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**Towards a new understanding of the right of self-determination in the post-colonial context  
the case of the Iraqi Kurdistan region**

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**Towards a New Understanding of the Right of Self-Determination in the  
Post-Colonial Context:**

**The case of the Iraqi Kurdistan Region**

**By**

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**Supervised by Professor Suzannah Linton**

## Abstract

This thesis discusses the meaning of the right to self-determination in its historical and contemporary perspective, and examines the different options available for the accommodation of contested self-determination claims. Arguably, the creation of new States and secession are amongst the most significant and controversial issues pertaining to self-determination beyond the colonial context. Detailing these implications in relation to the Iraqi Kurdistan Region (IKR), the thesis argues that even if secession is one mechanism to resolve self-determination disputes, this does not do away with the need to continue exploring a new conflict settlement approach as an alternative to extremist secession. The proposed 'Remedial Earned Sovereignty' (RES) approach affords a way of assessing post-colonial breakaway movements in their different manifestations. A new entity may come into being lawfully through negotiated and consensual constitutional processes.

The RES approach allows another layer of consideration to be added that goes beyond the superficiality of pure 'legality', by delving into the legitimacy of the new entity. It will argue that legitimacy is a second layer of essential consideration, and it involves a deeper and more holistic level of analysis. Significantly, the thesis will argue for a need to look at the circumstances that led to the secession and State creation, and also at how the entity has conducted itself, and how it has organised itself internally. It demonstrates that outside the colonial context the emergence of a new State is not a matter of meeting the statehood criteria, but rather a politically realised legal status. Accordingly, in order to navigate through these considerations of legality and legitimacy, a set of guidelines for States in assessing how to deal with entities coming into existence because of secession have been suggested. This is dubbed a 'Remedial Approach to Post-Colonial External Self Determination'. The thesis will then apply and refine the remedial approach to post-colonial external self-determination in the cases of Kosovo, Quebec and South Sudan, and ultimately test the finalised hypothesis idea on the IKR.

**This thesis is based on the situation up to (October 2014).**

## Dedication

This thesis is dedicated to the memory of my Father. A man who had no educational opportunity yet persuaded me to stay in school. I am indebted to him for his strength, guidance, and encouragement. He was and is an inspiration to me. Where I am now and where I will be in the future is a direct result of his influence, He can rest in peace.

Arsalan AlMizory

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## List of Abbreviations

ACHPR	[The] African Charter on Human and Peoples' Rights
<i>Am U Int'l L Rev</i>	<i>American University International Law Review</i>
<i>Am J Int'l L</i>	<i>American Journal of International Law</i>
ASIL	<i>American Society of International Law Proceedings</i>
<i>AKH-JCIR Rev</i>	<i>Journal of China and International Relations Review</i>
BYIL	British Yearbook of International Law
<i>BJMES</i>	<i>British Journal of Middle Eastern Studies</i>
<i>BC Int'l &amp; Comp L Rev</i>	<i>Boston College International and Comparative Law Review</i>
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CPA	Coalition Provisional Authority
CPA	Comprehensive Peace Agreement
CUP	Cambridge University Press
<i>Cornell Int'l L J</i>	<i>Cornell international law journal</i>
<i>Chi-Kent L Rev</i>	<i>Chicago-Kent Law Review</i>
<i>Chi J Int'l L</i>	<i>Chicago Journal of International Law</i>
<i>Case W Res Int'l L</i>	<i>Case Western Reserve Journal of International Law</i>
CEA	<i>Contemporary European Affairs</i>
<i>Chinese JIL</i>	<i>Chinese Journal of International law</i>
<i>Case W Res J Int'l L</i>	<i>Case Western Reserve Journal of International Law</i>

<i>Colo J Int'l L</i>	<i>Colombia Journal of International Law</i>
<i>C Int'l R Rev</i>	<i>Croatian International Relations Review</i>
CCP	Common Courage Press
<i>Can J L &amp; Jurisprudence</i>	<i>Canadian Journal of Law and Jurisprudence</i>
<i>Caucasian Rev Int'l A</i>	<i>Caucasian Review of International Affairs</i>
<i>DOP</i>	<i>A Declaration of Principles</i>
DFR	Department of Foreign Relations
<i>Denv J Int'l L</i>	<i>Denver Journal of International Law &amp; Policy</i>
ES	Earned Sovereignty
EC	The European Commission
EU	The European Union
<i>EJIL</i>	<i>European Journal of Internal Law</i>
<i>EJSS</i>	<i>European Journal of Social Sciences</i>
FRY	Federal Republic of Yugoslavia
FAHD	Final Act [Helsinki Declaration]
GP	Grotius Publications
<i>GA J Int'l &amp; Comp L</i>	<i>Georgia Journal of International &amp; Comparative Law</i>
GPG	Greenwood Publishing Group
HUP	Harvard University Press
HRC	Human Rights Quarterly
HRC	Human Rights Committee

<i>HRR</i>	<i>[The] Human Rights Review</i>
<i>HRLJ</i>	<i>Human Rights Law Journal</i>
<i>HRJ</i>	<i>Human Rights Journal</i>
<i>Hanse L Rev</i>	<i>Hanse Law Review</i>
<i>HARV ILJ</i>	<i>Harvard International Law Journal</i>
<i>ICON</i>	<i>International Journal of Constitutional Law</i>
<i>IJHR</i>	<i>[The] International Journal of Human Rights</i>
<i>Int'l &amp; Comp LQ</i>	<i>International &amp; Comparative Law Quarterly</i>
<i>Int'l &amp; Comp L Rev</i>	<i>International &amp; Comparative Law Review</i>
ICL	Responsibility of States for Internationally Wrongful Acts
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Reports	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
ISIS-ISIL	Islamic State of Iraq and the Levant
IHRL	International Human Rights Law
IKR	Iraqi Kurdistan Region
<i>J Int'l Service</i>	<i>Journal of International Service</i>
<i>JAAS</i>	<i>Journal of Asian and African Studies</i>
<i>J Transnat'l L &amp; Pol'y</i>	<i>Journal of Transnational Law &amp; Policy</i>
<i>JSPES</i>	<i>Journal of Social, Political, and Economic Studies</i>

KFOR	NATO Mission in Kosovo
KDP	Kurdistan Democratic Party
KLA-UCK	[The] Kosovo Liberation Army
KRG	Kurdistan Regional Government
<i>Loy LA Int'l &amp; Comp L Rev</i>	<i>Loyola of Los Angeles International and Comparative Law Review</i>
<i>Leiden J Intl L</i>	<i>Leiden Journal of International Law</i>
<i>LRP</i>	<i>Lynne Rienner Publishers</i>
<i>Md J Int'l L</i>	<i>Maryland Journal of International Law</i>
<i>Minn J Int'l L</i>	<i>Minnesota Journal of Internal Law</i>
<i>MPEPIL</i>	<i>Max Planck Encyclopedia of Public International</i>
MNP	Martinus Nijhoff Publishers
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organizations
NYP	New York University Press
<i>NYU L Rev</i>	<i>New York University Law Review</i>
<i>N Int'l L Rev</i>	<i>Netherlands Internal Law Review</i>
OPC	Operation Provide Comfort
OIF	Operation Iraqi Freedom
OAU	Organization of African Unity
<i>OHLJ</i>	<i>Osgoode Hall Law Journal</i>

OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	High Commissioner on National Minorities
OUP	Oxford University Press
PUK	Patriotic Union of Kurdistan
PIL	Public International Law
PUP	Princeton University Press
PILPG	Public International Law and Policy Group
Peshmerga	[The] armed Kurdish fighters
PCIJ	Permanent Court of International Justice
<i>Penn State L Rev</i>	<i>Pennsylvania State Law Review</i>
PSA	Political Studies Association
<i>Rev Int'l S</i>	<i>Review of International Studies</i>
RMK	Referendum Movement in Kurdistan
RES	Remedial Earned Sovereignty
RS	Remedial Secession
SFRY	Socialist Federal Republic of Yugoslavia
SSLM	[The] South Sudan Liberation Movement
<i>SSESOX</i>	<i>South East European Studies at Oxford</i>
<i>St-Antony's Int'l Rev</i>	<i>St-Antony's International Review</i>
<i>Stan J Int'l L</i>	<i>Stanford Journal of International Law</i>
<i>San Diego L Rev</i>	<i>San Diego Law Review</i>

<i>Syracuse J Int'l L &amp; Com</i>	<i>Syracuse Journal of International Law and Commerce</i>
TAL	<i>Traditional Administrative Law</i>
<i>Tex Int'l J</i>	<i>[The] Texas International Law Journal</i>
TUP	Temple University Press
UPP	University of Pennsylvania Press
USSR	Union of Soviet Socialist Republics
UN	United Nations
UNGA	United Nations General Assembly
UNGA Res	United Nations General Assembly Resolutions
UNSC	United Nations Security Council
UDI	Unilateral Declaration of Independence
UNMIK	United Nations Interim Administration Mission in Kosovo
UDHR	Universal Declaration of Human Rights
UNESCO	[The] United Nations Educational, Scientific and Cultural Organization
UNCERD	United Nations [Report of the Committee on the Elimination of Racial Discrimination]
UNDM	United Nations Declaration on Minorities
UNHRC	United Nations Human Rights Committee
UNHCR	United Nations High Commissioner for Refugees
UNAMI	[The] United Nations Assistance Mission for Iraq

UNDFR	Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States
USA	United States of America
USAWC	<i>Strategy Research Project</i>
<i>U Tasm L Rev</i>	<i>University of Tasmania Law Review</i>
<i>Va J Int'l L</i>	<i>Virginia Journal of International Law</i>
<i>Vand J Transnat'l L</i>	<i>Vanderbilt Journal of Transnational Law</i>
World War I [WWI]	First World War
World War II [WWII]	Second World War
<i>Yale L SLSR</i>	<i>Yale Law School Legal Scholarship Repository</i>
<i>Yale L J</i>	<i>Yale Law Journal</i>
YUP	Yale University Press



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[. . .] the whole history of the right of self-determination is, for better and worse, the story of adaptation to the evolving struggles of peoples attempting to achieve effective control over their own destinies, especially in reaction to circumstances that are discriminatory and oppressive.

Falk (2000: 48)

## Chapter One: The Introduction

### 1.1. Scope of the thesis

To explore self-determination is, in the words of Antonio Cassese, ‘a way of opening a veritable Pandora’s Box’.<sup>1</sup> The historical evolution of the concept reveals that it has been subjected to ambiguity, lacks precision and contradictory application. Over the years, it was refined and re-applied based on the interests of practical States. Recent events include the dissolution of the two multi-ethnic socialist federations, the Soviet Union and Yugoslavia, giving a new perspective to the meaning of self-determination, as well as a broader understanding of both internal and external conceptions. This period marked not only the end of the communist-socialist social, political, and economic order but also the emergence of a number of new States.<sup>2</sup> These events were followed by the dissolution of Czechoslovakia<sup>3</sup>, Eritrea successfully seceded from Ethiopia<sup>4</sup>, and East Timor<sup>5</sup> succeeded in its drive for independence. Montenegro<sup>6</sup> became an independent State, Kosovo<sup>7</sup> declared independence however, it has not been universally recognised. On July 14 2011, Southern Sudan<sup>8</sup> declared independence after the Sudanese people voted in a referendum, its acquisition of statehood has generally been accepted as a legal fact. Lastly, on 17 March 2014, the Crimean parliament declared independence and applied to join Russia, however; it is a referendum, which is argued as having no legal validity and urges the international community not to

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<sup>1</sup> He stated that, ‘[t]o explore self-determination . . . is also a way of opening a veritable Pandora’s Box’ because ‘[i]n every corner of the globe peoples are claiming the right to self-determination’. See, A Cassese, *International Law* (2<sup>nd</sup> edn, OUP 2005) 60-64.

<sup>2</sup> New states emerging in the territory of the SFRY were: Bosnia-Herzegovina, Croatia, the Federal Republic of Yugoslavia (FRY), Macedonia and Slovenia. While the new states emerging in the territory of the Soviet Union were: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. Estonia, Latvia and Lithuania became independent states prior to the dissolution of the Soviet Union. See; J Vidmar, ‘Democracy and State Creation in International Law’ (PhD thesis, University of Nottingham 2009).

<sup>3</sup> J Crawford, *The Creation of States in International Law* (2<sup>nd</sup> edn, OUP 2006) 402.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid* 560-562.

<sup>6</sup> ‘UNGA Res 60/264 (28 June 2006)’.

<sup>7</sup> R Wilde, ‘Kosovo (Advisory Opinion)’ *Max Planck Encyclopedia of Public International Law*, para6 (Heidelberg and OUP 2012).

<sup>8</sup> ‘Southern Sudan Referendum Act’, 2009 trans, 2010.

recognise its results.<sup>9</sup> These developments indicate that in the post-decolonisation period and after the dissolution of the multi-ethnic socialist federations, the exercise of the right to self-determination and the creation and recognition of States remains relevant and important.

This is a study about self-determination, secession, and State creation in the post-colonial, post-Cold War era. It is a study of the law, and a study of State practice in [Kosovo, Quebec and Southern Sudan], with a practical useful theory that can be applied to the difficult and ongoing situation of the Iraqi Kurdish Region (IKR). This thesis investigates how these elements of international law have manifested themselves on a practical level, in a comparison between two sorts of peoples of different geographical and historical backgrounds. It aims to find a suitable theoretical-legal solution to the Kurdish claim to statehood and independence in north Iraq. Most importantly, it suggests how the Iraqi State ought to treat the Kurdish claim in the future, as their right to self-determination has been denied in the federal constitution.

This thesis presents a new understanding of self-determination in the post-colonial context, and from that develops an original way of guiding States in evaluating contemporary claims to external self-determination. The thesis argues under what circumstances, and by what means, could the right of secession be a just and applicable solution. The objective of the thesis is to examine the right of self-determination as it applies to the groups controlled by the State. It aims to apply a new understanding of self-determination in the case of IKR, by arguing a strong normative debate on the merits, advantages, and disadvantages of the theory of Remedial Earned Sovereignty. The Remedial approach has emerged as a response to the increasingly limited utility of the self-determination approach to resolving sovereignty-based conflicts. Under this approach, a new entity may come into being lawfully through negotiated and consensual constitutional processes. The general aim of this thesis is to develop and to propose a new normative theory (known as 'Remedial Earned Sovereignty' or 'RES') for the exercise of external self-determination, ultimately leading toward remedial secession and independence.

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<sup>9</sup> J Vidmar, 'Crimea's Referendum and Secession: Why It Resembles Northern Cyprus More than Kosovo' (*EJIL* Talk, 2014) <<http://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/>> accessed August 11, 2014.



State practice on how existing instruments of international law fit into the theoretical debate is lacking. The thesis analyses that there is no necessary incompatibility between the maintenance of the territorial integrity of an existing State, and the right of a 'people' to achieve a full measure of self-determination. Outside the colonial system, the exercise of the right to self-determination does not usually result in creation any State; it can only take place with the approval of the parent State, through a constitutional framework or follow an initial declaration of independence or unilateral secession. The exercise of the right of self-determination should normally not violate the territorial integrity of a State and the right is normally to be exercised within the framework of the existing sovereign State, assuming that the government represents the people. A number of international law theories are pertinent to the issue of group separation from the State: secession, statehood, and recognition. It is necessary to examine whether a group has an international legal right to secede from the State; if so, whether they have satisfied the relevant criteria of statehood; and finally, whether recognition by the entity as a new State (or its absence) will affect the place of the entity on the global scene.

The focus is the post-Cold-War practice of State creation. The thesis concentrates on situations that led to new State creation in this context, and clarifies the role of international law as regards the exercise of the right of self-determination of new State creations. It will conclude that other solutions besides independence could provide more stability for the IKR, while respecting Iraq territorial integrity, and avoiding encouragement to other separatist groups operating throughout the world. It posits that the conceptualization of 'Remedial Earned Sovereignty' (RES) is a useful approach that could be applied in the case of the IKR to achieve self-determination, in a manner that gains international support and causes minimal disruption to the region. The thesis therefore seeks to provide an overview of some of the advantages and risks associated with the approach.

On the other hand, the thesis argues that the right of self-determination should normally be exercised within the framework of the existing State, whereas the right of external self-determination appears under carefully defined circumstances. Outside the colonial paradigm, a non-consensual independence is much more problematic, and no right to independence is applicable. In other words, when a group of people is repeatedly denied the right to exercise self-determination and can articulate a legitimate basis for its secession, however the group

may legally be entitled to self-determination. If that group is systematically refused basic human rights and access to the democratic process, that group may be legally entitled to secession and international recognition. Accordingly, the thesis will demonstrate that, if the Kurdish right to internal self-determination will be fulfilled within the framework of the Iraqi State in the future, there would be no right to external self-determination and then no right to secede from Iraq. However, if we were to conclude that it is unlikely that Iraq would respect the Kurdish rights to internal self-determination in the future, and conducted itself in compliance with the principle of equal rights and self-determination, then the Kurds would have the right to external self-determination and thus, the right to secede from Iraq.

The thesis will eventually conclude that, the old restrictive doctrine of self-determination does not help resolve the issue in the post-colonial era. Neither does exaggerating the problem. Accordingly, Remedial Earned Sovereignty offers an alternative short of secession if it can be avoided or as a step towards independence where it is inevitable. The hypothesis is that RES can be a useful and legitimate tool to address secessionist conflicts if the self-determination claim itself is deferred or denied.

## 1.2. Context

The evolution of the right of self-determination is one of the most dramatic normative developments this century. During the decolonisation era, affirming rights of self-determination seemed fully in step with the march of history, having an overall positive effect on the human condition, freeing millions from colonial bondage. The result of this process was to extend sovereignty and statehood to all corners in the planet for the first time, and to transform the United Nations into a genuinely universal body representing virtually the whole of humanity.<sup>10</sup> Today, what makes the right of self-determination such a difficult topic is that its exercise involves a clash of fundamental world order principles.<sup>11</sup> Falk argued that, ‘compared with the present arrangements for regional and global governance, any further significant fragmentation of existing states is widely seen as producing unwieldy and insufficient world order.’ Significantly, there is also the fear that nurturing the dream of statehood for many distinct peoples in the world will undoubtedly provide ample fuel for

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<sup>10</sup> R A Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge 2000) 124.

<sup>11</sup> *ibid* 97.

strife.<sup>12</sup> On the other hand, is the sense that all people should be treated equally and that since some people have the advantage of statehood, others should be entitled to it as well.<sup>13</sup>

The idea that there was a legal right of self-determination in the colonialism era was resisted by the colonial powers.<sup>14</sup> It was, in their view, merely a political aspiration, but gradually, their resistance to the idea of a legal right became more muted.<sup>15</sup> The development of the concept of self-determination was historically bound up with decolonisation with the growing agreement that it was obligatory to bring forward dependent peoples to independence, even though Article 73<sup>16</sup> had spoken only of self-government. While Dahlitz argued that, self-determination began to be accepted as a legal right in the context of decolonisation; it was never restricted to a choice for independence. In a post-colonial situation, the concept of a legal right to self-determination has proved controversial, but its existence cannot really be doubted.<sup>17</sup> Dahlitz pointed out that, the bridge between the colonial notions and the contemporary notions has been provided by the evolution of the idea of self-determination as a human right. In 1960, UN General Assembly passed two famous resolutions 1514 and 1541, representing the necessary elaborations and refinements of the classical right of self-determination in colonial situations.<sup>18</sup> Later in 1966, the text of the Covenant on Civil and Political Rights<sup>19</sup> and the Covenant on Economic, Social, and Cultural Rights<sup>20</sup> were concluded. Common Article I of each of these provides: ‘All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.’ Thus, during the process of decolonisation, the right of self-determination manifested itself in the creation of new

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<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> J Dahlitz (ed), *Secession and International Law: Conflict Avoiding-Regional Appraisals* (T.M.C. Asser Press 2003) 24.

<sup>15</sup> *ibid.*

<sup>16</sup> ‘Charter of the United Nations (Chapter XI): Declaration Regarding Non-Self-Governing Territories (Article 73)’, (1945).

<sup>17</sup> Dahlitz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 26.

<sup>18</sup> Resolution 1514 provides in operative paragraph 2 that ‘all peoples subject to colonial rule have the right to freely determine their political status and freely pursue their economic, social and cultural development’. Resolution 1541 (XV) made clear that this exercise in self-determination could result in various outcomes and stipulated the processes required to ensure that informed, free and voluntary choice were being made.

<sup>19</sup> ‘The International Covenant of Civil and Political Rights’ (UNGA Res 2200A (XXI) (16 December 1966) (entered into force 23 March 1976, in accordance with Article 4) 1966).

<sup>20</sup> ‘International Covenant on Economic, Social and Cultural Rights) (ICESCR), Adopted and opened for signature, ratification and accession by UNGA Res 2200A (XXI) of 16 December 1966, entered into force 3 January 1976, in accordance with Article 27’, (1966).

independent States, but in non-colonial contexts, the right of self-determination has been clearly divorced from the notion of a ‘right to secession’.<sup>21</sup>

From this time onward, repeated reference to self-determination in human rights builds on the old UN Charter language, while at the same time confirming that self-determination is a right of peoples. The Helsinki Final Act speaks of ‘the principle of equal rights and self-determination of peoples’, making it clear that self-determination is a right of peoples.<sup>22</sup> Later, the UN Declaration on Friendly Relations seems at first sight to support the view that self-determination is limited to a specific moment of decolonisation.<sup>23</sup> It provides ‘*inter alia*, that a colonial or non-self-governing territory continues its separate existence ‘until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter’. Thereafter, the concept has also been adopted in the African Charter on Human and Peoples Rights providing that ‘all peoples shall have the right to self-determination’ in terms that does not tie it to colonialism.<sup>24</sup> Thus, Cassese argued that, the principle of self-determination has become so widely recognised in international law conventions that it may be considered a general principle of international law, conferring on the people the right to self-determination.<sup>25</sup> In the Case Concerning East Timor, the International Court of Justice (ICJ) affirmed that: ‘Self-determination has been recognised by the United Nations Charter and in the jurisprudence of the Court, and is one of the essential principles of contemporary international law’.<sup>26</sup>

Accordingly, Kelsen<sup>27</sup> concluded that self-determination is a ‘principle of internal policy, the principle of democratic government. Emerson<sup>28</sup> believed that the principle implies ‘the right

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<sup>21</sup> As observed by the Supreme Court of Canada in the Québec Case: ‘The right of colonial peoples to exercise their right to self-determination by breaking away from the “imperial” power is now undisputed. See ‘*Reference re Secession of Quebec*’, 2 SCR 217, 218 (1998) paras 154 and 155.

<sup>22</sup> ‘The Final Act of the Conference on Security and Cooperation in Europe (Helsinki Declaration)’, (1975) 14 ILM 1292.

<sup>23</sup> ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States. UNGA Res 2625 (XXV) (24 October 1970) UN Doc (A/8082) 1970.’ (UNGA Res 2625 (XXV), (24 October 1970), (Adopted on a Report from the Sixth Committee (A/8082) 1970).

<sup>24</sup> ‘African Charter on Human and Peoples’ Rights’ (Adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

<sup>25</sup> Antonino Cassese, *Self-Determination of People, A legal Reappraisal* (CU: A Grotius Publication 1995) 171.

