC. SCIS. COMMS., Oct. 2021, at 1, 3 (explaining that rural communities, that make up the majority of the population, still exert little political significance).

165. Lawrence, *supra* note 163.

166. *Building Sri Lanka’s Resilience to Climate Change*, WORLD BANK (Sept. 21, 2018), www.worldbank.org/en/news/feature/2018/09/21/building-sri-lankas-resilience-to-climate-change.

167. Gunaratne et al., *supra* note 164, at 11.

168. Jeevethan Selvachandran, *Preparing for the Impact of Climate Change in Sri Lanka*, ASIA & THE PAC. POL’Y SOC’Y (Oct. 30, 2021), www.policyforum.net/preparing-for-the-impact-of-climate-change-in-sri-lanka/; Uditha Jayasinghe & Devjyot Ghoshal, *Sri Lanka Finalises Oil Exploration Rules, Earmarks 900 Offshore Blocks*, REUTERS (Jan. 12, 2023), <https://www.reuters.com/business/energy/sri-lanka-finalises-oil-exploration-rules-earmarks-900-offshore-blocks-2023-01-12/>.

climate resiliency initiative, but its implementation has been especially limited in regions where the Tamils reside.¹⁶⁹ Those areas are expected to encounter “severe water scarcity” and sea level rise in the future, which could “lead to a re-emergence of ethnic conflict between the Sinhalese majority and the Tamil minority and aggravate ongoing sectarian conflict between the former and the Muslim minority.”¹⁷⁰ These considerations elevate the situation beyond a theoretical exercise and could garner the international support necessary for Tamil independence based on a remedial theory.

CONCLUSION

This paper has examined whether there is currently a right to remedial secession under CIL. After arguing that there is some momentum developing towards this right, it considered how climate change impacts and jurisprudence could shift interpretations of international law and help remedial secession crystallize into a CIL norm. The possibilities and challenges within this pathway to independence were then highlighted in two case studies centered around particularly aggrieved peoples in climate-affected areas.

Finally, there are several other notable developments arising from the nexus of human rights and the environment that could be a boon for peoples pursuing secession under international law. This includes the potential addition of an ecocide crime to the Rome Statute of the International Criminal Court, the burgeoning rights-of-nature movement, and the UN’s recent recognition of the human right to a healthy environment.¹⁷¹ Viewed in tandem with the impacts of climate change, future scholarship could build on the arguments in this paper and examine how these ecocentric legal shifts also represent conceivable avenues for oppressed groups to fulfill the remedial secession criteria.

169. Selvachandran, *supra* note 168.

170. Angshuman Choudhury et al., *Climate Security in the Bay of Bengal*, IPCC-CLINGENDAEL INST. 5, 41 (Jan. 2022), www.planetarysecurityinitiative.org/sites/default/files/2022-01/Climate_Security_in_the_Bay_of_Bengal_3eproef.pdf.

171. See Katie Surma, *Fifty Years After the UN’s Stockholm Environment Conference, Leaders Struggle to Realize its Vision of “a Healthy Planet,”* INSIDE CLIMATE NEWS (June 10, 2022), <https://insideclimatenews.org/news/10062022/un-stockholm-ecocide-right-of-nature/> (discussing the possibility of “making ecocide a crime before the International Criminal Court” alongside crimes like genocide and war crimes).