

Resolving Claims to Self-Determination: Is There A Role For The International Court of Justice?

Andrew Coleman

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The Crimean crisis has again drawn the controversial and complex issues of self-determination, statehood and sovereignty to the forefront of public consciousness. Appropriately, in *Resolving Claims to Self-Determination*, Andrew Coleman has delivered a masterful treatment of many of the major themes, cases and contentious issues in these fields of international law. Coleman's text is especially prescient, as it outlines an innovative model of peaceful resolution of statehood disputes, with the potential to prevent scenes reminiscent of those observed in East Timor, Kosovo and arising in the Crimean Peninsula.

Put simply, Coleman argues that the International Court of Justice ('ICJ') – acting under its advisory jurisdiction – both can and should act as the body arbitrating the legitimacy of the purported exercise of a right to self-determination. Despite seeming simplistic at first glance, Coleman's proposition represents a fundamental development of international law and his treatment of this subject is appropriately nuanced. The monograph begins by tracing the colonial history, and modern application, of the law surrounding self-determination and statehood. Coleman then reconciles the 'great debate' between theories of recognition, by expanding the *Montevideo* criteria and the role of the ICJ in statehood disputes. The remainder of the monograph represents a detailed consideration of the characteristics, benefits and possible controversies surrounding his proposal. It is this section where Coleman both shines brightest and breaks substantial new intellectual ground.

Effectively fusing political theory, state practice and jurisprudence, Coleman contends that a 'legitimate' self-determination attempt occurs when the following four conditions are satisfied:

- A distinct 'people' claim self-determination in a 'legitimate' circumstance;
- This claim is freely expressed in an internationally-scrutinised plebiscite;
- This people agree to respect the *Charter of the United Nations* and international law more generally; and
- This people are capable of forming a state as defined in international law.

The first three elements of Coleman's model are relatively uncontroversial, effectively codifying the *Reference re Secession of Quebec*¹ decision, the *Western Sahara (Advisory Opinion)*² and the effect of the *Charter of the United Nations* art 103 respectively. However, the greatest strength of Coleman's model is in the elegant 'sleight of hand' contained in the final element.

The law surrounding statehood has been relatively static since the 1933 *Montevideo Convention*'s 'four-step' test – requiring a 'permanent population', 'defined territory', 'government' and 'capacity to enter into relations with other states' – crystallised into customary law.³ However, despite their widespread acceptance, the *Montevideo* criteria have been heavily scrutinised.⁴ Coleman, however, suggests significant amendments to this law.

Cleverly, Coleman expands David Raič's 'two-tiered' model requiring demonstration of statehood both 'in fact' (i.e. satisfying the *Montevideo* criteria), and 'in law' (i.e. demonstrating that the exercise of the self-determination claim has complied with existing international law). Importantly, Coleman also suggests adding an 'independence' element to the *Montevideo* criteria, requiring a state function outside another's authority. This condition is supported by both early case law,⁵ and other publicists.⁶

The substantial benefits of Coleman's model make this monograph an important contribution to international legal discourse. Firstly, Coleman provides a modern, conceptually sound framework by which highly emotive statehood disputes can be assessed. Secondly, by clearly defining and tightly circumscribing the circumstances in which self-determination is 'legitimate', Coleman overcomes oft-rehearsed opposition fearing 'balkanisation', endless state fragmentation, conflict and instability. This achievement cannot be understated. However, the greatest strength of Coleman's model comes from his reconstruction of the law in this field, stripping away the politicised elements to the greatest extent possible. In

¹ [1998] 2 SCR 217.

² [1975] ICJ Rep 12.

³ *Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States*, opened for signature 22 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1 ('*Montevideo Convention*').

⁴ For a comprehensive summary of many of these arguments, see Thomas D Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37 *Columbia Journal of Transnational Law* 403.

⁵ *Customs Régime Between Germany and Austria (Advisory Opinion)* [1931] PCIJ (ser A/B) No 41, 46.

⁶ See especially James R Crawford, *The Creation of States in International Law* (Oxford University Press, 2007) 62–90.

leaving an essentially legal test, Coleman's model invests statehood inquiries with greater certainty, predictability and impartiality.

By casting self-determination in this way, Coleman confronts and circumvents the 'great debate' between theories of statehood. International law, by virtue of its nature, has left recognition of new states to existing states, with debate focused upon the necessity of that recognition. Coleman's model recognises that this model is fundamentally flawed, leaving statehood to be governed by a myriad of geopolitical, economic and other non-legal concerns. This effectively reduces a seceding peoples' rights to little more than a political 'football'. Coleman offers Macedonia, Poland, and Abkhazia as examples where this has occurred. Arguably, Crimea may now be added to this list.

Other eminent publicists including Hersch Lauterpacht, Hans Kelsen and John Dugard have made similar attempts to overcome this problem.⁷ However, none have succeeded as elegantly as Coleman. By framing the test for statehood as a rational 'legal' test, Coleman starkly illustrates the problems of politicisation, which lead almost inescapably to his conclusion: let the ICJ determine the legality of a statehood attempt. Provided the United Nations General Assembly or Special Committee on Decolonisation is the requesting body, Coleman argues the Court's advisory jurisdiction is more than sufficient for such a purpose.

Despite its elegance, adopting Coleman's model would entail substantial ramifications for states, seceding peoples, the ICJ and international law more generally. However, the greatest strength of Coleman's monograph is his direct, considered, and thorough refutation of these potential criticisms. Coleman refutes suggestions that his model would unduly politicise the ICJ, citing the Court's history of delivering measured opinions upholding the Court's integrity, professionalism and 'guardian of legality' role in highly contentious scenarios. He convincingly paints the *Nicaragua*⁸ and *Bosnian Genocide*⁹ cases as superlative examples of this. Furthermore, Coleman rejects suggestions that a merely non-binding advisory opinion would be practically inadequate, identifying a plethora of benefits which an ICJ opinion would deliver, including moral 'rightness' and pressure to peacefully settle disputes. These benefits suggest Coleman's model is of potentially dramatic importance not only

⁷ See, eg, Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 2012); Hans Kelsen, *Principles of International Law* (Lawbook Exchange, 1952); John Dugard, *Recognition and the United Nations* (Grotius Publications, 1987).

⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 ('*Nicaragua*').

⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 ('*Bosnian Genocide*').

for seceding peoples, but also for the institutional strength, integrity and development of the ICJ and international law more generally.

Coleman's monograph presents an elegant, persuasive and conceptually powerful reconstruction of the law surrounding statehood, self-determination and sovereignty. This renders his text a valuable contribution to the development of the law, rewarding for both academics and practitioners alike. Given its accessible, clear and up-to-date summary of the law in this area, this text also represents an excellent resource for students and those interested in understanding this controversial, yet fascinating, field. Lastly, as the Crimean crisis tragically demonstrates, Coleman's model is of broader importance, given its potential to facilitate the peaceful resolution of such disputes. Coleman's text represents a commendable addition to the canon of international legal scholarship.

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