<sup>26</sup> ‘Case Concerning East Timor (*Portugal v. Australia*)’, [1995] ICJ Rep 84.

<sup>27</sup> H Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (London Institute of World Affairs 1950) 51.

<sup>28</sup> R Emerson, *From Empire to Nation: the Rise to Self-Assertion of Asian and African peoples* (Beacon Press 1970) 301.

of self-government of peoples and not the right of secession'. Whilst, Buchheit<sup>29</sup> found no right of secession, which can be 'supported or discredited by reference to the *travaux preparatoires*' of the San Francisco Conference. Cassese concluded that 'a generic right to self-government.<sup>30</sup> In his opinion, the right of self-determination cannot be implemented if basic human rights and fundamental freedoms are not ensured to all members of the people concerned. In his words, 'internal political self-determination, does not mean generic self-government, but rather the right to choose freely a government exercising all the freedom which make the choice possible, and the right that the government once chosen continues to enjoy the consensus of the people and is neither oppressive nor authoritarian.'<sup>31</sup> One can deduce from the debate that the principle of a people, constituting a State, choosing its own form of government is generally accepted.<sup>32</sup> The right is also limited by and weighed against the principle of territorial integrity of States, and would normally be consummated in its internal mode; its exercise will normally not result in a new State being created.

This thesis explores how the will of the people in the context of the right of self-determination may be limited by the rules of international law. One source of such a limitation is the principle of territorial integrity of States.<sup>33</sup> Further, what remain controversial are the interpretations of the phrase 'the principle of equal rights and self-determination of peoples' for possible arguments. It has been said that 'no right of self-determination is accepted and no other rights of people exist, the addition of equal rights is incorrect and contradictory... a certain right of self-determination exists on the footing of equality between peoples, but then the formula 'principle' of self-determination is too weak. Consequently, both concepts in one phrase and saying they are complementary is a *contradiction in terminis*.'<sup>34</sup>

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<sup>29</sup> L C Buchheit, *Secession, The Legitimacy of Self-Determination* (YUP 1978) 73 Article 1 (2) was made at San Francisco by the four major powers at the behest of the Soviet Union. Two viewpoints emerged in the debates of the Technical Committee (I/1) assigned to consider the matter. It was strongly emphasised on the one hand that the principle of self-determination 'corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated' in the Charter, and, on the other hand,; it was stated that the principle conformed to the purposes of the Charter only in so far as it applied the right of self-government of peoples and not the right of secession. See 'UN Doc 343, I/1/16, 6 UNCIO Docs 296 [1945]'.  
<sup>30</sup> Cassese, *Self-Determination of People, A Legal Reappraisal* (n 25) 139.

<sup>31</sup> *ibid* 154.

<sup>32</sup> J Duursma, *Fragmentation and the International Relations of Microstates* (CUP 1996) 15.

<sup>33</sup> R McCorquodale, 'Self-determination: A Human Rights Approach' (1994) 43 *Int'l & Compe LQ* 857.

<sup>34</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 34) 15.

The second controversial argument is, whether the right of self-determination carries with it a right of secession.

The concept of secession has no relevance to decolonisation.<sup>35</sup> An alternative view has been offered by Koskenniemi,<sup>36</sup> who commented that, ‘secession was compliance, and opposing rupture of old colonial State was unlawful’. He added that Article 19 (3) (b) of the International Law Commission’s draft articles in States Responsibility even spoke of this as *jus cogens*. Dahlitz observed that ‘there was no suggestion that the old colonial rulers should stay in State X, with ‘the people’ seceding, but rather that the colonial rulers should go. In this context, secession was not in issue. In a post-colonial context, secession is irrelevant to the ongoing entitlement of peoples to self-determination. Dahlitz concluded that, confusion has arisen when it has been stated that minorities are entitled to self-determination, and that may mean a right to secede.

It remains to be clarified as to whether minority rights allow for self-determination. In 1992, the Joint Opinion prepared in Quebec by professors Shaw, Higgins, Frank, Pellet and Tomuschat emphasised that ‘no legal right existed in favour of secession on the alleged ground that the entity concerned is composed of a linguistic minority within a State in which the majority are of different linguistic groupings.’<sup>37</sup> Moreover, the first Badinter Opinion answers this question in the negative.<sup>38</sup> ‘Serbia had invoked the principle as a basis for gathering together, within Serbia, Montenegro and beyond, in a new State structure, those of Serbian identity. In Serbia’s eyes the Serbian population in Croatia and Bosnia and Herzegovina had the right to ‘self-determination’ but other nascent republics were ‘seceding’ from the Socialist Federal Republic of Yugoslavia (SFRY), rather than exercising a right of self-determination.’<sup>39</sup> Accordingly, ‘the Badinter Commission in its First Opinion, finding that the exercise or disappearance of a State is simply a question of fact. No legal entitlements were in issue, disintegration and by implication secession too were matters of

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<sup>35</sup> Dahlitz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 35.

<sup>36</sup> M Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43 *Int'l & Compe LQ* 241.

<sup>37</sup> T M Frank (ed), *Self-Determination in International Law, Quebec and Lessons Learned* Opinon Directed at Question 2 of the Reference in Anne Bayefsky (Cambridge, Kluwer Law International 2000) 241.

<sup>38</sup> Dahlitz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 36.

<sup>39</sup> *ibid.* See also Steve Terrett, *The dissolution of Yugoslavia and the Badinter Arbitration Commission: a contextual study of peace-making efforts in the Post-Cold War World* (Ashgate 2000) 119.

fact, not law.<sup>40</sup> However, Frank<sup>41</sup> suggested that in extreme situations, there may be a right to secede if minorities' rights are being trampled on in an unbearable or irredeemable way. In Kosovo there was widespread international public sympathy for the reasonable need to secede from Serbia. Dahiltz argued that, in contrast, 'governments continue to give a greater priority to territorial unity, and with the evolution of events and the passage of time, the possible pre-requirements for the true need to secede have faded.'<sup>42</sup>

The difficulty of giving effect to the concept of self-determination is illustrated by unheeded claims of many ethnic and minority groups on the ground that established that their identity is not being respected and protected by the State.<sup>43</sup> The minority rights approach has its own difficulties. The extent of the rights at issue, and the groups entitled to claim them remain matters of continuing ambiguity and debate, rendering self-determination a variable principle.<sup>44</sup> For a fresh look at a persistent problem, Brilmayer suggested an imaginative solution to a long-standing tension between two fundamental legal norms of doubtful compatibility: the right of peoples to self-determination and the right of States to preserve their territorial integrity.<sup>45</sup> Brilmayer<sup>46</sup> proposed a new framework, focused on the relative legitimacy of competing territorial claims, as the best way to analyse and resolve secessionist disputes. The approach can only be understood in context, for better or for worse, the legal instruments establishing the right to self-determination do not identify with any precision the peoples entitled to exercise the right. She 'believed that, the legitimate foundation of the secessionist claim must be based on territorial conflict. The distinct culture argument does not, in Brilmayer's belief, 'represent a valid case for secession; without a claim to territory the argument is illegitimate'. However, what remains debatable yet are the minority rights still at issue, and the groups entitled to claim them, they remain a matter of continuing ambiguity and uncertainty, 'rendering self-determination a highly indeterminate and variable principle'.<sup>47</sup>

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<sup>40</sup> Dahiltz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 36.

<sup>41</sup> T Franck, 'Postmodern Tribalism and the Right to Secession', in *Peoples and Minorities in International Law*, (1993) 84 NYU L Rev 13.

<sup>42</sup> Dahiltz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 37.

<sup>43</sup> V P Nada, 'Self-Determination and Secession Under International Law' (2011) 29 *Denv J int'l L & Pol'y* 305.

<sup>44</sup> D Wippman, 'Secession, Territorial Claim, and the Indeterminacy of Determination' (2000) 25 *YJ Int'l L* 287.

<sup>45</sup> *ibid.*

<sup>46</sup> L Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 *Yale Law School Legal Scholarship Repository* 177.

<sup>47</sup> *ibid.*

On the other hand, Crawford<sup>48</sup> argued that in the Declaration on Friendly Relations, a number of commentators have asserted that the right to self-determination may ground a right to unilateral secession, the underlying proposition is that, when people are blocked from the meaningful exercise of their right to self-determination internally. In other words, it is asserted that the exercise of the right of self-determination should not violate the territorial integrity of a 'state' that the right is normally to be exercised within the framework of existing sovereign state, assuming that the government represents the people. Consequently, secession as a last resort may be available in certain exceptional circumstances involving gross breach of fundamental human rights.<sup>49</sup> The right of internal self-determination is 'the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime which is much more than choosing among what is on offer perhaps from one political or economic position only' it is entitled, as a last resort, to exercise this by secession. Even if Declarations do not have the same binding power, they must be considered as relevant in any theory of secession. The latest developments, especially after Kosovo and East Timor, and in the light of the Canadian Supreme Court's pronouncement relating to the claim for Quebec's secession, however, indicate that there could be exceptional circumstances, which might lead to the acceptance of a claim to unilateral secession.<sup>50</sup> However, Nada pointed out that the exception is the case of undemocratic, authoritarian regimes, which are not representative, thus, not providing the opportunity for the 'people' to participate effectively in the political and economic life of the State, especially when there is a pattern of flagrant violations of human rights. It thus remains questionable whether secession is one of the means of resolving or aggravating inter-ethnic problems and conflicts. In other words, does international practice really decrease the support for secession?

The recent case of South Sudan indicates that a strictly anti-colonial definition is far too limiting. People with no prior history of direct colonial rule have seceded and received recognition. In addition, while no right to independence exists under international law, practice shows that where the parent State waives its claim to territorial integrity, the

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<sup>48</sup> Crawford, *The Creation of States in International Law* (n 3).

<sup>49</sup> 'Reference re Secession of Quebec' (n 21) para 126.

<sup>50</sup> Nada, 'Self-Determination and Secession Under International Law' (n 43).



international community promptly accepts the emergence of a new State.<sup>51</sup> Sudan waived its claim to territorial integrity by enacting a clear mechanism for any secession by a prompt recognition of the new South Sudanese State. The consent of the parent State is the reason why, unlike in the situation of Kosovo, the new legal status of South Sudan is undisputed.<sup>52</sup>

The moral arguments examined by Buchanan<sup>53</sup> have provided what is now regarded as the classic formulation of the remedial-rights justification for secession. His approach certainly represents an improvement over many attempts by philosophers to enter the fray of international law. Buchanan proposed certain grounds for a remedial right to secession that can be exercised only in exceptional circumstances when there is clear evidence that groups have suffered certain kinds of injustices. He argued that secessionists' claims can be valid only against a State that fails to act as a trustee for the people, conceived of as an intergenerational community. However, what remains insufficiently explored is such claims cannot be valid against a democratic State in which basic individual rights may be exercised. In addition, he proposed that all cultural groups under certain conditions have the right to secede. Buchanan concentrated on the relationship between the minority groups and the state. He discussed two questions about secession; first, whether there is a moral right to secede, and whether a right to secession ought morally to be recognised in international law. The disagreement about the conceptualisation of both the 'cultural groups' and 'nation' have marked the debate.

On the other hand, in its opinion on Quebec's claim to unilaterally secede from Canada, the Supreme Court of Canada stated that: 'international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign States and consistently with the maintenance of the territorial integrity of those States. Where this is not possible, in exceptional circumstances a right of secession may arise.'<sup>54</sup> But, what remains unexplored yet is the compatibility between the maintenance of the territorial integrity of existing States, and the right of a 'people' to achieve a full measure of self-determination. Rather, what remains somewhat unexplained also, is under what conditions would a group

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<sup>51</sup> J Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (2011) 47 *Tex Int'l J* 541.

<sup>52</sup> *ibid.*

<sup>53</sup> A Buchanan, *Secession: The Morality of Political Divorce From Sumter to Lithuania and Quebec* (Boulder, Westview Press 1991).

<sup>54</sup> 'Reference re Secession of Quebec' (n 21) para 122.

have a moral right to secede from the state? As it leaves aside issues about the moral appropriateness of various policies for dealing with secessionist crises that might be adopted by international institutions as well as issues about international law.

Seymour on the other hand argued that, in contemporary international law, Remedial Rights theorists would be interested in partitioning States as a measure of protection for a minority population and would not be interested in breaking up a State that is democratically considerate of the minority territory.<sup>55</sup> Significantly, the thesis agrees with the Buchanan view that there is only a remedial right to external self-determination, or secession. The remedial right to secession has its origin in the advisory opinion given by the second Commission of Rapporteurs in the 1920 *Aaland Islands Case*.<sup>56</sup> The right can also be found in the 1970 Declaration on Principles of International Law Concerning Friendly Relations<sup>57</sup>, and the 1993 Report of the Rapporteur to the UN Sub-Commission Against the Discrimination and the Protection of Minorities,<sup>58</sup> and General Recommendation XXI adopted in 1996 by the Committee on the Elimination of Racial Discrimination.<sup>59</sup>

Both Buchanan and Seymour rejected the idea that nations, or for that matter any other cultural group, could have a primary right to secede, that is, a general right to violate the territorial integrity of a State and one that they would have in the absence of past injustice.<sup>60</sup> However, cultural groups could legitimately secede if they rectify some past injustice. Contrary to Buchanan, Seymour has argued that nations or peoples are somehow special and entitled to unique rights. Buchanan asserted that ‘there is only a remedial right to external self-determination, or secession.’ However, it has been insufficiently explored whether a

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<sup>55</sup> M Seymour, ‘Secession as a Remedial Right’, (2007) University of Montreal Publications, <<http://www.philo.umontreal.ca/documents/cahiers/SecessionasaRemedialRight.pdf>> accessed 20 February 2013.

<sup>56</sup> After excluding the existence of a general right to secede, excluding the existence of a general right to secede, the Commission observed that ‘the separation of a minority from the State of which it forms part and its incorporation into another State may only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees [for the protection of minorities] See *Aaland Island Case*, (1920) ‘League of Nations Official Journal Spec Supp 3’, .

<sup>57</sup> ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States. UNGA Res 2625 (XXV) (24 October 1970) UN Doc (A/8082) 1970.’ (n 23).

<sup>58</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Report of the Sub-Commission on Prevention of Discrimination and Protections of Minorities on its 45th Session’, ‘UN Doc E/CN.4/Sub.2/1993/34’, 1993.

<sup>59</sup> ‘Report of the Committee on the Elimination of Racial Discrimination’, 48th session, UN Doc A/51/18’, February 1996.

<sup>60</sup> Seymour, ‘Secession as a Remedial Right’ (n 55).

general primary right to self-determination entails a primary right to internal self-determination, understood as the ability for a people to develop itself within the encompassing state and to determine its own political status within that state. It is thus questionable whether the violation of internal self-determination can be a remedial right for seceding. In other words, could secession remedy harms that undermined internal self-determination?

International law appears to emphasise the importance of the territorial integrity of States. Generally, the preference is to rely on internal domestic laws of existing states to adjudicate the succession and establishment of new States.<sup>61</sup> In *Kadic v Karadzic*<sup>62</sup> the Second Circuit of the United States Court of Appeal was presented with the question of whether a self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina, referred to as Republika Srpska could be considered a State. The court summarised its conclusion that Srpska met the definition of a State by noting that it ‘is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments’. It has a president, a legislature, and its own currency. The court emphasised that ‘These circumstances readily appear to satisfy the criteria for a state in all respects of international law.’ Srpska, by virtue of its state-like characteristics, was indeed a *de facto* state entitled to the rights and encumbered by the responsibilities of a State within the international system.<sup>63</sup> The court has long recognised ‘any government, however violent and wrongful in its origin, must be considered *a de facto* government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation’.<sup>64</sup>

The events of 1991 have given a new perspective to the meaning of statehood and changed it to some degree. Arguments have been made based on the State’s practice, that achieving statehood criteria will not necessarily be enough for a State’s creation. Crawford argued that additional ones have supplemented the traditional statehood criteria and an entity, which does meet them, is not a State.<sup>65</sup> Dugard<sup>66</sup> argued that the creation of an entity in breach of *jus*

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<sup>61</sup> ‘UN Charter, Article 2 (4)’.

<sup>62</sup> *Kadic v. Karadzic*, 70 F.3d 232, 236–237 US Court of Appeals 2nd Cir’, 1995, 93.

<sup>63</sup> *ibid.* See also A K Eggers, ‘When is a State a State? The Case for Recognition of Somaliland’ (2007) 30 BC Int’l & Comp L Rev 211.

<sup>64</sup> *ibid.*

<sup>65</sup> Crawford, *The Creation of States in International Law* (n 3) 96-173.

<sup>66</sup> J Dugard, *Recognition and the United Nations* (Grotius Publications, Cambridge 1987).

*cogens* is illegal and cannot produce legal rights to the wrongdoer; such an entity cannot become a State. He concluded that the 'United Nations has for practical purposes become the collective arbiter of statehood through the process of admission and non-recognition'.<sup>67</sup> However, what remains questionable is thus, has UN membership become a criterion for statehood? In particular, the principle of effectiveness has undergone a dynamic change in the following time due to the swift change of the political situation in the world and describes the shift from effectiveness to legitimacy and consequently international recognition.<sup>68</sup>

In recent years, recognition of States has become much more important because of its results. Grant<sup>69</sup> argued that, 'recognition of an entity doesn't mean only that this entity has met the required qualifications, but also that the recognising State will enter into relations with the recognised State and let that State enjoy usual legal consequences of recognition such as privileges and immunities within the domestic legal order.' Lauterpacht<sup>70</sup> and Guggenheim asserted that recognition is constitutive.<sup>71</sup> While Brownlie<sup>72</sup> argued that 'recognition is an optional and political act and there is no duty in this regard.' However, the key question in the discussion about the legal effect of recognition is whether the formation (and continued existence) of a State is dependent or independent of recognition by the existing States: in other words, may a political entity be considered a State under international law, even if it is not recognised as such by the existing States?<sup>73</sup> It is thus questionable whether recognition has re-emerged as an important legitimising criterion for statehood and how it has been modified through the changes in world order.

Fulfilling the criteria for statehood and self-determination does not automatically lead to the formation of a new State. Secession could jeopardize groups' chances of international

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<sup>67</sup> *ibid.*

<sup>68</sup> S Nijhawan, 'The Criteria for Statehood in International Law are Based on the Principle of Effectiveness not Legitimacy.' essay submitted to the School of Oriental and African Studies (London, Faculty of Law and Social Sciences Centre for International Studies and Diplomacy 2003) <[http://tamilnation.co/selfdetermination/03\\_criteria\\_for\\_statehood.pdf](http://tamilnation.co/selfdetermination/03_criteria_for_statehood.pdf)> accessed 20 February 2013.

<sup>69</sup> T D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Greenwood Publishing Group 1999) 83.

<sup>70</sup> H Lauterpacht, *Recognition in International Law* (CUP, Cambridge) 1948) 401-407.

<sup>71</sup> I Brownlie, *Principles of Public International Law* (7<sup>th</sup> edn, OUP 2008) 86.

<sup>72</sup> *ibid* 87.

<sup>73</sup> A Z Zadeh, 'International Law and the Criteria for Statehood: The Sustainability of the Declaratory and Constitutive Theories as the Method for Assessing the Creation and Continued Existence of States' (LLM thesis, University of Tilburg 2011).

recognition, which depends largely on political persuasion. Williams<sup>74</sup> and Scharf<sup>75</sup> have recently applied a useful approach in the Nagorno Karabagh/Azerbaijan situation, combining ‘Earned Sovereignty’, and ‘Earned recognition’ to achieve self-determination. Williams described ES as entailing ‘the conditional and progressive devolution of sovereign powers and authority from a State to a sub-State entity under international supervision.’<sup>76</sup> The reconceptualization of RES would follow, including a process of determination by an international mechanism to give effect to the referenda within a sub-State, with the result being its recognition by the international community as an independent State. The use of legal norms such as RES and plebiscite legalises the process of recognising emerging independent States or, in the alternative, recognising the sovereign rights attributed to sub-States.<sup>77</sup> RES provides the legal framework resolution and addresses international legal status, and the plebiscite ensures that the framework attains legal status only after a popular consultation with the people.

RES provides an ideal legal solution for IKR because it recognises the Kurdish right to self-determination and sovereign powers without the use of secession, which would effectively destroy Iraq’s territorial integrity. Therefore, this methodology provides an additional option to the Kurdish/Iraqi dispute outside of the traditional legal dispute resolution mechanisms. RES, approved by plebiscite (through a referendum), can be the best possible legal methodology for an agreement on the future of IKR. The Kurds have to contemplate first a negotiated grant of a level of sovereignty for a period, during which both parties would establish a system of protection of minority rights and human rights and engage in a series of defined confidence-building measures. This would take place with the support of the international community. During the interim period IKR has to prove it stabilised its internal political strife and began successfully rebuilding a civil society and community services, and solving its constitutional disputes within the State, and that they have earned their sovereignty. Later, an assessment of the will of the people, presumably through a referendum, would also guide the decision on the final status of the region.

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<sup>74</sup> P R Williams and F J Pecci, ‘Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination’ (2004) 40 *Stan J Int’l L* 347.

<sup>75</sup> M P Scharf, ‘Earned Sovereignty: Juridical Underpinnings’ (2012) 31 *Denv J Int’l L & Pol’y* 373.

<sup>76</sup> Williams and Pecci, ‘Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination’ (n 74).

<sup>77</sup> K Heymann, ‘Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust’ (2003) 19 *Am U Int’l L Rev* 153.

Today Iraqi Kurdistan exists in a *de facto* sense, but struggles to exist in a *de jure* sense. The area itself became essentially independent of Saddam Hussein's regime after the 1991 uprising. Thanks to the U.S.-British-French enforced no-fly zone established in the wake of the first Gulf War, Iraq's Kurds were able to go about their own business unencumbered by Baghdad's retention of nominal and geographic unencumbered sovereignty.<sup>78</sup> Despite having a distinct language, common culture, ancient land, shared history, and a large population, there is an existential dilemma; the Kurds are deprived of a recognised State. Statelessness has created a sense of pessimism within the Kurdish psyche that they see no remedy for, except through some form of self-rule.<sup>79</sup> The Iraqi election in 2005 is viewed by most as a success for the Kurds, they won the large number of seats as an apposite and deserved outcome. However, many obstacles stand in the way of their autonomy. These include the style of government in Iraq, as the federal state structure is opposed by many, including the Arabs and Turkmen of Kirkuk.<sup>80</sup> In addition, the claim of Kirkuk as the capital of the Kurdish regional government KRG has instilled fear among Iraq's neighbours and poses a threat to the future of the Iraqi State itself.<sup>81</sup> The city has become a source of ethnic-sectarian conflicts, as well as the possibility of a regional conflict.<sup>82</sup> Accordingly, what remains questionable is whether federalism will become the road to secession for the Kurds, as the language of the new constitution is problematic and illustrates a lack of sophistication in constitutional writing.<sup>83</sup>

The Constitution establishes Iraq as a federal entity, meaning the union of various independent entities.<sup>84</sup> However, Article 1 states that 'the Republic of Iraq is an independent, sovereign nation, and the system of rule in it is a democratic, federal, parliamentary republic'. The Preamble affirms that 'adhering to this Constitution shall preserve for Iraq its free union of people, land, and sovereignty'. Dawoody argued that, by identifying the unity of Iraq as a

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<sup>78</sup> M J Kelly, 'The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause' (2010) 114 Penn State L Rev 707.

<sup>79</sup> A Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (2006) 41 JAAS 483.

<sup>80</sup> R M Usherwood, 'World War I and the Principle of National Self-Determination: A Closer Look at Kurdistan' (Anthropology theses, paper 6, Georgia State University 2005).

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

<sup>83</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>84</sup> 'Iraqi Constitution', 2005 <[http://www.iraqinationality.gov.iq/attach/iraqi\\_constitution.pdf](http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf)>accessed 20 December 2013, Article 1.

‘free’ act of its people, it at least indirectly acknowledges that the Iraqi union is a form of ‘union at will’ that is subject to change according to the determination of its groups.<sup>85</sup> Furthermore, Article 107 states that ‘the federal authority will maintain the unity of Iraq, its integrity, independence, sovereignty and its democratic federal system’.<sup>86</sup> This means that the task of maintaining the integrity of the Iraqi state is by the federal government alone, in effect, Dawoody pointed out that, ‘the constitution exonerates the Kurdish region from such obligation and frees it to break away if it chooses to do so in the future.’<sup>87</sup> Thus, IKR can be granted self-determination if such an act will not infringe upon the territorial integrity of a State.<sup>88</sup> The thesis explores that there is no way for Iraqi Kurds to attain self-determination without threatening the territorial integrity of their sovereign state. However, what remains unexplored yet is what would happen if Iraq proves to be a failed State that cannot sustain a federal democracy?

It is thus suggested that a people of a given ethnic group or religious group or tribal group can only have a meaningful communal existence if they are an independent nation, not if they have genuine autonomy, or if there are no human rights abuses and oppression. Whether they must actually be independent is a questionable assertion in a global economy where cooperation pays greater benefits in every area of life than destructive competition.<sup>89</sup> Here, serious questions should be asked when a people thinks it should be independent in order to have a meaningful political existence: first, is there any violation of human rights? Are the rights of the group seeking self-determination respected by the State? Will it be better or worse off if they are independent, or have a federalist system? Nonetheless, if every ethnic, racial, and religious group that occupies a piece of land became a separate nation, the world might have more than thousand countries and have a very difficult time having a functioning global policy or a functioning economy.<sup>90</sup>

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<sup>85</sup> Dawoody, ‘The Kurdish Quest for Autonomy and Iraq’s Statehood’ (n 79).

<sup>86</sup> ‘Iraqi Constitution’ (n 84) Article 107.

<sup>87</sup> Dawoody, ‘The Kurdish Quest for Autonomy and Iraq’s Statehood’ (n 79).

<sup>88</sup> Usherwood, ‘World War I and the Principle of National Self- Determination : A Closer Look at Kurdistan’ (n 80).

<sup>89</sup> Nada, ‘Self-Determination and Secession Under International Law’ (n 43) .

<sup>90</sup> A Beigman, ‘Secessions vs. Praise for Unity’ *The Washington Times* (Washington October 18 1999)

<<http://www.highbeam.com/doc/1G1-56474142.html>> accessed 19 February 2013.

### 1.3. Thesis statement and research questions

This thesis will present a new understanding of self-determination in the post-colonial context, and from that, develop an original way of guiding states in evaluating contemporary claims to external self-determination.

International law provides that for a group to be entitled to exercise its right to self-determination, it must qualify as a 'people'. At the same time, it stresses that the territorial integrity of States must be respected. Both are fundamental principles of the international order. Even so, the orthodox view is that the right to self-determination is to be exercised within the framework of the existing sovereign State; that is to say, the right to self-determination is subordinated to the territorial sovereignty of the parent State. Thus, a colonised people would exercise their choice, for example through a referendum, within and as part of that colonial empire. If that is not possible, for example, because the colonial empire refuses to countenance the risk of a break-up, the colonised people may have to take control of their political future through unilateral non-consensual secession (I am not making any observations on the right to use force in struggles for self-determination).

Nevertheless, what does the right to self-determination mean today? The normative scope of the right of the principle of self-determination continues to lack precision. Firstly, it is unclear whether the concept of 'peoples' now includes minorities, and secondly, it is unclear what the appropriate objective remedy for a claim of self-determination should be in a post-colonial context (for example, creation of an independent State, or any other political status freely determined, as stated in the UN Friendly Relations Declaration). The Scottish example provided an illustration of an exercise of the right to self-determination that is taking place in a post-colonial context and within the framework of the existing parent State. If separation was to be the will of the Scottish people in the referendum, Westminster were committed to allowing a process of secession. However, is there any role for unilateral, non-consensual secession in the post-colonial world? Authority for this comes from the landmark finding of the Supreme Court of Canada, that territorial changes without the consent of the State can be a remedy in extreme circumstances involving grave breaches of fundamental human rights.



This thesis takes up the argument of ‘earned sovereignty’ as a fresh way of looking at the content of the right to self-determination, and providing grounds for overcoming the default presumption of territorial integrity. Alan Buchanan originally developed the theory. In 1991, he launched the contemporary debate about the morality of secession. However, his initial theories were taken further in his 2004 *magnum opus*, where he proposed a justice-based reorganisation of international law, incorporating a ‘just cause’ theory of secession as a remedial right only. In his view, secession can only be justified if important harms have been committed to the seceding people or entity. This seems, to me, to say that it is not enough that a ‘people’ wishes to have a future outside of and independent from the parent State; these ‘people’, entitled to the right to self-determination, must have a good cause for wishing to secede from their parent State. There is an additional element here, which did not exist for colonial peoples (possibly, the mere fact of being colonised can be equated with this modern additional element). Buchanan stipulated that a ‘people’ entitled to the right to self-determination are also entitled to secede unilaterally when confronted with the parent State’s persistent violation of previous agreements affording them some limited form of self-government. In the situation where there may be autonomy arrangements within the constitution, systematic violations by the parent State may provide justification for secession, he argued.

Accepting and building on Buchanan’s, ‘earned sovereignty’ theory, and arguments raised by the Supreme Court of Canada in the matter of Quebec, I propose a new way of guiding the international community in this area, a new method for assessing the legality and legitimacy of external self-determination claims within the post-colonial international law framework. I call my new method the ‘Remedial Approach to Post-Colonial External Self Determination’ because I see the creation of the would-be State through secession as a remedy in certain limited circumstances. Starting with the right to self-determination, I analyse the right from its colonial-era roots to the contemporary post-colonial era. I argue that the right to self-determination has never been monolithic. It has had different aspects depending on the group one was dealing with. It is now uncontroversial that colonised people had the right to determine their political future and destiny, but these people lived with others within the colonial empire that also had entitlements. These others, such as those within the Metropolitan area, may not have been ‘colonised’, but they did have rights to determine their political future and destiny (at least once democracy had spread around the world). These

rights were exercised in different ways – one gave the opportunity for externality, and the other for internality; another way of looking at it is that one gave the right to choose (among a range of options) external self-determination (from among a range of options), and the other gave the right to make choices internally, the right of self-determination exercised within the State. My point is that self-determination, already at the colonial stage, had inherent flexibility and this links to the flexibility that I believe it must have today.

I argue, moving out of the colonial era, that self-determination still exists for all ‘people’. However, it now takes an internal shape; another way of looking at it is that the default is self-determination is to be exercised internally, within the legal and socio-political structures and procedures of a State. Democratic participation, I would argue, is about exercising the right to self-determination internally. This is the default position.

However, I argue that in exceptional (and necessarily limited) situations, the default position can be overridden. There has to be a way to manage situations where the exercise of the right to self-determination, understood in this internal way, is impossible or involves breaches of fundamental norms of international law. My argument is that if the right to self-determination is to have a moral and just content, it must allow for escape routes, or exceptions, when things just do not work out. These are the remedies that I refer to. In support of this, I draw from the Supreme Court of Canada and Buchanan, and argue that in certain extreme circumstances, the modern right to self-determination must include an external element, the right to secede from the parent State.

My argument is that the ‘Remedial Earned Sovereignty’ approach affords a way of assessing post-colonial breakaway movements in their different manifestations. A new entity may come into being lawfully through negotiated and consensual constitutional processes; on the other hand, a new entity may come into being through the use of force as the only remedy for the ‘people’ denied a right to determine their future internally. The latter are of interest to me, as this is where the controversy lies. We should look at whether these entities have earned their sovereignty. Some such movements may be lawful at creation; some may be unlawful at creation. What is lawful may become unlawful, what is unlawful may become lawful; although the fact of statehood, once accepted, is a mere fact, a State exists or does not exist. The ‘Remedial Earned Sovereignty’ approaches allow us to add another layer of

consideration that goes beyond the superficiality of pure ‘legality’, by delving into the legitimacy of the new entity. I argue that legitimacy is a second layer of essential consideration, and it involves a deeper and more holistic level of analysis. Consideration of legitimacy involves but goes beyond consideration of criteria relevant to the ‘Remedial Earned Sovereignty’ argument. We have to look at the circumstances that led to the secession, also how the entity has conducted itself, and how it has organised itself internally. In order to navigate through these considerations of legality and legitimacy, I will develop a set of guidelines for States in assessing how to deal with entities coming into existence because of secession. This is my ‘Remedial Approach to Post-Colonial External Self Determination’.

From this starting point, which emerges from chapter three, I will test and refine the ‘Remedial Approach to Post-Colonial External Self Determination’ by applying it to Kosovo, Quebec and Southern Sudan, and ultimately test the finalised hypothesis idea on the Iraqi Kurdish Region.

The following research questions will assist in the development of the thesis statement:

1. What is the content of the right to self-determination in the post-colonial world order? Does it include the right to secede from the parent State? If so, in what context?
2. Is the theory of ‘earned sovereignty’ adequate for addressing external self-determination? If not, how can it be improved?
3. Can a doctrinally sound and practical method for assessing the legality and legitimacy of external self-determination claims be developed?
4. Do the peoples of the Iraqi Kurdish region, specifically the Kurds, have a right to external self-determination that would enable them to establish their own state in accordance with international law?

## 1.4. Methodology

### 1.4.1. Technical approaches

The thesis approach draws on a traditional international law methodology, relying on the doctrinally accepted ways of sourcing international law, with a practical focus on customary international law. It is a conventional ‘black letter legal analyse’. Accordingly, the thesis proposes the following methodology:

### 1.4.2. Conceptual approaches

**Firstly:** This thesis will examine the right to self-determination as an important legal principle in international law, defined in Articles 1-(2) and Article (55) of the United Nations Charter. This review will show that the right has generally been overlooked as a viable option for the people. I will critically discuss whether the right carries with it a right of secession. It shall be illustrated that the entitlement of every ‘people’ to self-determination under international law leaves some questions unanswered, namely, what does self-determination mean, and what is a ‘people’?

To illustrate this methodology, two arguments should be noted:

1) -The ICCPR states that peoples ‘freely determine their political status.’ ‘This language strongly suggests the ability to determine political dependence or independence, and in fact, General Assembly Resolution 1514 declares that self-determination includes the right to complete independence, at least in the colonial setting.’

2) -Nevertheless, self-determination is not limited to a simple alternative between independence and dependence. General Assembly Resolution 2625 speaks of several different modes of exercising self-determination: ‘The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.’

**Second:** After analysing the right of self-determination, the thesis explores whether the right of self-determination includes the possibility of secession, in other words, does the right of self-determination suggest a right of secession? Here three arguments should be considered:

1) Whether the right of self-determination carries with it a right of secession that will be argued in both the colonial and post-colonial era. It will be argued that the right has no relevance to decolonisation, and secession is also irrelevant to the ongoing entitlement of peoples to self-determination in the post-colonial era.

2) Whether minority rights allow for self-determination. To answer this question the thesis will argue The Joint Opinion prepared in 1992 in Quebec, and the First Badinter Opinion regarding the status in SFRY, arguing that in extreme circumstances there may be a right to secede if minorities' rights are being violated in an irredeemable way.

3) The thesis will essentially evaluate the post-Cold-War State practice creation. Mainly, the statehood criteria and recognition theories will be outlined. It shall consider which statehood criteria have effects on the law of statehood, what is the role of effectiveness, sovereignty, human rights, and recognition, do they have a central role in the creation of a new State in pre-1991 practice? The thesis will create an argument in favour of the concept of the additional statehood criteria, and the relationship between the statehood criteria and recognition requirements, between recognition and non-recognition through doctrinal law methodology, as it tries to clarify the importance of some additional basic criteria of creating new States and to examine the post-Cold era State practice.

**Third:** the thesis will discuss and critically examine Allen Buchanan's theory of secession. It will analyse both primary right theories and remedial right only theories, it will question the continued value of the concept of nationhood in this context. Buchanan's remedial right only theory of secession will be compared with some primary right theories. On the other hand, to analyse and resolve secessionist disputes, the thesis will evaluate Brilmayer's proposed framework regarding the relative legitimacy of competing territory claims, as the best way to end the disputes. Thereafter, the thesis will deal with the problems of normative and liberal theories, special rights to secede, and conditions of groups and ask if constitutions should

include a right to secede. Eventually, after excluding the existence of a general right to self-determination and secession, excluding the existence of a general right to secede, the thesis will turn to bridge the gap between the right of self-determination and sovereignty of the State through the theory of Remedial Earned Sovereignty 'RES'. By providing a mechanism whereby some sub-State entities may be guided through a process of transition to heightened autonomy or statehood in such a way so as not to undermine the legitimate interests of parent States and of the international community. Such a viable option could have been envisioned to the situation of IKR if the Kurds have failed to break away from Iraq in democratic fashion, RES, can be a useful and legitimate tool for the exercise of external self-determination, ultimately leading toward remedial secession and independence.

**Fourth:** the research picks up several case studies, the specific disputable situation of Kosovo's Declaration of Independence. These include the right of self-determination, statehood criteria, recognition, and remedial secession theory. Quebec and South Sudan, as a struggle by a group against an existing State. The thesis evaluates that groups can only have a meaningful communal existence if they are a 'people' and their right to internal self-determination has been directly or indirectly violated, not if there is no violation of human rights and no oppression, not if they have a genuine (federal or autonomy political system). The will of the people, those seeking separation or autonomy and presumably resistance by the State to preserve its territorial integrity will be considered properly.

**Fifth:** after providing an overview of the right to self-determination and the legality of the right to secession in both theory and practice and minority rights, this thesis turns to analyse the Kurdish question in Iraq. To illustrate this methodology two arguments should be noted:

1)-The thesis argues how the Kurds in Kurdistan of Iraq have made a significant achievement in securing their rights, and controlling their region since 1991. The factual situations, what the Kurds have achieved, upon the Iraqi occupation of Kuwait in 1990, and how far these situations have given rise to Kurdish expectations of greater autonomy and Federalism.

2)-The thesis analyses, how the Kurds and Iraqi government are sharply divided over the most fundamental issues in the constitution relating to the nature of their future State and to the governmental system that is to play a role in it. In particular, whether the Kurdish region

will be defined territorially or ethnically, and whether it will include Kirkuk. A continuing territorial dispute between the central government in Baghdad and Kurdistan Region Government over the area in and around the city of Kirkuk may be at the crux of a stable Iraq. It will argue, how long the Iraqi Kurds can be persuaded to remain part of a federal Iraq. A constitutional framework will closely examine the major controversial issues between the IKR and the State.

**Finally:** The methods used in the investigation forming the basis for this thesis follow the traditional pattern of research and States practice, case law, and doctrine. This project relies on materials from a varied assortment of sources, chief among which are the international legal instruments and the case law pertaining to the right to self-determination and the creation of States on grounds of this right. All of the sources referred to in the investigation are listed in the bibliography at the end of the thesis.

## 1.5. Structure

Followed by the methodology presented above, this thesis will be structured in seven Chapters.

**Chapter 1:** is the introduction of the thesis as shown in this chapter.

**Chapter 2:** comprehensively presents the relevant legal issues and literature review.

This chapter deals with the right of self-determination, the rights of minorities, the act of recognition, the law of statehood and secession. It considers that, for a group to be entitled to exercise its right to self-determination, it must qualify as a ‘people’. It will examine how the exercise of the right of self-determination should not violate the ‘territorial integrity’ of a State that the right is normally to be exercised within the framework of an existing sovereign State.

This chapter evaluates how to identify a group as a minority. It will argue how the right of minority groups or sub-groups is distinguishable from the right to self-determination. The focus of this chapter will be the concept of statehood in international law. It will outline the

classic statehood criteria and the development of the additional criteria and analyse the role and the significance of recognition. It will argue how recognition lets the State enjoy the usual legal consequences within the domestic legal order and international community. It will examine the obligation to withhold recognition and the additional statehood criteria to see if they are problematic in light of the perceived role of recognition in contemporary internal law. The chapter will then overview the fundamental debate about secession. It will argue that, secession, as a last resort may be available in certain exceptional circumstances. It will analyse how the international community needs to overcome the default presumption against secession, on the other hand, it needs to establish a means to assess and recognise secession claims within an international law framework.

**Chapter 3:** is (Theories of secession) and the evaluation of the concept of (Earned Sovereignty and plebiscite), as an additional option outside of the traditional legal dispute resolution mechanisms.

This chapter reviews theories of secession, and identifies what they have in common and where they differ. It will argue, under what conditions a group within an existing community may, with justification separate from the larger group in order to establish its own self-governing community. It begins the task of remedying the controversial debate on moral secession, evaluating under what grounds and under what conditions is secession morally justified. It will argue how international law should deal with secession. It examines whether the international law of self-determination authorises a right to secession as a remedy for the violation of the right to self-determination of peoples.

Normative theories of secession provided by Allen Buchanan and Lea Brilmayer will be taken as representative examples of just-cause theories. Thereafter, Beran's account on liberal democratic theories will be examined. The chapter will then turn to discuss the legal aspects of secession, especially as it relates to the constitutional laws of sovereign States. It evaluates rules for achieving independence, arguing international law may provide guidance on how it may be achieved, especially when a people are entitled to restore remedial secession. Thereafter, the chapter will examine the role of plebiscite in recognising the creation of a new independent State. It will illustrate how the will of the people occurs through the legal norm of plebiscite. The chapter will then turn to discuss the legal aspects of secession, especially as



it relates to the constitutional laws of sovereign states. The chapter will address the theoretical justifications for constitutional secession.

Later, the chapter will turn to explore a fresh balanced theory on the external right to self-determination (Remedial Earned sovereignty), as a remedial approach to the right of self-determination in international politics. It will discuss both advantages and disadvantages of the theory, and drawing some cautious policy conclusions from the approach. Accordingly, this chapter will be arguing both politics and legal theories of secession, as multidisciplinary approaches seems to be the most effective way to approach secession and self-determination.

**Chapter 4: is the assessment of State practice**, to illustrate the discrepancy of results attached to the self-determination struggles by different people.

This chapter presents different cases around the world. It articulates a variety of arguments that purport to justify secession under certain circumstances. It will address whether international law and State practice really declines the support for secession, or rather is allowed only in certain circumstances. Recent endorsement of Kosovo, South Sudan and Quebec, have indicated that the premise that the separation of ethnic groups is supposedly legitimate in certain exceptional cases. This applies alternatively when the mother State rejects every compromise solution in a conflict situation, or when there is no realistic prospect of a conflict being resolved, especially when the methods of peaceful conflict resolution appear to have been exhausted.

**Chapter 5: is the Kurdish question in Iraq:**

The chapter in part (1) provides an overview of the roots of the Kurdish question in Iraq, (Historical Perspective). The chapter evaluates the Kurdish origins to demonstrate the distinctive Kurdish cultural identity and the Kurdish claim to territory. It analyses a historical explanation for the unjust annexation of the Kurdistan Region into the Iraqi State, arguing how the Iraqi Kurds were oppressed and subjected to some of the worst atrocities of humanity through their history. It outlines the elements of self-determination and considers whether the Iraqi Kurds possess this right. Then the chapter in part (2) will turn to evaluate the constitutional framework between Iraq and the IKR. It will critically analyse why the

Kurds supported the constitution in 2005, as it appeared to meet their significant demands as well as, not only to preserve the Kurdish autonomy, but also to include the Kurds insistence on *de-facto*-federalism or a formal creation of each region with its own regional government. Finally, the part will examine the Kurdish drive for secession based on a constitutional framework, identifying challenges facing the Iraqi Kurds' quest for independence and statehood. The ramifications of the impending Iraqi federalism for the future of Iraq as a country will be discussed also.

**Chapter 6:** Is the application of the reconceptualised theory of 'RES' to the situation of the IKR.

The chapter will apply the concluded work presented in chapters II, III, IV, and V, in the IKR situation in northern Iraq. In order to assess the claim of the IKR to independence or secession, this chapter will turn to the examination of the three core issues described above, statehood, secession, and recognition, under international law as it applies to the situation of the IKR. This chapter will argue that for an entity to become a State, it has firstly to fulfil the requirements of statehood and secondly, to have been created lawfully. Later, it will examine the Kurdish drive for self-determination based on the theory of 'Remedial Earned Sovereignty' as a settlement short of secession and alternative to change established international boundaries. The chapter will argue that for the Kurds to obtain international legitimisation and gain some degree of self-determination, they must fulfil several guidelines. Eventually, it will demonstrate issues surrounding the IKR independence.

**Last, Chapter 7:** is the conclusion of the thesis. The chapter evaluates important questions regarding the modern-day understanding of the right of self-determination and of the international legal theories of secession, statehood, and recognition. Moreover, it challenges to assert new theories as justification for the IKR persuading for the creation of an independent entity from its mother-state through the process of RES. The chapter will argue that for a successful self-determination struggle it is important for the Kurds to demonstrate to the outside world that it has achieved statehood, and view its struggle as legitimate to the superpower States. Rather, it suggests that a possible peaceful solution should have been considered especially for disputed areas before any declaration of independence or secession, which may probably, embraced the neighbours' countries and the international community. This chapter will conclude that as a remedial approach, 'RES' will be a useful and legitimate

tool to address ongoing post-colonial self-determination cases and guide international responses in future if the self-determination claim itself is denied or deferred by the State. This approach can be used as a fresh way of looking at the content of the right to self-determination, and providing grounds for overcoming the default presumption of territorial integrity.

## **Chapter Two: Towards a New Understanding of the Concepts of Self-determination, Minorities, Statehood, Recognition, and Secession in Contemporary International Law**

### **2.1. Introduction**

This chapter examines the crucial legal issues relevant to this thesis, and focuses on the right of self-determination, the rights of minorities, the act of recognition, the law of statehood and secession. This is essential in order to identify the central of applicable rules to these international concepts, and to lay the groundwork for the development of our original contribution in this area. The aim of the chapter is to scrutinize and analyse the legal theory of self-determination within the context of international law. The concept of ‘people’ and its differentiation from the term ‘minorities’ will be addressed in order to establish a foundation of the group’s claim as a separate and distinct nation. Most importantly, the problems with regard to the application of the right of self-determination have shifted from the question of who are the holders of the right, to the question of when does the right take precedence over the obligation to respect the territorial integrity of a State. This holds true especially concerning national minorities, which have not traditionally been considered recipients of this right. In this regard, the chapter will evaluate how to identify a group as a minority. This chapter will argue how the right of minority groups or sub-groups is distinguishable from the right to self-determination. Thereafter, the chapter will examine the evolution and the contents of the right of self-determination, and attempts to define the necessary elements of statehood and illustrate the importance of international State recognition thereto. The chapter will then overview the fundamental debate about secession. It will argue how the international community views secession with suspicion, and traditionally, the right to independence or secession as a mode of self-determination has only been applied to people under colonial domination or some kind of oppression. Theories of secession will be dealt with in chapter 3, in the context of a theoretical discussion of the legal and political right of secession.

## 2.2. The right of self-determination

### 2.2.1. What is the right of self-determination?

The right of self-determination is one of the most important, yet controversial, principles of international law. It has served as a strong slogan and a vital justification for the independence of many peoples, specifically the independence of colonial peoples. The right of a fundamental principle of human rights law, is an individual and collective right to ‘freely determine political status and to freely pursue economic, social and cultural development.’<sup>91</sup>

Significantly, the right is linked to many of the most important and fundamental principles of public international law and that it embodies the concept of the right of peoples to determine their own destiny without outside interference or subjugation, presupposing all peoples are equal. The right complements fundamental principles of public international law like the equality of States, State sovereignty, and territorial integrity, including the prohibition of force and the principle of non-intervention. With self-determination as a slogan, indigenous groups or minorities raise claims of either secession from an independent State entity or independence and freedom from foreign domination. This right does not only exist under public international law but also under international human rights law ‘IHRL’ where it contains, among other things, of the equal rights of people within a State.

In fact, to say that under international law every ‘people’ is entitled to self-determination leaves unanswered problems that are still very much in flux and vague, namely, what does self-determination mean, and what is ‘a people’?

Articles 1 (2) and 55 of the United Nations Charter mention the right of self-determination, and although not expressly mentioned, it constitutes the foundation for the chapters concerning the non-self-governing territories and the trusteeship system. Article 1 (2) declares that one of the fundamental purposes of the United Nations is to ‘develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples’. Article 55 is part of the chapter concerning international economic and social cooperation. It can therefore be said that all States, which have become members

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<sup>91</sup> ‘The International Covenant on Civil and Political Rights’ (n 19). Also Art (1) of the ‘International Covenant on Economic, Social and Cultural Rights) (ICESCR) (n 20).

of the UN by ratifying the UN Charter, have accepted the principle of respect for the self-determination of peoples. The Universal Declaration of Human Rights UDHR followed the UN Charter. The rights elaborated in two more detailed international covenants which, unlike the Declaration itself, are treaties intended to have legal force. Article (1) of the ICCPR states that ‘All peoples have the right to self-determination, and ‘may freely determine their political status’.<sup>92</sup> Accordingly, a nation, which is a signatory of an international treaty, is obliged under international law to ‘refrain from acts which would defeat the purpose and object of the treaty’ (Vienna Convention on the Law of Treaties, Article 18, and codifying earlier customary international law.<sup>93</sup>

The language of the common Article 1 of the ICCPR strongly suggests the ability to determine political dependence or independence, and in fact, General Assembly Resolution 1514 declares that self-determination includes the right to complete independence, at least in the colonial setting.<sup>94</sup> Nevertheless, self-determination is not limited to a simple alternative between independence and dependence. General Assembly Resolution 2625 speaks of several different modes of exercising self-determination: ‘The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people’.<sup>95</sup>

In fact, since the ICCPR came into force in 1976 there has been widespread concern that if the right to self-determination in Article 1 is applied literally, this could lead to the break-up of many existing States.<sup>96</sup> Particularly, this applies to Africa, whose national boundaries are mostly colonial era constructs, but also to numerous other States with an ethnic minority population who form a majority in particular regions.<sup>97</sup> Harris argued that, the consensus,

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<sup>92</sup> ‘The International Covenant of Civil and Political Rights’ (n 19).

<sup>93</sup> Vienna Declaration and Program of Action, 1993, (adopted by the World Conference on Human Rights), UN Doc A/Conf.157/23.

<sup>94</sup> ‘Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res (1514) (XV), 15 UN GAOR Supp (No 16) at 66, UN Doc A/4684 (1961).’ (Res 1514(XV) (December 1960), (947th plenary meeting) 1960). Article 1 of the Declaration states that ‘The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the UN and is an impediment to the promotion of world peace and co-operation’.

<sup>95</sup> ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States (n 23). The Declaration states that ‘alien subjugation, domination, and exploitation are a violation of the principle of self-determination, as well as a denial of fundamental human rights, and is contrary to the UN Charter’.

<sup>96</sup> P Harris, ‘Is Tibet entitled to self-determination?’ (CCPL Occasional Paper 18, 2008) <<http://www.law.hku.hk/ccpl/pub/Documents/OccasionalpaperNo.18Eng.pdf>> accessed 22 June 2013.

<sup>97</sup> *ibid.*

which has emerged, is that the right to self-determination for the purpose of ICCPR Article 1 applies only to the following: (1) entire populations living in independent states, (2) entire population of territories yet to receive independence, and (3) territories under foreign military occupation.<sup>98</sup>

In addition, Sterio argued that self-determination in international law is the legal right for a people to attain a certain degree of autonomy from its sovereign.<sup>99</sup> President Woodrow Wilson, in introducing the concept to the League of Nations in 1919, described self-determination as ‘the right of every people to choose the sovereign under which they live, to be free of alien masters, and not to be handed about from sovereign to sovereign as if they were property.’<sup>100</sup> Subsequently, other writers have described the right as ‘a right which arises when there is international recognition of the rights of the inhabitants of a colony to choose freely their independence or association with another State.’<sup>101</sup> Alternatively, when there is a collective right of a people sharing similar objective characteristics to ‘freely determine their own form of government while further developing their economic, social, and cultural status.’<sup>102</sup> Judge Dillard in a separate opinion in the *Western Sahara Case* stated that ‘It is for people to determine the destiny of the territory and not the territory the destiny of the people’.<sup>103</sup> Therefore, it can be argued that self-determination encapsulates three basic ideas (1) there has to be a group (2) that group has to be concerned about its political status; and (3) that group must be able to exercise its own choice with regard to its political future.<sup>104</sup>

Similarly, self-determination has been one of the most important driving forces in the new international community; it has set in motion a restructuring and redefinition of the world community’s basic rules of the game.<sup>105</sup> The definition was elaborated regarding the manner in which the right could be implemented. The right can be exercised in one of three ways, integration, free association or independence, but whichever method is chosen, ‘it is clear that

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<sup>98</sup> *ibid.*

<sup>99</sup> M Sterio, ‘On the Right to External Self Determination: “Selfistans,” Secession and the Great Powers’ Rule’ (2010) 19 M J Int’l L 29.

<sup>100</sup> E M Amberg, ‘Self-determination in Hong Cong: A New Challenge to an Old Doctrine’ (1985) 22 San D L Rev 839.

<sup>101</sup> *ibid.*

<sup>102</sup> J A Collins, ‘Self-Determination in International Law: The Palestinians’ (1980) 12 Case W Res J Int’l L 137.

<sup>103</sup> *Western Sahara Case* [1975] ICJ Rep 12.

<sup>104</sup> D Z Case, ‘Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories’ (1992) 18 Syracuse J Int’l L & Com 21.

<sup>105</sup> Cassese, *Self-Determination of People, A legal Reappraisal* (n 25) 1.

it is the process itself, which is the essential feature.’<sup>106</sup> Accordingly, the precise scope of the principle of self-determination, both as to its substantive content, the legal rights it confers and the entities to which it applies is still vaguely defined. This tends to make it particularly attractive as an elastic principle, which can be moulded to fit a variety of very different situations and aspirations.<sup>107</sup> On the other hand, outside the context of decolonisation, the right has an ‘internal nature’, that consists of a people’s right to freely pursue their social, economic, and cultural development, ideally through democratic governance.

The right has also been used in conjunction with principle of ‘territorial integrity’<sup>108</sup> to protect the territorial framework of the colonial period in the decolonisation process and to prevent a rule permitting secession from independent states from arising.<sup>109</sup> The Canadian Supreme Court of Canada in the Quebec case noted that ‘international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states’.<sup>110</sup> However, as a concept, self-determination is capable of developing further to include the right to secession from existing states, but that has not yet convincingly happened.<sup>111</sup>

The principle of self-determination has evolved into a part of positive international law. The right is indisputably a norm of *jus cogens*<sup>112</sup>, the norms are the highest rules of international law, and they must be strictly obeyed at all times.<sup>113</sup> The International Law Commission takes the stand, in light of, *inter alia*, the *East Timor case*, that the obligation to respect the right is ‘*jus cogens*’.<sup>114</sup> In addition, many scholars will even go further to state that the right constitutes a norm of ‘*erga omnes*’. The ICJ has affirmed in the ‘*East Timor*’ case that the

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<sup>106</sup> ‘*Western Sahara Case*’ (n 103).

<sup>107</sup> K Yildiz, *The Kurds in Iraq, the Past, Present and Future* (Rev edn, London, Pluto Press 2007) 191.

<sup>108</sup> Territorial integrity has been defined as the material expression of state sovereignty and jurisdiction (land, water, subsoil, airspace, population), and in some instances, state ownership of such material expression (aircraft, space vehicles, ships). See C L Rozakis, ‘Territorial integrity and Political independence’, in R Brenhardt (ed), *Encyclopaedia of Public International Law*, IV (North-Holland Publishing Co 2000) 812-818.

<sup>109</sup> T M Franck, *The Power of Legitimacy Among Nations* (OUP, USA 1990) 153.

<sup>110</sup> ‘*Reference re Secession of Quebec*’ (n 21) para 122.

<sup>111</sup> *ibid.*

<sup>112</sup> The term of ‘*Jus cogens*’, ‘refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted’. See, I Brownlie, *Principle of Public International Law* (5<sup>th</sup> edn, OUP 1998) 517.

<sup>113</sup> K Parker, ‘Understanding Self-Determination, The Basics’ (Association of Humanitarian Lawyers, Geneva 2000) <<http://www.guidetoaction.org/parker/selfdet.html>>accessed 23 March 2013.

<sup>114</sup> ‘Case Concerning East Timor’ (*Portugal v Australia*) [1995] ICJ Rep 84.



right to self-determination has an '*erga omnes* character'.<sup>115</sup> The Court went on to state that the right of peoples to self-determination is 'one of the essential principles of contemporary international law'.<sup>116</sup> Both the ICJ and the Inter-American Commission on Human Rights of the Organisation of American States have ruled on cases in a way that supports the view that the principle of self-determination also has the legal status of '*erga omnes*'.<sup>117</sup> Accordingly, due to the normative quality of '*erga omnes*' rights and obligations, the '*erga omnes*' character of the right to self-determination can only apply to well-established definitions of that right. This may include the right to some measure of internal self-determination. In other words, '*erga omnes*' obligations of a State are owed to the international community as a whole when a principle achieves the status of *erga omnes* the rest of the international community is under a mandatory duty to respect it in all circumstances in their relations with each other.<sup>118</sup>

Meanwhile, the right clearly applies within the context of decolonisation of the European empires and thus provides the peoples of such territories with a degree of international personality.<sup>119</sup> The principle of self-determination provides that the people of the colonially defined territorial unit in question may freely determine their political status.<sup>120</sup> Such determination may result in independence, integration, with a neighbouring state, free association with an independent state or any other political status freely decided upon by the people concerned.<sup>121</sup> In addition, the principle also has a role within the context of the creation of statehood, preserving the sovereignty and independence of states, in providing criteria for the resolution of disputes, and in the area of the permanent sovereignty of states over natural resources.<sup>122</sup> Thus, the definition and the scope of the rights are unclear but its development into a rule of law in Public International Law is almost indisputable. One field of application that is free from doubts is that of foreign domination and other forms of alien governance and subjugation, which initially referred to colonialism, but has evolved beyond that to include current forms of alien governance. In other words, the right evolved from a

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<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*

<sup>117</sup> The term "*erga omnes*" means flowing to all. It can also be described as a [law applies as against every individual person or State without distinction]. See, Parker, 'Understanding Self-Determination: The Basics (n 113).

<sup>118</sup> *ibid.*

<sup>119</sup> M N Shaw, *International Law* (6<sup>th</sup> edn, CUP 2008) 257.

<sup>120</sup> *ibid.*

<sup>121</sup> '*Western Sahara Case*' (n 103).

<sup>122</sup> '*Case Concerning East Timor*' (n 114).

mere slogan to a principle and later into an actual right in international law even though its scope is far from undisputed. Not only is it unclear but it also includes many elements. The only element of the right that is certain and indisputable is the element regarding independence from colonial or foreign domination.<sup>123</sup> Beyond that, there are different views on what this right includes. The right is thus, it has been construed as the right of peoples to determine their own destiny and form of government. For instance, self-determination can be based on a peoples' desire to be free from colonial rule. 'Self-determination may be exercised, *inter alia*, through the establishment of a sovereign independent state, by integration, or by association with another state. Thus, the exact meaning of self-determination is enmeshed in controversy'.<sup>124</sup>

## 2.2.2. Background and development of the right to self-determination

### 2.2.2.1. Self-determination and Colonialism

The principle of self-determination is linked to the decolonisation process that took place after the promulgation of the UN Charter of 1945. There began in the 1950s to be a moral stand taken on the issue by the General Assembly. In the 1960's, the right became increasingly invoked as a right of dependent peoples, with the increase in Afro-Asian membership. As a legal right, the right was first resisted by several colonial powers; it was in their view, merely a political aspiration. However, their resistance of a legal right gradually became muted, as they accepted under Article 73 (e) a broader interpretation of their duties.

Thus, the concept of self-determination was historically bound up with decolonisation that it was to bring forward dependent peoples to independence if they choose it, even though Article 73 has spoken only of self-government. The development of the concept within the body politic of the UN received early support from the ICJ, in the *Namibia* Advisory Opinion<sup>125</sup>, and in the *Western Sahara* Advisory Opinion.<sup>126</sup> The International Court of

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<sup>123</sup> M Abdullah, 'The Right to Self-Determination in International Law' (University of Göteborg 2006)

<sup>124</sup> P L Okoronkwo, 'Self-Determination and the Legality of Biafra's Secession under International Law' (2002) 25 Loy LA Int'l & Comp L Rev 63.

<sup>125</sup> The Court had affirmed that 'the subsequent development of international law concerning non-self-governing territories as enshrined in the Charter of the UN, made the principles of self-determination applicable to all of them. See, *Namibia* Opinion [1971] ICJ Rep 1971 16.

Justice (ICJ) refers to the right to self-determination as a right held by people rather than a right held by governments alone.<sup>127</sup> Accordingly, the legal concept of self-determination as a right of peoples of territory under colonial rule to determine their own destiny was firmly established.<sup>128</sup> In 1960 the Colonial Declaration, which confirmed the right of all people to self-determination, suggested that self-determination was not limited to colonial territories but might have a wider application.<sup>129</sup> By the late 1960s, even fairly Orthodox scholars of international law came to the inescapable conclusion that self-determination had developed into an international legal right, though its scope and extent were still open to some debate.<sup>130</sup>

These entitlements of the people's ability to determine their future, found its place in the United Nations Declaration of Friendly Relations of 1970. The Declaration speaks of self-determination being available in situations of colonialism and the 'subjection of peoples to alien subjugation, domination, and exploitation'.<sup>131</sup> The Declaration was designed to protect peoples in such territories, not just by humanitarian law, but also by insistence upon their right to self-determination. It is notable that the UN Charter has the implementation of self-determination as one of its purpose, although the provisions which deal specifically with dependent territories Chapter (XI)<sup>132</sup> make no reference to statehood as an option for the people of such territories.<sup>133</sup> Nonetheless, independent statehood did become the practically inevitable result of the exercise of the right of self-determination.<sup>134</sup> The General Assembly confirmed that statehood was one option for dependent people<sup>135</sup> and it was the option, which they generally chose, fuelling the greatest expansion in the number of member States of all time.<sup>136</sup>

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<sup>126</sup> The Court again affirmed the linkage between self-determination and the right of peoples under colonial rule, when it spoke of the 'principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end'. See, '*Western Sahara Case*' (n 103).

<sup>127</sup> *ibid.*

<sup>128</sup> Dahlitz, *Secession and International Law* (n 14) 26.

<sup>129</sup> 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (n 94).

<sup>130</sup> A Heraclides, *The Self-Determination of Minorities in International Politics* (London: Frank Cass & Co Ltd, Routledge 1991) 21-24.

<sup>131</sup> 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States' (n 23).

<sup>132</sup> 'Charter of the United Nations (Chapter XI): Declaration Regarding Non-Self-Governing Territories (Article 73)', 1945.

<sup>133</sup> M D Evans, *International Law* (2<sup>nd</sup> edn, New York: OUP 2006) 224-230.

<sup>134</sup> *ibid* 225.

<sup>135</sup> 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (n 94).

<sup>136</sup> Evans, *International Law* (n 133) 225.

Thus, it was therefore clear that the right of self-determination was applied to [all inhabitants] of a colonial territory and not to minority groups or segments of the population within that territory.<sup>137</sup> In addition, the right was granted to Trust Territories and Non-Self-Governing Territories as a whole.<sup>138</sup> However, exceptions were accepted. If there was a clear, wish of the majority of all inhabitants of the territory in question, such as, the express wishes of the inhabitants of the Ellice Islands, which became the State of Tuvalu.<sup>139</sup> For colonised people Sterio argued that the right to self-determination entitled the [choice] to ‘freely decide their future status, and belonged to a people as a whole living in a given colonial territory. Whereas Non-colonised people had the right to self-determination within their mother States, they did not have the right to seek independence based on the theory of self-determination’.<sup>140</sup> Thus, as observed by the Supreme Court of Canada in the *Québec* Case that: ‘[The right of colonial peoples to exercise their right to self-determination by breaking away from the ‘imperial’ power is now undisputed]’.<sup>141</sup> Hence, the right existed for all peoples, but was limited in its scope with respect to non-colonised peoples, and was limited in its application to colonised peoples.

#### 2.2.2.2. Self-determination in the Post-Colonial World

The concept of a legal right of self-determination has become controversial in the post-colonial context. The evolution of the idea of self-determination as a human right appeared through the famous UN General Assembly resolutions 1514 and 1541 in 1960.<sup>142</sup> In addition,

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<sup>137</sup> D Raic, *Developments in International Law: Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 200-201. See also ‘GA Res (1514) (XV) UN Doc A/4684 (1961)’ (n 94). And ‘GA Res 1541 (XV) (15 December 1960)’.

<sup>138</sup> See, ‘Charter of the United Nations (Chapter XI): Declaration Regarding Non-Self-Governing Territories (Article 73)’ (n 16). Also, ‘United Nations Charter (Chapter XII), International Trusteeship System (Articles 75-85)’, July 1945.

<sup>139</sup> See, ‘UN Doc. A/Res/32/407, 28 Nov 1977.’ Also, Raic, *Developments in International Law: Statehood and the Law of Self-Determination* (n 137) 209.

<sup>140</sup> M Sterio, *The Right to Self-Determination under International Law: Selfistans, Secession, and the Rule of the Great Powers* (Routledge 2013) 12.

<sup>141</sup> ‘*Reference re Secession of Quebec*’ (n 21) para 132.

<sup>142</sup> Resolution 1514 provides in operative paragraph 2 that all peoples subject to colonial rule have the right to ‘freely determine their political status and freely pursue their economic, social, and cultural development’. See, ‘Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res (1514) (XV), 15 UN GAOR Supp (No 16) at 66, UN Doc A/4684 (1961).’ (n 94). While Resolution 1541 (XV) made clear that this exercise in self-determination could result in various outcomes and stipulated the processes required to ensure that informed, free, and voluntary choices were being made. See, ‘Transmission of Information Under Article 73e of the Charter’ (n 138).

the right to self-determination and the duty on all states to promote it is also incorporated as Article 1 in both the International Covenant on Civil and Political Rights (ICCPR)<sup>143</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>144</sup>, which together are considered to constitute the International ‘Bill of Rights’.

In 1960 the Colonial Declaration, which confirmed the right of all people to self-determination, suggested, that self-determination is not limited to colonial territories but might have a wider application.<sup>145</sup> Ten years later in 1970, The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the UN annexed to Resolution 2625<sup>146</sup>(XXV) of 1970, stated that every state has an obligation to promote the realisation of the right of self-determination.<sup>147</sup> Gradually, after the adoption of International Covenants, there was a shift in international documents and legal literature towards the internal aspect of self-determination. One of the first instruments that recorded this shift was the 1975 Final Act of the Conference on Security and Co-operation in Europe<sup>148</sup> (Helsinki Declaration), which made it clear that self-determination is a right of peoples.<sup>149</sup> In this regard, Principle VII reads: ‘By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development’.<sup>150</sup> Indeed, the specific language, providing that all "peoples "always" have the right to determine their internal and external

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<sup>143</sup> Common Article I of each of ICCPR and ICESCR provides that: ‘All people have the right of self-determination’. See, ‘The International Covenant of Civil and Political Rights’ (ICCPR) (n 19).

<sup>144</sup> ‘International Covenant on Economic, Social and Cultural Rights’ (ICESCR) (n 20).

<sup>145</sup> ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ (n 94).

<sup>146</sup> The Declaration frames the proper balance between self-determination and territorial integrity as follows: ‘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 of 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’. See, ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States. UNGA Res 2625 (XXV) (24 October 1970) UN Doc (A/8082) 1970’ (n 23).

<sup>147</sup> The Declaration provides, *inter alia*, that a colonial or non-self-governing territory continues its separate existence ‘Until the people of the colony or Non-self-governing Territory have exercised their right of self-determination in accordance with the Charter’. See, *ibid*.

<sup>148</sup> ‘Final Act, Conference on Security and Co-operation (August I 1975, 14 ILM 1292’, 1975).

<sup>149</sup> ‘Principle VIII, of the Principles Guiding Relation Between Participating States’, 1975.

<sup>150</sup> A Xanthaki and N Ghanaea (ed), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (MNP, London 2005).

political status, goes beyond the more terse formulation in the covenants on human rights.<sup>151</sup> However, Hannum argued that, this formulation must be understood in the context of the principles of the inviolability of frontiers (principle III) and the territorial integrity of states (principle IV) proclaimed in the Helsinki Final Act.<sup>152</sup> Cassese is of the opinion that this statement means that the Act goes further than the FRD in connecting the internal aspect of the principle of self-determination to democratic rule, as well as once and for all confirming that the right to self-determination is continuous.<sup>153</sup> Still, the Act cannot be said to grant external self-determination to national minorities, especially since it explicitly upholds the virtues of territorial integrity.<sup>154</sup>

For a considerable period, there was substantial resistance to the suggestion that self-determination might have any application outside the colonial context, shared by the Eastern European States and the new States.<sup>155</sup> There was little desire of Eastern European States to concede that people had an entitlement to determine their own political and economic destiny. Dahlitz argued that, the phenomenon was appropriate for decolonisation only and many of the new States regarded self-determination as a matter between them and their colonial masters, not as between them and their own population.<sup>156</sup> On the other hand, part of 'the fear of Third World States was that post-colonial self-determination would necessarily result in the fragmentation of the new nation States, with ethnic or religious groups in one country seeking to secede or to join with the same ethnic groups or religious population in another country'.<sup>157</sup> However, the Human Rights Committee, acting under the ICCPR has, consistently fostered the idea that self-determination is of continuing applicability.<sup>158</sup> Thus, it is accepted that the right exists; the debate is however, about the forms that it can take.

Higgins believed that the Committee on Human Rights established under the covenants, played a key role in this evolutionary process.<sup>159</sup> The Committee addressed the matter in

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<sup>151</sup> H Hannum, 'Rethinking Self-determination' (1993) 34 Va J Int'l L 18.

<sup>152</sup> *ibid.*

<sup>153</sup> Cassese, *Self-Determination of People, A legal Reappraisal* (n 25) 286.

<sup>154</sup> 'Helsinki Final Act, principle VIII, paragraph 1', 1975.

<sup>155</sup> Dahlitz, *Secession and International Law* (n 14) 28.

<sup>156</sup> *ibid.*

<sup>157</sup> *ibid.*

<sup>158</sup> When the Committee on Human Rights examining the report of a State party to the Covenant, asks not only about any dependent territories that such a State party may be responsible for (external self-determination) but also about the opportunities that its own population has to determine its own political and economic system (internal self-determination). See, *ibid* 29.

<sup>159</sup> T Franck, 'Postmodern Tribalism and the Right to Secession,' in C Brolmann (ed), *Peoples and Minorities in International Law,* (Martinus Nijhoff Publisher 1993) 15.

virtually every single examination of a State upon the report that it is required to submit periodically. In this regard, ‘the committee took a robust view about continued application of self-determination to post-colonial situations’.<sup>160</sup> In addition, Tomuschat stressed that the fact that the emergence of the IHRL and its consolidation amount to a general recognition that states are no longer the sole subjects of international law and that the main objective and raison d’être of a state is to provide a service to their citizens.<sup>161</sup> However, if they fail in a fundamental way to meet their essential responsibilities; they begin to lose their legitimacy and thus their very existence can be called into question.<sup>162</sup>

The African Charter on Human and People’s Rights to self-determination is also in terms that do not tie it to colonialism.<sup>163</sup> In 1960, Biafra seceded from Nigeria and gained few recognitions. However, as a result of a civil war, it was reintegrated into Nigeria in 1970.<sup>164</sup> In its drive to secession, Biafra received less substantial external support than Katanga; there was no substantial UN involvement, although the Organisation of African Unity OAU was a strong supporter of the central government.<sup>165</sup> Biafra's secession from Nigeria, based on the principle of self-determination, was legally justified under the following factors: there were gross violations of Biafran's human rights; Biafra had a historical claim to independence; it was the most plausible way of restoring peace in Nigeria; and the Nigerian government discriminated against the Biafran population.<sup>166</sup> However, the majority of states Crawford argued adjudged that it did not qualify for recognition as a state; there was no case even of belligerent recognition in the civil war, the case that Biafra was not a state<sup>167</sup>. Most recently, the Supreme Court of Canada dealt with the right to self-determination regarding the proposed separation of Quebec from Canada.<sup>168</sup> Embracing the Aland Island<sup>169</sup> precedent, the Supreme Court of Canada distinguished the right to internal self-determination from an external one. The Supreme Court, like the League of Nations, held that a people has a right to

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<sup>160</sup> *ibid* 31.

<sup>161</sup> D Murswiek, 'The Issue of a Right to Secession - Reconsidered,' in Christian Tomuschat (ed) *Modern Law of Self-Determination* (Springer 1993) 27.

<sup>162</sup> A A Idowu, 'Revisiting the Right to Self-Determination in Modern International Law: Implications for African States' (2008) 6 EJSS 43.

<sup>163</sup> Article 20 (1,2,3) from 'African Charter on Human and Peoples' Rights' (n 24).

<sup>164</sup> Crawford, *The Creation of States in International Law* (n 3) 406.

<sup>165</sup> *ibid*.

<sup>166</sup> Okoronkwo, 'Self-Determination and the Legality of Biafra's Secession under International Law' (n 124).

<sup>167</sup> Crawford, *The Creation of States in International Law* (n 3) 406.

<sup>168</sup> 'Reference re Secession of Quebec' (n 21).

<sup>169</sup> Aland Island problem, and the Rapporteurs report held that "[t]he 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 either the will or the power to enact and apply just and effective guarantees." See, *Aland Island Case*, 'League of Nations Official Journal Spec Supp 3, 3', 1920.

internal self-determination first, and that only if that right is not respected by the mother-state, the same people's right to break off may accrue.<sup>170</sup> In other words, the right to separate is conditioned on the non-respect of the right to some form of provincial to separate autonomy.<sup>171</sup> Dahlitz concluded that 'all people determine their political and economic destiny is that they can participate in periodic free elections in which they can choose between pluralities of possibilities.'<sup>172</sup> Thus, it has been evidenced that Post-colonial self-determination has become indissolubly linked with notions of democracy and good governance.

Accordingly, the right to self-determination is granted first to peoples in non-self-governing peoples (mandates, colonies, and so on). However, since it is bestowed upon 'all peoples' (as spelt out by Article 1 (1) of the 1966 Covenants) subject to no exception whatever; it is also vested in peoples co-existing within the present boundaries of an independent State.<sup>173</sup> This means that, the right to self-determination is accorded not only to peoples under colonial domination, but also to peoples living within independent nations, as well as to those existing within nations just as a people. Hence, during this era four principles characterise self-determination, as Hannum pointed out. First, 'self-determination referred only to decolonisation. Second, it did not apply to peoples but to territories. Third, self-determination was now considered an absolute right though, again, for colonies only; this marked a significant change from the previous era. Finally, self-determination did not allow for secession; instead, the territorial integrity of existing states and most colonial territories was assumed'.<sup>174</sup> Thereafter, in the late 1970s the right was refined to mean that every distinctive ethnic or national group has a right to independence; however, the right has not been accepted by any state or by international law on this new meaning in a popular sense. It was a unique process for each territory, allowing its people to escape from external domination.<sup>175</sup> Where those people wished for statehood, that was the only legitimate end, the most notable example being East Timor, which became independent as Timor-Leste in 2002, having being invaded

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<sup>170</sup> *Reference re Secession of Quebec* (n 21) para 122.

<sup>171</sup> (Noting that when "the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated," only then does the right to external self-determination accrue). See, *ibid*, para 122.

<sup>172</sup> Dahlitz, *Secession and International Law* (n 14) 30.

<sup>173</sup> Y Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 *Int'l & Comp LQ* 102.

<sup>174</sup> H Hannum, *Autonomy, Sovereignty and Self-Determination The Accommodation of Conflict Rights* (Rev edn, UPP 1996) 30-35.

<sup>175</sup> *Case Concerning East Timor* (n 114).



in 1975 by Indonesia, an action deemed by the United Nations to be unlawful because of its incompatibility with self-determination.<sup>176</sup>

Provisional steps towards a broader approach have been based on the so-called ‘safeguard clause’, first articulated in principle 5, paragraph (7) of the FRD.<sup>177</sup> The United Nations World Conference on Human Rights held in Vienna in 1993,<sup>178</sup> in slightly different language, also reaffirmed it. Consequently, Crawford argued that, ‘a State whose government represents the whole people of its territory without distinction of any kind, that is to say, on a basis of equality, and in particular without discrimination on grounds of race, creed or colour, complies with the principles of self-determination in respect of all of its people and is entitled to the protection of its territorial integrity.’<sup>179</sup> To put it another way, the people of such a State exercise the right of self-determination through their participation in the government of the state on a basis of equality’.<sup>180</sup> This issue occurred before the Supreme Court of Canada in the *Quebec* case. By no stretch of the imagination could it be said that the people of Quebec were oppressed or that Canada was not governed by a constitutional system ‘representing the whole people belonging to the territory without distinction of any kind.’<sup>181</sup> However, the Government of Canada relied on the observance of the ‘safeguard clause’, without committing itself to the idea of ‘remedial secession’, it argued that the ‘safeguard clause’ was

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<sup>176</sup> Evans, *International Law* (n 133) 227. The principle of colonial self-determination and the legal consequences of its application are no longer controversial. The same cannot be said about claims that self-determination has a role discrete from its place in decolonisation. In the *Burkina-Faso V Mali* case, the ICJ said [*uti possidetis*] is a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggle provoked by the challenging of frontiers following the withdrawal of the administering power. See, ‘Frontier Dispute, Judgment (*Burkina Faso v Republic of Mali*) ICJ Rep 1986, 554.

<sup>177</sup> [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]. See, ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States’ (n 23). See also, ‘GA Res 47/135 (18 December 1992) art 8(4)’, 1992.

<sup>178</sup> [In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this 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]. See, ‘Vienna Declaration, World Conference on Human Rights’ [1993] UN Doc A/CONF157/24 1993 (n 93).

<sup>179</sup> Crawford, *The Creation of States in International Law* (n 3) 118-119.

<sup>180</sup> *ibid.*

<sup>181</sup> *ibid* 119. See also, ‘*Reference re Secession of Quebec*’ (n 21) para 136.

a safeguard against secession for those states that complied with it'.<sup>182</sup> At least, many international documents have established a right to self-determination as a right, but it has never been defined.<sup>183</sup>

Thus, the application of the right of self-determination beyond the colonial framework is, however, a much more complex and disputable question, as it collides with the principle of territorial integrity. In addition, it has been clearly divorced from the notion 'right to secession'. The right outside the colonial context is primarily known as a process by which the peoples of the various states determine their future through Constitutional Processes without external interference. This position was observed by the Supreme Court of Canada in the *Quebec* case; the Court stated that 'The recognised sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination, a people's pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances'.<sup>184</sup> In other words, the right of self-determination is understood as a 'legal right' for a people to attain a degree of autonomy from its sovereign. This may include political and representative rights within a central State. Alternatively, it may amount a remedial secession and ultimately independence.

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<sup>182</sup> Crawford, *The Creation of States in International Law* (n 3) 119.

<sup>183</sup> The committee of the Rapporteur appointed by the League of Nations to investigate aspects of the dispute over the Aland Islands, stated that 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 situation, a last resort when the state lacks either the will or the power to enact and apply just and effective guarantees. There is, however, no conclusive body of legal principles or state practice of clarity application of the right of self-determination in respect of this possible third category, which remains 'acutely controversial'. See, '*Aland Island Case*', (n 169).

<sup>184</sup> '*Reference re Secession of Quebec*' (n 21) para 122.

## 2.2.3 Holders of the right to self-determination

### 2.2.3.1. The concept of 'People'

The dilemma concerning the right of self-determination can ultimately be described in terms of which groups are entitled to exercise a right to self-determination. The critical uncertainty here is whether the right attaches to all people in a literal sense, or only to those within existing colonial boundaries.

Peoples are groups of persons who, whatever, their appellation, have been separated from each other on ethnical, racial, linguistic, cultural, religious, traditional, or historical grounds.<sup>185</sup> Whatever, they are called, Dahlitz argued that, communities, minorities or peoples, these elements have always been enunciated. According to the Arbitration Commission on Yugoslavia, a people and minority are ethnic, religious, or linguistic communities,<sup>186</sup> while the Supreme Court of Canada in the *Quebec* case defined a people as 'a portion of the population of an existing state'.<sup>187</sup> The Commission of Jurists who arbitrated the status of the Aland Islands in 1921 found that for the purpose of self-determination one cannot treat a small fraction of peoples as one would a nation as a whole.<sup>188</sup> Thus, the Swedes on the Aland Islands, who were only a small fraction of the totality of the Swedish 'people' did not have a strong claim to secession in comparison to, for example, Finland, which, when it broke away from Russian rule, contained the near totality of the Finnish people.

In fact, a people has a right to determine its 'self' by deciding what form of self-determination it will choose. However, international law does not provide any clear standard on how to define a 'people'. Gruda argued that, 'Although the term 'people' is ambiguous and vague under international law, it typically refers to 'people who live within the same state or people organised into a state'. Thus, 'people' is a legal rather than natural category'.<sup>189</sup> Likewise, Brown pointed out that, the term 'people' has been purposely left undefined in international

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<sup>185</sup> Dahlitz, *Secession and International Law* (n 14) 79.

<sup>186</sup> A Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples, Opinion No 2' (1992) 3 *EJIL* 178.

<sup>187</sup> 'Reference re Secession of Quebec' (n 21) paras 123, 124 and 125.

<sup>188</sup> 'Aland Island Case' (n 169).

<sup>189</sup> Z Gruda, 'Some Key Principles for a Lasting Solution of the Status of Kosova: *Uti Possedetis*, The Ethnic Principle, and Self-Determination' (2005) 80 *The Chi-Kent Law* 353.

law, because if the right to self-determination were to be applied broadly to all conceivable groups, this could destabilize states and cause peace and security problems.<sup>190</sup>

On the other hand, Fitzmaurice has obviously noted that 'it is in fact ridiculous because the people cannot decide until somebody decides who the people are'.<sup>191</sup> Whether a certain group constitutes a people is rather a question of fact than a question of law. Nonetheless, determination of this fact is important for the application of law. In order to determine whether a certain group of individuals constitutes a people, it is necessary to have enough criteria to define a people. Crawford claimed that a people can be identified with 'reasonable precision', he tends to use a vague term 'self-determination unit' in order to define the subject of the right.<sup>192</sup> Higgins has described 'self-determination unit' as the 'right of the majority within a generally accepted political unit to the exercise of power. In other words, it is necessary to start with stable boundaries and permit political change within them.'<sup>193</sup> However, Crawford argued that, the definition of a 'people' at large, outside the context of 'generally accepted political units' has proved fraught with difficulty'.<sup>194</sup>

Furthermore, some authors have tried to suggest a workable definition of a 'people'. Murawick in his definition links a people to a territory. He defined a people as 'a group which can be a holder of the right to self-determination which exists only if it lives in a distinct territory, where it constitutes the majority and where it is able to speak its own language, develop its own culture, cultivate its traditions or practice its particular religion'.<sup>195</sup> However, there are sovereign tribes that issue license plates, operate courts, and perform similar state functions that exercise no territorial sovereignty, but nonetheless exercise authority over members of the tribe.<sup>196</sup>

Adam has suggested that 'to grant the right of self-determination exclusively to those who have a distinct ethnic, religious, or culture background' actually increases the danger of ethnic

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<sup>190</sup> B S Brown, 'Human Rights, Sovereignty, and the Final Status of Kosovo' (2005) 80 *The Chi-Kent L Rev* 235.

<sup>191</sup> Fitzmaurice, as quoted in Crawford, *The Creation of States in International Law* (n 3) 124.

<sup>192</sup> *ibid* 124-125.

<sup>193</sup> R Higgins, *The Development of International Law: Through the Political Organs of the United Nations* (OUP, 1963) 104.

<sup>194</sup> Crawford, *The Creation of States in International Law* (n 3) 125.

<sup>195</sup> Murawick, 'The Issue of a Right to Secession - Reconsidered,' (n 161 ) 27.

<sup>196</sup> P A Clark, 'Taking Self-determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate?' (2012) 5 *Chi J Int'l L* 737.

or religious cleansing.<sup>197</sup> If only those groups that have a distinct language and culture are entitled to self-determination, then leaders fearful of such claims may go out of their way to destroy the traditions and languages that make the people unique.<sup>198</sup> This is a recurrent theme in world history, from Turkey's ban on the Kurdish language and names, to the Soviets' attempts to stamp out non-Russian languages and traditions.<sup>199</sup>

Significantly, a number of scholars have agreed that distinct 'racial groups' are generally entitled to qualify as a people.<sup>200</sup> Some of them suggest that a people, or nation, be regarded as any group 'having a common and distinctive history, language, culture, and/or religion.'<sup>201</sup> At last, more ambiguous than groups distinguished by culture are differences, which can best be described as political. The differences between Taiwan and mainland China, for example, are more political than cultural.<sup>202</sup>

In their final Report and Recommendations, the International Experts on the Concept of Peoples,<sup>203</sup> described 'people' as a group of individual human beings who enjoy some or all of the common features. Sterio in her definition has suggested testing 'the degree to which the group can form a viable entity'.<sup>204</sup> Adding this 'viability' requirement in the subjective prong could also add precision to the UNESCO definition of a people.

Besides, it is important to differentiate between a nation and a 'people'.<sup>205</sup> 'There is an Indian nation and a Bengali people, an Israeli nation and a Jewish people. A nation is easy to define

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<sup>197</sup> Prince Hans Adam II, in Danspeckgruber, in Wolfgang Danspeckgruber (ed) *The Self-Determination of Peoples* (Lynne Rienner 2002) 407.

<sup>198</sup> Clark, 'Taking Self-determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate?' (n 196).

<sup>199</sup> *ibid.*

<sup>200</sup> See for example, Cassese, *Self-Determination of People, A legal Reappraisal* (n 25) 147.

<sup>201</sup> See for example, P H Brietzke, *Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, in R McCorquodale (ed), *Self-Determination in International Law* (Ashgate Dartmouth 2000) 77.

<sup>202</sup> Clark, 'Taking Self-determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate?' (n 196).

<sup>203</sup> In the "Final Report and Recommendations" International Experts describes "people" as: 1. a group of individual human beings who enjoy some or all of the following common features: (a) common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; and (g) common economic life. 2. The group must be of a certain number, which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a state. 3. The group as a whole must have the will to be identified as a people or the consciousness of being a people. 4. The group must have institutions or other means of expressing its characteristics and will for identity. See, UNSCO 'Division of Human Rights and Peace, Final report and recommendations, International Meeting of Experts on further study of the concept of the rights of peoples' (22 February 1990) UN Doc SHS/89 CONF 602/COL 1.

<sup>204</sup> Sterio, 'On the Right to External Self Determination: "Selfistans," Secession and the Great Powers' Rule' (n 99).

<sup>205</sup> There are basically seven sorts of peoples based on different national self-representations:

inasmuch as; it consists of the entire citizen body of a State'.<sup>206</sup> All the nationals of the State form the nation. In each State, there is one nation, and this is why the terms 'State' and 'nation' have become practically interchangeable.<sup>207</sup> However, within the compass of one State and one nation there can exist several peoples, large and small, such a State is usually called 'multi-national', but what is actually meant is that the (one) nation comprises several peoples.<sup>208</sup>

Countries with indigenous populations<sup>209</sup> however, were obviously hesitant to accept a strong interpretation of self-determination because they feared that their own indigenous minorities might assert claims of independence. In this group, the United States can be included, which remains fearful of the demand of some Native American nations for independence.<sup>210</sup>

Thus, it has become clear that the term of 'people'<sup>211</sup> has become controversial over which group are entitled to self-determination amongst scholars and writers. Many believe that the 'people' should be defined prior to any rights being awarded. Jennings<sup>212</sup> stated 'on the surface it seems reasonable; let the people decide. It is in fact ridiculous because the people cannot decide until somebody decides who the people are'. Emerson<sup>213</sup> believed that 'what emerges beyond dispute is that all peoples do not have the right of self-determination: they

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1-Ethnic: same ancestry, language, culture, history and the same indigenous people. 2-Culture: multi-ethnic, same language, culture and history, no administrative unit (Acadian, Rom) 3-socialpolitical: possibly multi-ethnic, multicultural and multinational, but same public common identity and same non sovereign administrative unit (Nunavut, Quebec, Scotland, Catalonia) 4-Civic: same mono-national sovereign country (Island, Portugal, Korea) 5-Multisocietal: same multinational sovereign country (Great Britain, Canada, Spain, and Belgium) 6-Multiterritorial: same culture equally spared on many continuous sovereign territories (Mohawk in Akwasasne and the Kurds in Kurdistan) 7-Diasporic: same culture equally spared on discontinuous sovereign territories, minorities, on each of these territories (old Jewish diaspora before the creation of Israel). See, M Seymour, 'Peoples, Self-Determination and Secession,' (Department of Philosophy University of Montreal, ASEN seminar series 2012) <<http://www.youtube.com/watch?v=isw3IxLM518>>accessed 25 March 2013.

<sup>206</sup> Dinstein, 'Collective Human Rights of Peoples and Minorities' (n 173).

<sup>207</sup> *ibid.*

<sup>208</sup> *ibid.*

<sup>209</sup> The Special Rapporteur Martinez Cobo, has defined Indigenous communities as the following:

Indigenous communities, peoples, and nations are those, which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal systems. See, B Kingsbury, 'Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 *The Ame J Int'l L* 414.

<sup>210</sup> Clark, 'Taking Self-determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate?' (n 196).

<sup>211</sup> M Seymour, 'Secession as a Remedial Right' (2007) 50 *Inquiry* 395.

<sup>212</sup> W I Jennings, *The Approach to Self-Government* (CUP, 1956) 56.

<sup>213</sup> R Emerson, *Self-determination Revised in the Era of Decolonisation* (Center for International Affairs: Harvd, 1964) 60-64.

never had it and they never will have it. The changing content of natural law in the era of decolonisation has brought no change in this basic proposition?' In addition, Higgins<sup>214</sup> acknowledged that the argument over which groups are deserving of self-determination has not been adequately resolved. She asserted that, 'self-determination has developed into an international legal right, and is not an essentially domestic matter. The extent and scope of the right is still open to some debate'. Therefore it seems that the scholars cannot agree on who deserves rights of self-determination. They cannot then determine who the self is.

Thus, the controversy over who constitutes a people and merits the rights of self-determination continues. It is commonly accepted today that people who struggle for self-determination are defined as a people by their struggle. External definitions are superfluous. In some cases, external definitions are a deliberate attempt to deny groups rights to self-determination.<sup>215</sup> External definitions, generally, do not work to assist groups in their cause; rather they work to maintain the status quo.<sup>216</sup> In addition, 'people' and minority are two different concepts. Minorities do not fall into the category of 'all people', from common Article 1 of the ICCPR, and thus are not entitled to the right of self-determination.

Significantly, under the principle of self-determination a group with a common identity and link to a defined territory is allowed to decide its political future in a democratic fashion.<sup>217</sup> For a group to be entitled to exercise its collective right to self-determination, it must qualify as a 'people'.<sup>218</sup>

Finally, to determine when a group qualifies as a people, a two-part test has been applied; in other words, peoplehood must be seen as contingent on subjective and objective elements.

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<sup>214</sup> R Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP, 1963) 103. Furthermore, Other scholars questions the legitimacy of what criteria define a people. Margaret Moore claimed that "One of the most serious objections raised to the principle of national self-determination is that the concept, in itself, does not tell us who the peoples are that are entitled to self-determination or the jurisdictional unit they are entitled to." Moore contended that the problem is a result of the imposition of objective standards that the groups seeking self-determination must meet in order to be considered a nation." See, M Moore, 'On National Self-determination' (1997) 45 *Political Studies Association* 900. Further, other commentators take a different view, For example, it has been suggested that when the UN Charter was drawn up the UN Secretariat defined 'Peoples' as groups who may or may not comprise states or nations. See, J Mathews, 'Revision of ILO Convention, Unpublished manuscript delivered at International Law Association Conference, Australian National University (1988) 107.

<sup>215</sup> H Cojer, 'Denial of Rights and Self-Determination : The Case of the Kurds of Iraq. A thesis presented to the University of Waterloo in fulfilment of the thesis requirement for the degree of Master of Arts in Political Science' (University of Waterloo 1996)

<sup>216</sup> *ibid.*

<sup>217</sup> Scharf, 'Earned Sovereignty: Juridical Underpinnings' (n 75).

<sup>218</sup> *ibid.*

The first element is objective, and seeks to evaluate the group to determine to what extent its members 'share a common racial background, ethnicity, language, religion, history, and cultural heritage'.<sup>219</sup> Dinstein has suggested that the link must express itself, *inter alia*, in a common territory, religion, or language, but these requirements are excessively tough.<sup>220</sup> The second element is subjective and examines 'the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct 'people' and the degree to which they consciously perceive themselves collectively as a distinct which the group can form a viable political entity?'<sup>221</sup> In this regard, it is not enough to have an ethnic link in the sense of past genealogy and history, it is essential to have a present ethos or state of mind.<sup>222</sup> A people is both required and entitled to identify it as such. Dinstein argued that an individual cannot gate crash and compel a people to admit him to its fold; the group has to make up its collective mind and resolve whether such an individual qualifies.<sup>223</sup> Thus, it can be concluded that for the group to be considered as a 'people' they must perceive themselves to have a special relationship to the territory and thus the state, and therefore seem to expect that all other inhabitants from other ethnic groups share their connection and commitment.

One must concede that, giving a unique right to certain groups and not others might cause infraction between various groups in society. The best way to prevent this sort of friction is to recognise that any distinct group, which is a majority in its region, is entitled to the same right of self-determination as any other group.<sup>224</sup> For instance, if Quebec left Canada, why shouldn't the 'Maritime Provinces'<sup>225</sup> be allowed to join Quebec or the United States? Hence, it has been suggested, if self-determination is a tool designed to prevent conflict, it can best do its job the more widely it is applied. This suggests that the concept of 'a people' under international law ought to be applied not simply to religious or cultural minorities, but even to 'political minorities'.<sup>226</sup> 'The most obvious example of this would be Taiwan, which is distinct from mainland China more by politics than by culture. As well as this, the 'people of

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<sup>219</sup> *ibid.*

<sup>220</sup> Dinstein, 'Collective Human Rights of Peoples and Minorities' (n 173).

<sup>221</sup> Scharf, 'Earned Sovereignty: Juridical Underpinnings' (n 75).

<sup>222</sup> Dinstein, 'Collective Human Rights of Peoples and Minorities' (n 173).

<sup>223</sup> *ibid.*

<sup>224</sup> Clark, 'Taking Self-determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate?' (n 196).

<sup>225</sup> 'Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area' (Canada V USA) (Advisory Opinions and Orders) ICJ Rep 12 October 1984. <<http://www.icj-cij.org/docket/index.php?sum=346&code=cigm&p1=3&p2=3&case=67&k=6f&p3=5>> accessed 15 March 2013.

<sup>226</sup> Clark, 'Taking Self-determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate?' (n 196).



Nova Scotia’ are a distinct political entity, as much as ‘the people of Quebec’ or ‘the people of Hawaii’.<sup>227</sup>

### 2.2.3.2. The right-holder

The fundamental approach to the question remains that all peoples, as defined by objective and subjective factors, have a full right of self-determination that is a free choice of internal and external self-determination. The critical question here is whether the right of self-determination attaches to all people in a literal sense, or only to those peoples within colonial boundaries.

In general, two trends can be identified in the literature.

The first trend is represented by Harries who believed that General Assembly Resolution 1514, the first to deal comprehensively with self-determination contemplates the right within existing boundaries of the colonial structure.<sup>228</sup> He argued that, pragmatically, that this limitation is necessary in the interests of international harmony.<sup>229</sup> Accordingly, ethnic minorities, not within definite colonial boundaries, are not entitled to exercise a right of self-determination. Therefore, under a strict reading utilising this approach, many recent claims would fail.<sup>230</sup> These would include, for instance, claims by the peoples of the Kurdistan region from Iraq, Quebec from Canada, and the Bougainville claim against Papua New Guinea.<sup>231</sup> In addition, Nada argued that, under this approach, the claims of the peoples of Baltic States who are arguably resident within pre-existing but dormant colonial boundaries would have some validity.

On the other hand, Dahiltz has argued that, people living under colonial domination are granted full self-determination, irrespective of the territorial integrity principle.<sup>232</sup> The inhabitants of Non-Self-Governing and Trust Territories were granted the right of self-

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<sup>227</sup> *ibid.*

<sup>228</sup> D J Harris, *Cases and Materials on International Law* (3<sup>th</sup> rev edn, Sweet & Maxwell, London 1983) 96.

<sup>229</sup> *ibid.*

<sup>230</sup> Nada, ‘Self-Determination and Secession Under International Law’ (n 43).

<sup>231</sup> *ibid.*

<sup>232</sup> Dahiltz, *Secession and International Law* (n 14).

determination because they were a people.<sup>233</sup> He further argued, with respect to the inhabitants of existing states, the right of self-determination of colonial territories is the combination of the right of self-determination of the different peoples, fractions of peoples or one homogenous people living in the territory. Thus, it was not necessary for the GA and the Special Committee of Twenty-Four to ascertain the homogeneity of the population of the territories. However, they did in general; assure themselves of the indigenous ties existing between the people and the territory.<sup>234</sup> Significantly, the territory of a colony was given a status separate from the territory of the state administering it,<sup>235</sup> and the integration of a colony was considered a 'legal fiction'.<sup>236</sup> For that reason, Dahiltiz stated that, the independence of a colony could not result in a partial disruption of the territorial integrity of the Metropolitan state. Hence, people in similar circumstances as colonies, will enjoy a complete right of self-determination even if they are not specifically mentioned on the list of Non-Self-Governing and Trust Territories, such as Bengali people in East Pakistan, which was geographically separate from West Pakistan.<sup>237</sup>

A different a more controversial trend is adopted by others, Nada asserted that the right of self-determination extends beyond the colonial context although a formal set of criteria must first be satisfied for the group to qualify for the right. In addition, Collins argued that, it is only political exigencies, which have focused the right of self-determination onto colonial territories.<sup>238</sup>

He stated that: 'Although political events have concentrated the UN's focus on colonial territories and the UN stands firm on the concept of territorial integrity, the principle of self-determination should not be considered strictly as a colonial right'.<sup>239</sup>

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<sup>233</sup> *ibid.*

<sup>234</sup> In fact, the UN did not want to define a people with the right of self-determination, because as only colonial peoples were granted this right and such as peoples were not homogenous, no univocal characteristics of a people could be accepted. If these characteristics were adopted, some colonial peoples would not and others for whom they were not intended would have the right of self-determination. See, *ibid* 82, quoted from, Jean Francois Guilhaudis, *Le droit des peuples a disposer d'eux-memes* (Presses universites de Grenoble (1976) 66.

<sup>235</sup> UNGA Res 2625 (XXV) (n 23).

<sup>236</sup> Dahiltiz, *Secession and International Law* (n 14) 83.

<sup>237</sup> The Bengalis were moreover culturally and ethnicity distinct from the other part of Pakistan and suffered human rights violations. They could be considered as arbitrary placed in a position of subordination, as they had, for example, no right of equal participation in elections and governmental affairs. This led the Bengalis to proclaim their own independent state of Bangladesh. See Crawford, *The Creation of States in International Law* (n 3) 116. See also, Dahiltiz, *Secession and International Law* (n 14) 83.

<sup>238</sup> Collins, 'Self-Determination in International Law: The Palestinians' (n 102).

<sup>239</sup> *ibid.*

### Which trend to self-determination is appropriate?

It should be clear then that these two trends, which have been controversial, are inconsistent. However, the majority of scholars have agreed that in certain circumstances, the right to self-determination should be made available to the 'people'. In other words, the right should be available to an independent people that is the permanent population of an existing state, which has the right to self-determination. In this regard, Dahiltz demonstrated that, this population may well comprise one homogenous people or a collection of different peoples and fractions of peoples.<sup>240</sup> He stated that, the right of self-determination in the latter case, of the inhabitants of a state is the compilation of the right of self-determination of the different peoples living in the state's territory. Significantly, the international community accepts the exercise of the right of self-determination of fractions of peoples, which find themselves within the borders of an existing state.<sup>241</sup> In 1991, the Arbitration Committee on Yugoslavia, asked whether the Serbian population in Croatia and Bosnia-Herzegovina, considered as one of the constituent peoples of Yugoslavia, have the right to self-determination.

[1-The Committee considers that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise. 2- Where there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law].<sup>242</sup>

Moreover, the Aland Islands report found that there was no right of secession in the absence of 'a manifest and continued abuse of sovereign power to the detriment of a section of population'.<sup>243</sup> In a like manner, the Serbs were responsible for serious human rights abuses against the Kosovars, as Resolution 1244 notes, a 'grave humanitarian situation' and a threat to international peace and security'.<sup>244</sup> While the Supreme Court of Canada in re-secession of *Quebec* found that 'a right to external self-determination, which in this case potentially takes

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<sup>240</sup> Dahiltz, *Secession and International Law* (n 14) 81.

<sup>241</sup> *ibid.*

<sup>242</sup> Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples, Opinion No 2' (n 186).

December 1966). See further, Article 27 ICCPR states that 'In those States in which ethnic, religious, or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

<sup>243</sup> '*Aland Island Case*' (n 169).

<sup>244</sup> C J Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession, and Recognition' (2008) 12 ASIL 1-11. See also, 'UNSC Rec 1244 (10 June 1999) UN Doc 1244/1999'.

the form of the assertion of a right to unilateral secession, arises only in the most extreme cases and even then, under carefully defined circumstances.<sup>245</sup>

Thus, the peoples who have a relationship with the territory of an existing state may exercise a full right of self-determination over the whole of the territory. Hence, the principle of inviolability of territorial integrity is respected and does not clash with the right of self-determination as long as the decisions concern the whole territory. As a result, the population of an existing state may therefore decide its form of government and determine its international status.

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<sup>245</sup> *Reference re Secession of Quebec* (n 21) para 122.

#### 2.2.4. External and internal self-determination

As the principle of self-determination is a very broad concept, for theoretical purposes it is usually divided into internal and external forms. The right can be satisfied either externally for example, by the establishment of a new State, or internally, through a variety of autonomous arrangements.

In fact, an important characteristic of the right to self-determination in the colonial context is its external appearance, meaning the aspiration to own an independent sovereign state. The external form of self-determination requires actions from, and imposes obligations on states to facilitate, and supports a people's aspirations to achieve independence. In contrast, self-determination outside the colonial context has an internal nature that consists of a people's right to freely develop its own economic, social and cultural institutions, ideally through democratic governance.

Cassese has defined internal self-determination as 'the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime.'<sup>246</sup> Hannum argued that the, internal aspect of self-determination is democracy, meaning that people have right to representative and democratic.<sup>247</sup> McCorquodale considered that the internal aspect of the right concerns the right of peoples within a state to choose their political status.<sup>248</sup> Moreover, Simpson presented that internal self-determination is alternatively called democratic self-determination,<sup>249</sup> while Bring has attached another element to the internal aspect, namely the right to freedom from outside interference and intervention in accordance with the principles of the UN and international law. He argued that most often, 'what is meant by internal self-determination is the element of non-interference, a negative obligation imposed on States (as opposed to the positive obligation imposed regarding external self-determination).'<sup>250</sup>

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<sup>246</sup> Cassese, *Self-Determination of People, A legal Reappraisal* (n 25) 111.

<sup>247</sup> Hannum, *Autonomy, Sovereignty and Self-Determination* (n 174) 30.

<sup>248</sup> R McCorquodale, 'Self-determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857 864.

<sup>249</sup> G J Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-colonial Age' (1996) 32 *SJ Int'l L* 255.

<sup>250</sup> See, Simpson in, Ove Bring, *FN-stadgan och världspolitiken-om folkrättens roll i en föränderlig värld* (Nordstedts Juridik AB, Stockholm 2002) 202-203.

Crawford pointed out that self-determination is a continuing, and not for all right.<sup>251</sup> Unlike external self-determination for colonial peoples, which ceases to exist under customary international law once it is implemented, Cassese argued that, ‘the right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect; thus, internal self-determination is being exercised continuously’.<sup>252</sup> Internal self-determination may take various forms, including, autonomy within a state, federal arrangements, or any other special constitutional arrangements for the people concerned. On the other hand, external self-determination can be seen as the right to decide on the political status of a people and its place in the international community in relation to other states, including the right to separate [secede] from the existing state of which the group concerned is a part, and to set up a new independent state.<sup>253</sup> The right will be further addressed in part 5, while discussing secession in international law.

Thus, Raič concluded that the exact content of internal and external aspects is however of little importance, as we are not dealing with two different rights but with the same right, and there are no differences of opinion regarding the material content of these aspects of rights.<sup>254</sup> Accordingly, when discussing a people’s right to self-determination and development within an independent state the legal foundation is used, for instance in the form of a UN Resolution such as the FRD, also serves as the legal foundation for the principles of non-interference and non-intervention. However, the fact that the right to self-determination is wisely used in the rhetoric must not be forgotten. The majority of scholarly writers agree upon the aspects and the elements that constitute the right, however, these elements are sometimes interpreted in different lights according to the interests they are meant to serve. In addition, there is a consensus on the fact that the right of self-determination applies beyond the colonial context. This is supported not only by the FRD but also by the UN bodies like the Human Rights Committee HRC (in its General Comment on Article 1 of the ICCPR) and state practice and statements. However, one must concede that it is the scope of the right in the post-colonial era that can manifest itself differently depending on who is arguing.

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<sup>251</sup> Crawford, *The Creation of States in International Law* (n 3) 126.

<sup>252</sup> Cassese, *Self-Determination of People, A legal Reappraisal* (n 25) 111.

<sup>253</sup> ‘UNSCO ‘Division of Human Rights and Peace’ (n 203).

<sup>254</sup> D Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International, The Hague 2002) 227.

### 2.3. The Rights of Minorities

Minorities did not receive much attention from the international community before the foundation of the League of Nations. The League of Nations paid significant concern to minorities' rights, through the adoption of several treaties.<sup>255</sup> When the UN was set up, a number of norms, procedures, and mechanisms concerning minorities were developed, in particular, the ICCPR and the 1992 Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. However, in practice, these rights are far from being realised.

Historically, the failure to protect the minority rights has prompted international responsibility that collides against the principle of non-interference into the internal affairs of sovereign States. Nonetheless, it comes as no surprise that international minority rights have lagged behind the development of other branches of human rights. This is because of the international law is made by the governments most of whom are unwilling to recognise even the existence of minority in their territories let alone to ensure their protection and enjoyment of legal rights. In the past few years, community conflicts have emerged as the most serious threat to international and national peace. Notably, 'the majority of all conflicts that afflicted the World were within countries between communities and not between countries. Most of these conflicts, in turn, had their roots in the inability of cultural, ethnic, or religious communities to coexist peacefully'.<sup>256</sup>

In fact, 'tension between communities within the same societies arises when such communities believe that their basic rights are being ignored or that their interests are being threatened'. The tension will be aggravated when the communities in question are also minority, and are, or feel, unable to secure what they perceive to be their reasonable interests through democratic means.<sup>257</sup> Frequently, the gap between minorities and majorities in multi-ethnic religious societies causes tension, leading to the violence and conflict, when the

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<sup>255</sup> See for example, Treaty of Peace with Poland [Polish Minorities Treaty] (adopted 28 June 1919, entered into force 10 January 1920) LNTS 1919. Also, UNHC 'Minority Rights: International Standards and Guidance for Implementation' (New York and Geneva 2010) UN Doc HR/PUB/10/3. And, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (18 December 1992) UNGA Res A/RES/47/135.

<sup>256</sup> J Rossouw and D Geldenhuys, 'The International Protection of Minority Rights, F W de Klerk Rep' [2001] <[http://www.fwdeklerk.org/cause\\_data/images/2137/01\\_08\\_Minority\\_Rights\\_Publication.pdf](http://www.fwdeklerk.org/cause_data/images/2137/01_08_Minority_Rights_Publication.pdf)>accessed 27 March 2013.

<sup>257</sup> *ibid.*

minorities in such communities were discriminated, ignored, and oppressed in many different ways by the majority.

Today, protected minorities often seek to be recognised as such by their government and wish to secure their rights to identity, to use their own language in both public and private, to profess and practice their own religion, to enjoy their own culture, and to establish and maintain their own associations. They also want to participate in public and political life and in constituting and implementing development policies and projects that affect them. However, in many parts of the world, the status of minority communities remains a central political issue, as minorities and majorities across the globe still clash over such issues as language rights, religious freedom, education curricula, land claims, regional autonomy, and national symbols.<sup>258</sup>

### 2.3.1. The International Protection of Minorities in History

The root of minority rights can be traced back in the seventeenth century reform regarding protection of religious minorities.<sup>259</sup> In contrast, Sigler argued that ‘the contemporary minority issues with which we have familiarity are largely rooted in the nineteenth century’.<sup>260</sup> Until the eighteenth century, religion was certainly the most significant distinction among most groups; however, since the nineteenth century was ‘concerned less with religious or racial groups than with linguistic and ethnic groups’.<sup>261</sup> In other words, most of the early provisions for the protection of minorities were concerned with what today might be viewed as freedom of religion rather than group rights.<sup>262</sup> ‘The three great congresses of the nineteenth century, Vienna (1814-15), Paris (1856), and Berlin (1878), encompassed minority protection provisions in treaties establishing rights and security of populations that

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<sup>258</sup> *ibid.*

<sup>259</sup> Natan argued that, ‘Compare for example Treaty of Westphalia, which in 1648 granted religious right to the Protestant German population, or the Treaty of Oliva in 1660 in favour of the Roman Catholics in Livonia, ceded by Sweden and Poland, or the Treaty of Paris in 1763, signed between France, Spain and Great Britain, in favour of Roman Catholics in Canadian territories ceded by France. For more details see, N Lerner, *Group Rights, and Discrimination in International Law* (Dordrecht/Boston/London: MNP 1991) 7-22.

See also, ‘Treaty of Westphalia, 24 October [1648]’ Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies’ (Yale Law Library, 2008).

<<http://dc144.4shared.com/doc/0fKS3s19/preview.html>> accessed 25 March 2013.

<sup>260</sup> J A Sigler, *Minority Rights, A Comparative Analysis* (Westport, Connecticut/London, Greenwood Press 1983) 68.

<sup>261</sup> *ibid.*

<sup>262</sup> Hannum, *Autonomy, Sovereignty and Self-Determination The Accommodation of Conflict Rights* (n 174) 50.



were to be transferred to a foreign sovereignty'.<sup>263</sup> Rehman argued that, the Peace Festival Convention in 1648 can be considered the first international law instrument for the protection of Minorities Rights. Article 5 of this Convention stated the admission of the equality of the Protestant and the Catholic creeds, national issues came up to the scene on the 19<sup>th</sup> century, then the concept of the National Minorities appeared also.<sup>264</sup> Nonetheless, it is more reasonable to claim that modern international protection was systematically prescribed for the first time in the Treaty of Versailles, after the First World War.

The League of Nations paid a significant interest towards minorities' right, through the Peace Treaties of (1920-1921). The interests had given to individuals belonging to minorities without any actual political recognition of the existence of minorities' community. In addition, the development of the protection of minorities' instruments had political goals rather than humanity purposes. Accordingly, proceeding to the 20<sup>th</sup> century, the first document to mention is the Treaty of Versailles of 1919,<sup>265</sup> the peace agreement that formally ended World War I.<sup>266</sup> The Treaty, the peace agreement that formally ended World War I and gave birth to the League of Nations, was the first of these instruments concentrating on the protection of minorities.<sup>267</sup> The League of Nations system for the international protection of minorities originates from the Paris peace conference held in 1919.<sup>268</sup> The international law of the time involved supporting the rights of minorities through a series of treaties, which reflected major boundary changes after the end of the WWI; these treaties were signed as part of the Pact of Paris. Brownlie demonstrated that the Minorities Treaties under the League of Nations system had provisions for the protections for the civil and political rights of members of racial, religious and linguistic minorities, they were mostly similar in content concentrating in the norms of the protection of rights to life, liberty, and equality before the law and in the exercise of civil and political rights.<sup>269</sup>

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<sup>263</sup> A Petričušić, 'The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations' (2005) XI C Int'l R Rev 23.

<sup>264</sup> J Rehman, *The Weaknesses in the International Protection of Minority Rights* (Klu L Int'l, The Hague 2000) 32.

<sup>265</sup> 'Treaty of Versailles, 28 June [1919]' (Lillian Goldman Law Library, 2008) <[http://avalon.law.yale.edu/subject\\_menus/versailles\\_menu.asp](http://avalon.law.yale.edu/subject_menus/versailles_menu.asp)> accessed 22 March 2013.

<sup>266</sup> Rossouw and Geldenhuys, 'The International Protection of Minority Rights' (n 256).

<sup>267</sup> B Khan and M M Rahman, 'Protection of Minorities: A South Asian Discourse' (Cambridge Scholars Publishing 2009) <[http://www.eurac.edu/en/research/institutes/imr/Documents/EURASIA-Net\\_Del\\_17\\_South\\_Asian\\_Discourse.pdf](http://www.eurac.edu/en/research/institutes/imr/Documents/EURASIA-Net_Del_17_South_Asian_Discourse.pdf)> accessed 19 March 2013.

<sup>268</sup> 'The Paris Peace Conference and the Treaty of Versailles The Remaking of Europe in 1919' January [1919] (CT Evans, 2005) <<http://www.ctevans.net/Versailles/Index.html>> accessed 22 March 2013.

<sup>269</sup> Brownlie, *Principle of Public International Law* (n 112) 570-596.

Thus, the League of Nations was taken a significant step to protect minority's rights. The little Treaty of Versailles or the Polish Minority Treaties had an influence on the international standards towards the protection of minority's rights. However, the League failed to fulfil its goals. This is primarily because the Pact of the League of the Nations contained no provision regarding human rights; it incorporated two related systems of mandates and minorities.<sup>270</sup> On the other hand, the League failed to establish an *effective* minorities system reflected the economic, social, and political problems of the inter-war period and contributed to the fall of the Wilsonian vision system and disarmament that resulted with the World War II.<sup>271</sup> For that reason, the League was considered as a new organisation in the history of the international relations and mutual co-operation between States but it could, just in practice, to shed a light on conflicts and disputes without solving them. The League failed to fulfil its implementations and to achieve its goals, but it became a foundation for the establishment of a new international instrument to maintain and protect minority's rights the United Nations.

The idea of human rights protection was emerged stronger after the WWII's extermination peoples that would be considered minorities from today's perspective. Since then, those people did not enjoy any rights. When the UN was established in 1945, most member States did not acknowledged existence of minority problems. Even today most countries who have declared to be unitary ones such as, China, Russia and Spain, fear that recognition of minority groups within their territories would rekindle the regional claims against which they have had to fight in the past.

After World War II, 'the possibility of ethnic conflicts and endangering stability arising out of discontents of minority groups led several European countries to negotiate bilateral agreements with neighbouring states for protection of kin-minorities'.<sup>272</sup> Notable among

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<sup>270</sup> Petričušić, 'The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations' (n 263).

<sup>271</sup> *ibid.* The league failed to meet its obligations due to disability to enforce the treaties and at the same time failed to maintain peace in the world. One of the important issues is that it failed to resolve the Polish–Russian war, the war occurred due to the fact that the Allies had not defined Poland's borders with Russia, the war lasted until 1921. Furthermore, the minorities protection system did not succeed after World War I, due to that the main reason of the War, such as Chauvinism and Racism, was still unresolved. In addition, when the leagues' Convention was written, there was no plan to establish an international obligation concerning minorities' protection issues. Victorious states intended to establish equality between Minorities and other nations, attempt concentrated on protection of the individual. For further details see, Khan and Rahman, 'Protection of Minorities: A South Asian Discourse' (n 267).

<sup>272</sup> *ibid.* The United Nations Charter recognises the principle of equal rights of peoples. Referring to peoples as not national minorities within states, but for entire national minorities, especially those in colonial territories. Article (73), dealing with non-self-governing territories, obliges states administrating these territories to

these are the 1946 ‘Austro-Italian’ agreement on the status of South Tyrol, and the 1955 agreement between ‘Germany and Denmark’ on the rights of the Danish and German minorities on both sides of the German-Danish border.<sup>273</sup> Another instrument bearing on minority protection during this period was the adoption of the Genocide Convention in 1948.<sup>274</sup> Thereafter, neither the United Nations Charter nor the Universal Declaration of Human Rights mentioned the rights of minorities, but instead the Declaration emphasised individual human rights. In other words, the Charter did not contain any explicit provision for the protection of minorities. A significant move with minorities’ rights towards individual and human being rights occurred obviously in the charter of the United Nations. To prevent the denial of minorities’ rights, the United Nations has created a global structure for protecting their rights at the San Francisco Conference.<sup>275</sup> The right of minorities was also specifically excluded from the UDHR.<sup>276</sup>

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guarantee their political, economic, social, and educational interests, their just treatment, and protect them against abuses. See, Article 73 UN Charter.

<sup>273</sup> *ibid.*

<sup>274</sup> ‘Convention on the Prevention and Punishment of the Crime of Genocide’, 78 UNTS 277, (entered into force 12 January 1951)’.

<sup>275</sup> P Thornberry, *International Law and the Rights of Minorities* (OUP, 1993) 118.

<sup>276</sup> Khan and Rahman, ‘Protection of Minorities’ (n 267). See also, ‘Universal Declaration of Human Rights’ (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) 1948). The Universal Declaration of Human Rights, 1948, is also couched in the language of individual rights:

‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. 2- A notion of collective rights was evident in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. 3- Explicit international recognition of the existence of minorities and group rights emerged as early as 1954 in a recommendation of the United Nations Sub-commission on Prevention of Discrimination and Protection of Minority Rights. 4- The International Labour Organisation’s (ILO’s) Convention on Indigenous and other Tribal and Semi-tribal Populations in Independent Countries, 1957, went well beyond any of the preceding international instruments in addressing minority rights. 5- The United Nations Convention on the Elimination of All Forms of Racial Discrimination of 1966 is best known for prohibiting discrimination on the basis of ‘race, colour, descent, national, or ethnic origin’. 6- The move towards positive rights for minorities was given a major impetus by the Conference on Security and Cooperation in Europe (CSCE, later Organization for Security and Cooperation in Europe, OSCE) in 1975. 7- The African Charter of Human Peoples Rights, adopted by the Organisation of African Unity in 1981, contained an allusion to group rights art (22). 8- The UNESCO Declaration on Race and Racial Prejudice, 1982, addresses the contentious relationship between group differentiation and discrimination. 9- Resolution on the Languages and Cultures of Regional and Ethnic Minorities, adopted in 1987, the European Parliament went beyond any of the multilateral agreements or decisions already mentioned. 10- The rights of indigenous and tribal peoples are again specifically addressed by the International Labour Organisation in its 1989 Convention concerning Indigenous and Tribal Peoples in Independent Countries. 11- The Document of the Copenhagen Meeting of the CSCE, 1990. 12- The CSCE’s Charter of Paris for a new Europe also adopted in 1990. 13- UN General Assembly’s adoption in 1992 of the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. 14- The salience of minority issues in the post-communist world finds further recognition in the CSCE’s creation in 1992 of the office of High Commissioner on National Minorities. 15- The Council of Europe reiterates the link between individual and group rights in the Declaration on Human Rights and in the European Convention for the Protection of Human Rights and Fundamental Freedoms, both adopted in 1993. 16- At the global level the UN’s World Conference on Human Rights issued the Vienna Declaration in 1993. 17- Reflecting the Europeans’ pivotal role in championing minority rights, ten Central

The Declaration is considered as being non-obligatory,<sup>277</sup> containing general standards of conduct, containing no dispute resolution but some formal monitoring or enforcement. Obviously, the UDHR does not contain any reference to minorities.<sup>278</sup> Instead, it referred to rights pertinent to minority rights, the right to freedom of thought, conscience, and religion Article 18, promises equality Article 7 the right to freedom of opinion and expression Article 19, the right of peaceful assembly and association Article 20. Article 26 stated the rights of education, and the right freely to participate in the cultural life of the community Article 27.<sup>279</sup>

The Charter of the United Nations likewise recognises ‘the principle of equal rights and self-determination of peoples’. Rossouw and Geldenhuys argued that the ‘peoples’ referred to, at least in the UN Charter, were not national minorities within states, but rather entire national populations, especially those in colonial territories.<sup>280</sup> Although, many attempts were made to mention minorities, but not before 1966 when the General Assembly adopted the International Covenant on Civil and Political rights, which considered as a first legally binding treaty mentioning minority’s rights explicitly. Article 27 of the ICCPR has had an influence on other international instruments protecting minority rights.<sup>281</sup> Musgrave has pointed out that; Article 27 is the only article of the Covenant, which directly addresses the issue of minorities.<sup>282</sup> An Article 27 legally binding instrument is considered the first international standard that universalises the concept of minority rights. The article makes provision for group rights, and grants persons belonging to minorities the rights to national, ethnic, religious, or linguistic identity, or a combination thereof, and to preserve the

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European states in 1994 proposed the Central European Initiative Instrument for the Protection of Minority Rights article (7). 18- Finally, Inter-American Declaration on the Rights of Indigenous People, 1995. The states involved ‘recognise that the indigenous peoples are entitled to collective rights in so far as they are indispensable to the enjoyment of the individual rights of their members. See Further, Rossouw and Geldenhuys, ‘The International Protection of Minority Rights’ (n 256).

<sup>277</sup> Scholars were divided regarding the legal status of the UDHR. Some consider it as a non-binding Declaration. The head of the Committee of Human Rights emphasizes that the Declaration not considered as an International Treaty or International Convention, in addition the Declaration does not include any legal binding obligation. At the same time, the head of the Committee considered the Declaration as an implementing body of Human Rights principles. For more details see, A E Alcock, *A History of the Protection of Regional Cultural Minorities in Europe: From the Edict of the Nantes to the Present Day* (MacMillan, UK 2003).

<sup>278</sup> Article 2 states that: ‘everyone is entitled to the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. This Article stated non-discrimination as basic principle, and does not including any text protecting minorities’ rights. See, Article 2 of the Universal Declaration of Human Rights (n 276).

<sup>279</sup> *ibid*, Articles 7-18-19-20-26 and 27.

<sup>280</sup> Rossouw and Geldenhuys, ‘The International Protection of Minority Rights’ (n 256).

<sup>281</sup> See, ICCPR, Article 27 (n 19).

<sup>282</sup> T D Musgrave, *Self-Determination and National Minorities* (OUP, New York 1997) 135-136.

characteristic, which they wish to maintain and develop. It grants individual rights rather than collective group rights, has been mentioned in Article 1 of the Covenant. Moreover, it requires that a member of a minority shall not be denied his right to enjoy his culture.<sup>283</sup> Thus, Article 27 of the Covenant shows a significant step of norms on minorities' rights and its impact has an important role in guiding the development of the new minorities' protections system.

In addition, Article 1 of the International Covenant has generally been applied to trust colonies, the right of people to be free from external domination, the right to support internal self-determination, which enables a minority group to submit a claim for a kind of autonomy.<sup>284</sup> While, Article 40 of the ICCPR, is obliging states parties to submit periodical reports to the Human Rights Committee (HRC).<sup>285</sup> This procedure is considered to be the only binding procedure of the rights shown on the International Covenant and providing International legal protection to minority rights.

In 1992, the UN adopted by the General Assembly, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the United Nations Declaration on Minorities (UNDM).<sup>286</sup> The most important feature of the Declaration in Article 4 (1) is that it includes provisions imposing certain positive obligations on states regarding their minorities.<sup>287</sup> However, it is not a binding instrument, but the Declaration is inspired by Article 27 of the ICCPR. Thus, Petričušić argued that, when the UN has been established, the most developed countries of the world did not acknowledge existence of minority problems. Even today, many states, who have declared to be unitary ones, fear that

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<sup>283</sup> Article 27 of ICCPR states: 'In those states in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right in the community with the other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language'. See, Article 27 of The International Covenant of Civil and Political Rights (n 19).

<sup>284</sup> See, Article 1 ICCPR.

<sup>285</sup> See, Article 40 ICCPR.

<sup>286</sup> Article 1 of the declaration provides that States shall protect all kinds of minorities that inhabit its territories, establishing conditions for the promotion of the protection of minority rights, preserving their identity, adopting appropriate legislative and other measures to achieve those ends. While, Article (2/1) states:

"Persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and public, freely and without interference or any form of discrimination." See, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (n 255).

<sup>287</sup> Article 4 paragraph (1) provides that: 'States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards'. See Article 4 (1) *ibid*.

recognition of minority groups within their territories would rekindle the regional claims against which they have had to fight in the past.<sup>288</sup>

### 2.3.2. The concept of minority: who are protected minorities under international law?

It has been easier to set standards for the development of minority protection in international law than to define who the beneficiaries of such standards should be. It is a well-known fact that there is no definition of the concept of ‘minority’ in international law, which grants these units special protections. A number of contemporary scholars are reluctant to use the term ‘minority,’ claiming this term was closely connected with the League of Nations system and therefore is obsolete.<sup>289</sup> Others, on the contrary, argue that since minority implicates the group of people that is numerically smaller than the dominant group, this leaves out non-dominant groups that are majorities in their countries.<sup>290</sup> Therefore, following changes to the term were suggested: ‘communities’, ‘communalities’, ‘social groups’, and recently even term ‘peoples’.<sup>291</sup>

Moreover, despite the fact that the question of minorities presently enjoys such international prominence, surprisingly little has until relatively recently been done to formulate an authoritative, generally acceptable definition of a ‘minority’.<sup>292</sup> A plausible reason for this neglect, as Deon pointed out, is that ‘the lack of a definition could be used by states as an excuse not to deal at all with potentially contentious minority issues at home by claiming that the relevant group was not a ‘minority’ and had no claims to special rights, but was simply part of the broader national population’.<sup>293</sup> National minorities are ‘neither the pristine reproduction of their ‘mother people’, although they are tied to their people particularly by culture and language, nor a reflection of the sociological and ideological satisfaction of the dominant people, to whom they are linked by their geographical situation and economic,

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<sup>288</sup> Petričušić, ‘The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations’ (n 263).

<sup>289</sup> *ibid.*

<sup>290</sup> *ibid.*

<sup>291</sup> *ibid.*, For specified definitions of mentioned terms, See, N Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff Publishers, Dordrecht/Boston/London 1991) 28-34.

<sup>292</sup> Rossouw and Geldenhuys, ‘The International Protection Of Minority Rights’ (n 256).

<sup>293</sup> *ibid.*

cultural, historical and political features'.<sup>294</sup> Therefore, they deserve an 'exceptional accomplishment of their preserving and fostering in the state they inhabit, though the kin-states as well shape minority policies'.<sup>295</sup>

Certain scholars, most notably the United Nations Special Rapporteurs such as Francesco Capotorti and Jules Deschenes, have developed definitions, which have gained some scholarly support. However, relevant international instruments have generally not even attempted to define the concept. Despite many references to 'minorities' in international legal instruments, there is no universally agreed, legally binding definition of the term.<sup>296</sup> This is primarily because of a feeling that the concept of 'minority' is inherently vague and imprecise and that no proposed definition would ever be able to provide for the innumerable minority groups that could possibly exist.<sup>297</sup> Moreover, the diverse contexts of different groups claiming minority status also make it challenging to formulate a solution of universal application. Consequently, Rehman argued that international law has found it difficult to provide any firm guideline in relation to defining the concept.<sup>298</sup> Nonetheless, the efforts made so far at various forums and by many international scholars and lawyers into consideration in developing a definition of the term of minority.

Accordingly, minority can be described as a small group in a society that is different from the rest of the citizens of a state on the grounds of race, ethnicity, and religion, linguistic or political belief. Francesco Capotorti, defined a minority group, with the application of Article 27 of ICCPR in mind, as:

[A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language].<sup>299</sup>

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<sup>294</sup> Petričušić, 'The Rights of Minorities in International Law' (n 263). See further, M Komac, 'Nationalities and Minorities in Yugoslavia, European Minorities' (1991) 4 Con EA 129.

<sup>295</sup> Petričušić, 'The Rights of Minorities in International Law' (n 263).

<sup>296</sup> F Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (NY, United Nations, 1991) 5.

<sup>297</sup> Khan and Rahman, 'Protection of Minorities' (n 267).

<sup>298</sup> Rehman, *The Weaknesses in the International Protection of Minority Rights* (n 264) 14.

<sup>299</sup> 'Minority Rights : International Standards and Guidance for Implementation' (United Nations, Human Rights, Office of the High Commissioner 2010). See also, E/CN 4/Sub 2/384/Rev 1, para 568. The subjective elements of defining a group as a minority were well described by the Permanent Court of International Justice (PCIJ) as early as 1930, when it referred to minorities or communities as: a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race,

The basic standard required by Capotorti's definition is: a minority has to be a group that exists in a non-dominant position, must have shared ethnic, religious, or linguistic feature, which can be distinguished from the majority of society. The minority group needs either implicitly or explicitly to show a sense of solidarity towards preservation of its identity. Rather, in most instances, a minority group will be a numerical minority, but in others, a numerical majority may also find itself in a minority-like or non-dominant position, for example, Blacks under the apartheid regime in South Africa.<sup>300</sup> In a certain situation, a group, which constitutes a majority in a state as a whole, may be in a non-dominant position within a particular region of the state in question. In addition, the 'numerical inferiority' is determined by referring to the size of the rest of the population of the rest of the state. In a situation where there is no clear majority, the expression 'the rest of the people' is explained to indicate to the aggregate of all groups of the population of the state concerned. A criticism arose here, that the comparison is between a culturally homogenous group and a non – classified one. Capotorti's definition did not mention the numerical strength of the group. It is now well settled that a minority forms a sufficient number for the state to recognise it as a distinct part of the society and to justify the state making the effort to protect and promote it.

Additionally, Benedikter has defined a minority as 'A non-dominant institutionalised group sharing a distinct cultural identity that it wishes to preserve'.<sup>301</sup> While, Akermark has described a minority as 'A non-dominant institutionalised group sharing a distinct cultural identity that it wishes to preserve'.<sup>302</sup> In 1985, Jules Deschenes prepared another text on the definition of minority to the Sub-Commission to the Commission on Human Rights. However, the Commission did not accept the definition.<sup>303</sup>

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religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other. See, '*Greco-Bulgarian Communities* (Advisory Opinion) [1930] PCIJ Series B NO 17'.

<sup>300</sup> 'Minority Rights : International Standards and Guidance for Implementation' (n 299).

<sup>301</sup> T Benedikter, 'Minorities in Europe: Legal Instrument of Minority Protection in Europe, an Overview' [2006] Bolzano/Bozen < <http://www.gfbv.it/3dossier/eu-min/autonomy-eu.html> > accessed 25 March, 2013.

<sup>302</sup> Geldenhuys and Rossouw , 'The International Protection Of Minority Rights' (n 256).

<sup>303</sup> According to this definition, minority is: 'A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim it is to achieve equality with the majority in fact and in law'. See, Jelena Pejic, 'Minority Rights in International Law' (1997) 19 HRQ 671.

A C Helton, 'International Legal Principles Concerning National Minorities, Prepared by the Open Society Institute Forced Migration Projects, for the seminar on New Diasporas of Eastern Europe Budapest', (1998) <<http://vlib.iue.it/hist-romania/minorities.html>> accessed 28 March, 2013.



The HRC (General Comment) Article 27 of the Covenant provides that, ‘in those States in which ethnic, religious, or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’<sup>304</sup> The Committee observes that this article establishes and recognises a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights, which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.<sup>305</sup>

Consequently, ‘adopted by consensus in 1992, the United Nations Minorities Declaration in its Article 1 refers to minorities as ‘based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence.’ There is no internationally agreed definition as to which groups constitute minorities’.<sup>306</sup> In 1993, the European Commission for Democracy through Law and the Parliamentary Assembly of the Council of Europe essentially repeated Capotorti's conception.<sup>307</sup> The regime on minority rights, as part of a wider human rights regime, recognises that membership of a minority group is a matter of personal choice; a person may not be ascribed to a minority group against their will.<sup>308</sup> However, it has been argued that, ‘the difficulty in arriving at a widely acceptable definition lies in the variety of situations in which minorities live.’ Some live together in well-defined areas, separated from the dominant part of the population. Others are scattered throughout the country. Some minorities have a strong sense of collective identity and recorded history; others retain only a fragmented notion of their common heritage’.<sup>309</sup>

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<sup>304</sup> ‘The High Commissioner of Human Rights, General Comment No 23: The rights of minorities (Art 27) (Fiftieth session, 1994)’

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument) accessed 28 June, 2013.

<sup>305</sup> *ibid.*

<sup>306</sup> Article 1 states: 1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. 2. States shall adopt appropriate legislative and other measures to achieve those ends. See, UNGA Res A/RES/47/135’ (n 255).

<sup>307</sup> Geldenhuys and Rossouw, ‘The International Protection Of Minority Rights’ (n 256).

<sup>308</sup> Article 3(1) Framework Convention on National Minorities states that: “Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.” See, ‘Framework Convention for the Protection of National Minorities (1 September 1995) Strasbourg’ <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm> accessed 28 June, 2013.

<sup>309</sup> ‘Minority Rights : International Standards and Guidance for Implementation’ (n 299).

Thus, in the absence of the precise definition of minority in international law, the existence of a minority is a question of fact and not of definition.<sup>310</sup> The numerical inferiority on the other hand, is determined by referring to the size of the rest of the population of the rest of the state. In a situation where there is no clear majority, the expression ‘the rest of the people is explained to indicate to the aggregate of all groups of the population of the state concerned. Consequently, the comparison is between a culturally homogenous group and a non-classified one. Capotorti’s definition did not mention the numerical strength of the group. It is now well settled that a minority forms a sufficient number for the state to recognise it as a distinct part of society and to justify the state making the effort to protect and promote it. Thus, the absence of a unique definition cannot be solved merely by finding a more precise definition. Accordingly, based on the definitions above, the Kurds of Iraq would not be a minority, because they are a ‘national group’ a ‘people’ for the purpose of the right of self-determination.

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<sup>310</sup> The OSCE states that ‘to belong to a national minority is a matter of a person’s individual choice’. The existence of a minority does not depend on a decision by the State, determined by objective criteria such as language, ethnicity, or religion, but on self-identification. It depends on the will and decision of those individuals who collectively see themselves as different to the majority, on a sense of belonging to the group and a commitment to the preservation of the identity of the group. See, ‘OSCE, High Commissioner on National Minorities’, 1995 <<http://www.osce.org/hcnm/43201>> accessed 29 June, 2013.

### 2.3.3. Relationship between Minority, Indigenous people, and People

The right of minority groups or sub-groups is distinguishable from the right to self-determination. Minority rights, ‘which do not include the right to secede but are, nevertheless, general and broad in scope, are available to all ethnic, cultural, religious and linguistic groups within any type of nation-State’.<sup>311</sup> On the other hand, self-determination includes the right to form an independent State, but is recognised and designed to govern only certain special territorial situations concerning certain special categories of rights of certain special ‘peoples’.<sup>312</sup>

An important issue is whether protected ‘minorities’ also fall under the category of ‘all peoples’ entitled to the right of self-determination. Certainly, ‘minorities’ and ‘peoples’ are two separate concepts.<sup>313</sup> While the concept of self-determination is elaborated in the common Article 1 of the Covenants, the ICCPR elaborates minority rights in Article 27. It is clear that the rights of minorities under international law do not necessarily include or commingle with the right to self-determination. Hence, protected minorities do not automatically qualify as a ‘people’ eligible to the right to self-determination.<sup>314</sup>

On the other hand, the concept of ‘indigenous peoples’<sup>315</sup> in international practice has not been accompanied by any general agreement as to its meaning, nor even by agreement or a

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<sup>311</sup> J Shen, ‘Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan’ (2000) 15 Am U Int’l L Rev 1101. See also, Article 27 The International Covenant of Civil and Political Rights’ (n 19).

<sup>312</sup> Shen, ‘Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan’ (n 311)

<sup>313</sup> J Vidmar, ‘Montenegro’s Path to Independence’: A Study of Self-Determination, Statehood and Recognition’ (2007) 3 HL Rev 73. See for example, the question of minority’s right to self-determination considered by Conference on Yugoslavia Arbitration Commission (Badinter Commission). The Commission treated the Bosnian Serb population as a “minority” and denied that they have any right to form an independent state. Although some scholars interpret that, this opinion of Badinter Commission “effectively reflected the orthodox view that minorities were not peoples with the right to self-determination.” It is clear that Badinter Commission did not deny that Serbian minority is a subject or right to self-determination. See, Crawford, *The Creation of States in International Law* (n 3) 407.

<sup>314</sup> Shen, ‘Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan’ (n 311).

<sup>315</sup> Martinez Cobo a (UN Special Rapporteur) has defined ‘indigenous peoples’ as ‘Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial society that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own culture patterns, social institutions, and legal systems. See, B Kingsbury, ‘Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy’ (1998) 92 Ame J Int’l L, 414. However, Cobo’s definition is always problematic for groups who do not continue to live in accordance with traditional norms or who share the same geographic area with others who also claim to be indigenous. It implies that the group must have been colonized or invaded.<sup>32</sup> Because colonization or invasion does not always occur, groups in such situations may

process by which its meaning might be established. While indigenous peoples can claim minority rights under international law, there are UN mandates and mechanisms dedicated specially to protecting their rights.<sup>316</sup> The UN in its work has applied the principle of self-identification with regard to indigenous peoples and minorities. In practical terms, a number of connections exist between indigenous peoples and national, ethnic, linguistic and religious minorities.<sup>317</sup> Both groups are in a non-dominant position in the society in which they live. Both minorities and indigenous peoples wish to promote and retain their identity. Some minorities have strong and long-standing attachments to their lands as do indigenous peoples. However, minorities do not necessarily have long ancestral, traditional attachments to their lands and territories that are usually associated with self-identification as indigenous peoples.<sup>318</sup>

Accordingly, the definition of 'indigenous people' confirms that international law treats indigenous groups as distinct from minority groups'.<sup>319</sup> However, there are groups that fall under the legal definition of both concepts. Clearly, while an indigenous people may qualify as a minority, not all minorities are indigenous.<sup>320</sup> There is however, little debate that indigenous groups can be treated as minorities as long as they are numerically inferior to the rest of the population of the State in which they live.<sup>321</sup> In Bolivia and Guatemala however, the indigenous groups are numerically superior and hence cannot be treated as minorities.<sup>322</sup> Dahiltz concluded that, indigenous peoples, by virtue of their special circumstances as first peoples, and their close association with the land, may more often than most need and benefit from a high degree of autonomy, negotiated between them and the national government as equal.<sup>323</sup>

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fear that their Status as indigenous would be in doubt. See, Y T Jabareen, 'Redefining Minority Rights: Successes and Shortcoming of the UN Declaration on the Rights of Indigenous Peoples' (2012) 18 AKH-JCIR Rev 120.

<sup>316</sup> 'Minority Rights: International Standards and Guidance for Implementation' (n 299).

<sup>317</sup> *ibid.*

<sup>318</sup> *ibid.*

<sup>319</sup> B Khan and M M Rahman, *Protection of Minorities, Regimes, Norms and Issues in South Asia* (CSP 2012) 16.

<sup>320</sup> As far as Article 27 of the ICCPR is, concerned, indigenous peoples are in many instances classified as both minority and indigenous at the same time. See, *ibid.*

<sup>321</sup> *ibid.*

<sup>322</sup> *ibid.*

<sup>323</sup> Dahiltz, *Secession and International Law* (n 14) 34-35.

## 2.4. Statehood

### 2.4.1. General Observations

Since the development of the modern international system, statehood has been regarded as the paramount type of international personality.<sup>324</sup> Clearly, in doctrine and in practice, states have until recently been regarded as the only international legal person.<sup>325</sup> In all legal systems, the subject of law is an entity, which has enforceable rights and duties at the law. It can be an individual or a company and both are defined as 'legal person' by the law.<sup>326</sup> Legal personality is the main clause for the entities to function or in other words, to enforce and allege a claim.<sup>327</sup>

The traditional understanding was that international law deals with states and state activities. Today, international law has a wide range of interests, and there are a range of participants in the international system, 'Public international law covers relations between states, and regulates the operation of many international institutions'.<sup>328</sup> Nevertheless, 'states were the original, and remain the primary actors in the international legal system'.<sup>329</sup> Under the modern conception, participants can be regarded as; states, international organisations, regional organisations, non-governmental organisations, public companies, private companies and individuals.<sup>330</sup>

Some scholars have suggested that the concept of statehood does not have a separate place in international law, they have even come close to deny the existence of statehood as a legal concept altogether. While these views might contribute to view the State in non-absolute terms, they are difficult to match with the extensive reliance on the concept in international constitutional documents such as the United Nations Charter (UN Charter) or State practice.<sup>331</sup> In addition, the separate position of the state is rather underscored by the recognition of the existence of certain essential rights and obligations of states in international law. Many of these fundamental rights and duties, Werner argued, may be

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<sup>324</sup> Crawford, *The Creation of States in International Law* (n 3) 4-5.

<sup>325</sup> *ibid* 17-18.

<sup>326</sup> Shaw, *International Law* (n 119) 195.

<sup>327</sup> *ibid*.

<sup>328</sup> *ibid* 2.

<sup>329</sup> *ibid* 218.

<sup>330</sup> *ibid* 196.

<sup>331</sup> J Crawford, 'The Criteria for Statehood In International Law' (1977) 48 BYIL Int'l L 93.

summarised in three principles closely related to the principles of liberty, equality, and fraternity as those developed in the domestic sphere: the independence of states, the sovereign equality of states and the obligation of states to peacefully coexist.<sup>332</sup> In a like manner, Crawford observed that ‘States possess certain exclusive and general legal characteristics, which he divides into five principles that constitute in legal terms the hard core of the concept of statehood, the essence of the special position in customary international law of States.’<sup>333</sup>

#### 2.4.2. International Law and the criteria of Statehood

Since Westphalian times,<sup>334</sup> the concept of statehood has become one of the fundamental pillars of the international legal system. The term, ‘State’, has a specific meaning and when it is used in the context of the international legal system, it refers to the ‘nation-State’.<sup>335</sup> What this means is that for an entity to be accepted as a ‘State’ and for it to take its place in the global community, it must meet the defined requirements laid down by international law.<sup>336</sup>

The relationship in this area between factual and legal criteria, as Shaw argued, is a crucial shifting one.<sup>337</sup> Whether the birth of a new State is primarily a question of fact or law, and how the interaction between the criteria of effectiveness and other relevant legal principles may be reconciled are questions of considerable complexity and significance.<sup>338</sup>

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<sup>332</sup> The independence and equality of States includes for example, the right of States to choose their own constitution, to exercise (exclusive) jurisdiction over their territory and if necessary, to defend the State against an armed attack. The obligation of peaceful coexistence implies, among other things, that States have the duty to refrain from intervention in the (internal or external) affairs of other States, from using their territory (or allowing it to be used) for activities that violate the rights of other States, or form a threat to international peace and security, and to comply with obligations imposed on them by international law in accordance with the principle of good faith. The last requirement implies, for example, that States are obliged to respect human rights on their territory. For more details see, N Horbach, R Lefeber, and O Ribbelink, *Handboek Internationaal Recht* (Den Haag: Asser Press 2007) 160.

<sup>333</sup> Crawford, ‘The Criteria for Statehood In International Law’ (n 331) 94-108.

<sup>334</sup> ‘Treaty of Westphalia’, 24 October [1648] Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies <<http://dc144.4shared.com/doc/0fKS3s19/preview.html>> accessed 25 March 2013.

<sup>335</sup> N Wallace-Bruce, ‘Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law’ (2000) 47 *Neth Int'l L Rev* 53.

<sup>336</sup> *ibid.*

<sup>337</sup> Shaw, *International Law* (n 119) 197.

<sup>338</sup> M N Shaw, *International Law* (3<sup>th</sup> edn, CUP 1991) 138.

Now that the decolonisation process is at an end, the creation of new States in the future can only be accomplished because of the diminution or disappearance of existing States, and the need for careful regulation thus arises.<sup>339</sup> This can be seen for example, in the break-up of the Socialist Federal Republic of Yugoslavia, the USSR, and Czechoslovakia. Warbrick argued that, in international law, an entity, which meets the international legal criteria of statehood, is able to be a State.<sup>340</sup> The Arbitration Commission of the European Conference on Yugoslavia in Opinion No 1 declared that ‘the State is commonly defined as a community which consists of a territory and a population subject to an organised political authority’ and that such a State is characterised by sovereignty’.<sup>341</sup> Similarly, Article 1 of the Montevideo Convention on the Rights and Duties of States provides the criteria of the statehood.<sup>342</sup> These provisions have acquired the status of customary international law.<sup>343</sup> According to the Convention a State should have; a) a permanent population b) a defined territory c) government and d) capacity to enter into relations with other States. Moreover, scholars have elaborated additional criteria for statehood, including independence, sovereignty, permanence, willingness, and ability to observe international law, a certain degree of civilization, and, in some cases, recognition.<sup>344</sup> However, the question remains whether these criteria are sufficient for Statehood, as well as being always necessary.

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<sup>339</sup> Shaw, *International Law* (n 119) 198.

<sup>340</sup> C Warbrick, ‘States and Recognition in International Law’ in Malcolm D Evans (ed), *International Law*, chap 7 (2<sup>nd</sup> edn, OUP 2006) 218.

<sup>341</sup> Shaw, *International Law* (n 119) 198.

<sup>342</sup> ‘The Montevideo Convention on Rights and Duties of States’ [1933] 165 LNTS 19 (1933).

<sup>343</sup> D J Harris, *Cases and Materials on International Law* (6<sup>th</sup> edn, Sweet & Maxwell, London 2004) 99.

<sup>344</sup> Crawford, *The Creation of States in International Law* (n 3) 62-95.

### 2.4.2.1. The classic criteria of statehood (Montevideo Criteria)

#### 2.4.2.1.1. Defined territory:

As Crawford observed that, ‘States are territorial entities’.<sup>345</sup> The control of territory is the essence of a State.<sup>346</sup> This is the basis of the central notion of territorial sovereignty, establishing the exclusive competence to take legal and factual measures within that territory and prohibiting foreign governments from exercising authority in the same area without consent.<sup>347</sup> According to Judge Huber, ‘Territorial sovereignty involves the exclusive right to display the activities of a States.’<sup>348</sup> Crawford stated that, ‘Territorial sovereignty is not ownership of but governing power with respect to territory’.<sup>349</sup> In contrast, Crawford added that the right to be a State ‘is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory’.<sup>350</sup>

The need for a defined territory focuses upon the requirement for a particular territory based upon which to operate.<sup>351</sup> However, Shaw argued ‘there is no necessity in international law for defined and settled boundaries. He added, ‘a State may be recognised as a legal person even though it is involved in a dispute with its neighbours as to the precise demarcation of its frontiers, so long as there is a consistent band of territory, which is undeniably controlled by the government of the alleged State’.<sup>352</sup> For example, Albania prior to the First World War was recognised by many countries even though its borders were in dispute.<sup>353</sup> More recently, Israel has been accepted by the majority of nations as well as the UN as a valid State in spite

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<sup>345</sup> *ibid* 46.

<sup>346</sup> P Malanczuk, *Akehurst’s Modern Introduction to International Law* (7<sup>th</sup> Rev edn, Routledge 1997) 75.

<sup>347</sup> *ibid*.

<sup>348</sup> ‘Island of Palmas Case’ (*Netherlands v USA*) [1928] IAA Rep 829, 871, 4 ILR 3.

<sup>349</sup> Crawford, *The Creation of States in International Law* (n 3) 56.

<sup>350</sup> *ibid* 46.

<sup>351</sup> Shaw, *International Law* (n 119) 199.

<sup>352</sup> Shaw, *International Law* (n 338) 139.

<sup>353</sup> The ICJ held ‘The appurtenance of a given area, considered as an entity, in no way governs the precise determination of its boundaries, any more that uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not. See, ‘The North Sea Continental Shelf cases’ (*Federal Republic of Germany v Netherlands*) [1969] ICJ Rep 3, 33 (1969).



of the unsettled status of its borders in the Arab-Israel conflict and territorial delineation.<sup>354</sup> Even more recently, Palestine has been accepted as a State.<sup>355</sup>

Thus, the delimitation of States boundaries is important, but absolute certainly about a State's frontiers is not required. As to the criterion of defined territory, international law does not require that all borders of a State need to be undisputed but rather demands “sufficient consistency” of the territory.<sup>356</sup> Here, it is possible for the territory of the State to be split into distinct parts, for instance, Pakistan prior to the Bangladesh secession of 1971 or present-day Azerbaijan.<sup>357</sup>

#### 2.4.2.1.2. Permanent population

The criterion of a ‘permanent population’ is connected with that of territory and constitutes the physical basis for the existence of a State.<sup>358</sup> In fact, there must be some people to establish the existence of a State but there is not a specification of a minimum number of people and again there is not a requirement that all of the people be nationals of the State.<sup>359</sup> Importantly, ‘since in the absence of the physical basis for an organised community; it will be difficult to establish the existence of a State’.<sup>360</sup> However, in the ‘Falkland Islands’ conflict, one of the issues raised related to the question of an acceptable minimum with regard to self-determination, and it may be that the matter needs further clarification as there exists a number of small islands awaiting decolonisation.<sup>361</sup>

A population or ‘people’ has been defined by Oppenheim as ‘an aggregate of individuals who live together as a community, though they may belong to different races or creeds or cultures,

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<sup>354</sup> Brownlie, *Principle of Public International Law* (n 269) 71.

<sup>355</sup> GENERAL ASSEMBLY VOTES OVERWHELMINGLY TO ACCORD PALESTINE, ‘NON-MEMBER OBSERVER STATE’ STATUS IN UNITED NATIONS, Sixty-seventh General Assembly General Assembly Plenary 44th & 45th Meetings, UNGA/11317 (29 November 2012).

<sup>356</sup> The German-Polish Mixed Tribunal stated ‘It is enough that this territory [of a state] has sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.’ See, ‘*Deutsche Continental Gas-Gesellschaft v Polish State*’ (1929) 5 ILR, 11, 14–15., The ICJ later confirmed this position: ‘There is... no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not.’ See ‘The North Sea Continental Shelf cases’ (*Federal Republic of Germany v Netherlands*) [1969] ICJ Rep 3, 33 (1969).

<sup>357</sup> Shaw, *International Law* (n 119) 200.

<sup>358</sup> Malanczuk, *Akehurst’s Modern Introduction to International Law* (n 346) 76.

<sup>359</sup> I Brownlie, *Principles of Public International Law* (7<sup>th</sup> edn, OUP 2008) 70-71.

<sup>360</sup> *ibid.*

<sup>361</sup> Shaw, *International Law* (n 119) 199.

or be of different colour'.<sup>362</sup> Accordingly, for the purpose of statehood, an entity's population must first live together as one people, and secondly must form a national community.<sup>363</sup> The permanent population requirement suggests that 'there must be people identifying themselves with the territory no matter how small or large the population might be'.<sup>364</sup> Hence, Vidmar argued that, 'A group of people without a territory cannot establish a State and a territory alone cannot be considered a State without a group of people intending to inhabit it permanently'.<sup>365</sup> Furthermore, a qualifying group of people may consist of different peoples, and 'people of different nationalities',<sup>366</sup> in spite of the fact that they may belong to different races or creeds, or be different in colour.<sup>367</sup>

Crawford pointed out that, 'the rule under discussion requires States to have a permanent population; it is not a rule relating to the nationality of that population'.<sup>368</sup> The internal law of a State determines who belongs to the 'permanent population' of a State by nationality, which international law leaves to the discretion of States, except for a number of limited circumstances.<sup>369</sup> In addition, many States have a multinational composition as regards population. So that, it would be inconsequent to legally require any cultural, ethnic, linguistic, historical, or religious homogeneity in the sense of antiquated political concept of the nation-State.<sup>370</sup> Issues arise again under the topic of self-determination and indigenous peoples and the rights of minorities, 'but they are irrelevant as criteria to determine the existence of a State'. Moreover, Brownlie argued that the, 'criterion is intended to be used in association with that of territory, and connotes a stable community'.<sup>371</sup> As regards numbers, Crawford

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<sup>362</sup> R Jennings and A Watts (ed), *Oppenheim's International Law*, in L Oppenheim (9<sup>th</sup> edn, OUP 2008) 121. (Providing a definition of people for purposes of determining the extent of a fixed or permanent population).

<sup>363</sup> Shen argued that, 'The population in Taiwan constitute the permanent population of the province, as they live together as part of the Chinese population and form a special local Chinese community. Nevertheless, since ninety-seven per cent of the "people" of Taiwan are ethnic han Chinese, they are no different from the permanent population of any other province or political subdivision in the mainland. They are all citizens of China covering the same geo-graphical sphere, the Chinese mainland, and the Taiwan Island. The permanent population in Taiwan is simply part of the permanent population of the entire State of China, regardless of the name used to designate it. See, Shen, 'Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan' (n 311).

<sup>364</sup> *ibid.*

<sup>365</sup> J Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (Oxford and Hart Publishing 2013) 39-43.

<sup>366</sup> Crawford, *The Creation of States in International Law* (n 3) 52-53.

<sup>367</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 39-43.

<sup>368</sup> Crawford, 'The Criteria for Statehood In International Law' (n 331) 114.

<sup>369</sup> Malanczuk, *Akehurst's Modern Introduction to International Law* (n 346) 77.

<sup>370</sup> *ibid.*

<sup>371</sup> Brownlie, *Principle of Public International Law* (n 269) 71.

observed that, ‘no minimum limit is apparently prescribed’.<sup>372</sup> Thus, the ‘existence of States with very small populations is generally accepted’; although Duursma has explained that the ‘diminutive size of a population may cast doubts on a State’s ability to comply with certain requirements of membership of international organisations.’<sup>373</sup> This, however, did not serve as a bar to premiership of the UN. Microstates like ‘the Marshall Islands, San Marino, Monaco, Andorra, and Palau all have obtained full membership of the United Nations’.<sup>374</sup>

#### 2.4.2.1.3. Government or (Central control)

A government is an indispensable requirement for statehood<sup>375</sup>, since all the others depend upon it.<sup>376</sup> This is so because ‘governmental authority is the basis for normal inter-State relations; what is an act of a State is defined primarily by reference to its organs of government, legislative, executive, or judicial.’<sup>377</sup> A government of a State needs not only to exist as an authority but also to ‘exercise effective control in the territory of a State, as well as to operate independently from the authority of governments of other States’.<sup>378</sup> Crawford argued that, ‘what is essential for statehood is a stable central political organisation that exercises effective public power within a defined territory and over a permanent population, acts as the executive organs responsible for the external relations of the State, and is not subject to the sovereignty of any other authority’.<sup>379</sup>

The point about government as Crawford pointed out, is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority.<sup>380</sup> A government’s effectiveness or its actual exercise of authority ‘refers to its structural coherence and its general capacity to maintain law and order within an area it controls or purports to control’.<sup>381</sup> However, there are some especial situations admitted exceptions regarding the standards and

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<sup>372</sup> J Crawford, *The Creation of States in International Law* (Clarendon Press 1979) 40.

<sup>373</sup> J Duursma, *Fragmentation and the International Relations of Microstates* (CUP 1996) 135-36.

<sup>374</sup> *ibid* 138.

<sup>375</sup> Crawford, *The Creation of States in International Law* (n 3) 42.

(Stating the proposition that to be a State, one must have an effective government).

<sup>376</sup> *ibid* 55.

<sup>377</sup> *ibid* 56.

<sup>378</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 39-43.

<sup>379</sup> Crawford, *The Creation of States in International Law* (n 3) 48. (Listing the requirements for the exercise of authority as well as the other requirements that enable recognition of a sovereign State).

<sup>380</sup> *ibid* 44.

<sup>381</sup> *ibid* 45.

degree of effectiveness. Besides, legitimacy, or legal title, 'refers to the government's exclusive sovereign and legal right to govern a territory under international law'.<sup>382</sup> Elsewhere, it is possible that 'the territory came into acquisition by way of succession, prescription, or cession by the former sovereignty of the territory'.<sup>383</sup> However, a territory can be obtained in accordance with the principle of self-determination. 'Therefore, the government criterion possesses both legal and factual dimensions'.<sup>384</sup>

It is also noteworthy that, 'the existence of effective government is in certain cases either insufficient or unnecessary to support statehood. Brownlie argued, some States, 'have arisen before government was very well organised, as, for example, Poland in 1919 and Burundi and Rwanda, admitted to membership of the UN at the seventeenth session of the General Assembly'.<sup>385</sup>

Obviously, 'effectiveness is an essentially relative notion when applied to the criterion of government'. Brownlie demonstrated that, 'the existence of effective government is in certain cases either unnecessary or insufficient to support statehood'. Thus, 'the principle of self-determination will be set against the concept of effective government, when the latter is used in arguments for continuation of colonial rule'.<sup>386</sup> In addition, the lack of actual exercise of authority, and a weak legal title would require a higher degree of effectiveness. This inverse provides an explanation why (the former Belgian Congo) Zaire in 1960 was accorded precipitate recognition when its new government 'was divided, bankrupt, and hardly able to control even the capital'.<sup>387</sup> Rhodesia on the other hand lacked the legal title on the part of the government, 'which assumed power in violation of the principle of self-determination, to govern the territory in question resulted in almost universal non-recognition of the regime as a State or government, even if it maintained effective control over the territory at the time'.<sup>388</sup> More recently, Kosovo declared independence in 2008 with certain Serb-inhabited areas apparently not under the control of the central government.<sup>389</sup>

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<sup>382</sup> *ibid* 83.

<sup>383</sup> *ibid* 77.

<sup>384</sup> Shen, 'Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan' (n 311).

<sup>385</sup> Brownlie, *Principles of Public International Law* (n 269) 71.

<sup>386</sup> *ibid*.

<sup>387</sup> Crawford, *The Creation of States in International Law* (n 3) 43-44.

<sup>388</sup> Shen, 'Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan' (n 311).

<sup>389</sup> Shaw, *International Law* (n 119) 201.

Moreover, Harris argued that ‘State practice suggests that the requirement of a ‘stable political organisation’ in control of the territory does not apply during a [civil war] in a State that already exists (e.g. the Lebanese Civil War 1975-1990).’<sup>390</sup> A State that currently has problems of effective government is Somalia. ‘Since guerrillas overthrew the Government in 1991, fighting has persisted between rival clan-based militias with different territorial bases. A separate State of Somaliland declared its independence in the north west of Somalia, but has not gained international recognition.’ The Djibouti Conference of interested States and parties led to the establishment of an interim Government, but this does not have effective control of Mogadishu, the capital, or the country at large. UN forces were sent into Somalia between 1992 and 1995, but failed to bring the situation under control. Despite these problems, Somalia remains a UN member and continues to be recognised as a State by the international community.’<sup>391</sup>

Thus, what remain questionable is whether the lack of a government in Somalia, which was described as a ‘unique case’ in the resolution of the Security Council authorising the UN humanitarian intervention, abolish the international legal personality of the country as such.<sup>392</sup> In this regard, Evans argued that ‘the final situation to be considered is where there is no government at all, in what was undoubtedly a State.’ Does the absence of the government call into question the continued existence of the State? Such occasions are rare’.<sup>393</sup> In 1991, Somalia remained without a government until 2005 (and even after that date, the effectiveness of the formal government was far from apparent, the President being unwilling to return to the capital, Mogadishu, which was under the control of his rivals)’. However, there was no suggestion that Somalia ceased to be a State. It remained a member of the UN. States conducted themselves on the basis that there would eventually be a government of Somalia’.<sup>394</sup>

Here, in such situations, the lack of effective central control might be balanced by significant international recognition, culminating in membership of the UN nevertheless; a foundation of effective control is required for statehood.<sup>395</sup> However, the loss of control by the central

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<sup>390</sup> D J Harris, *Cases and Materials on International Law* (5<sup>th</sup> edn, London Sweet & Maxwell 1998) 104.

<sup>391</sup> *ibid.*

<sup>392</sup> Malanczuk, *Akehurst’s Modern Introduction to International Law* (n 346).

<sup>393</sup> Evans, *International Law* (n 133) 239.

<sup>394</sup> *ibid.*

<sup>395</sup> Shaw, *International Law* (n 119) 201.

authorities in an independent State will not avoid statehood.<sup>396</sup> Once a State has been established, ‘extensive civil strife or the breakdown of order through natural disaster or foreign invasion’,<sup>397</sup> ‘the collapse governance within a State (sometimes referred to as ‘failed State’) are not considered to affect upon the statute of that State as a State’.<sup>398</sup>

#### 2.4.2.1.4. Capacity to enter into relations with other States

The capacity to enter into relations with other States is said to be a corollary of a sovereign and independent government, which exercises jurisdiction on the territory of the State.<sup>399</sup> As such, Crawford argued it is ‘a consequence of statehood, not a criterion for it’.<sup>400</sup> The criterion as Crawford pointed out, ‘is not the exclusive entitlement of States: autonomous national authorities, liberation movements, and insurgents are all capable of maintaining relations with States and other subjects of international law’.<sup>401</sup> In other words, ‘it is capacity not limited to sovereign nations, since international organisations, non-independent States and other bodies can enter into legal relations with other entities under the rules of international law’.<sup>402</sup> Here, ‘it is essential for a sovereign State to be able to create such legal relations with other units as it sees fit’,<sup>403</sup> as non-State entities cannot enter into relations with foreign States on the same level as do States. Once they become a State, they will have this capacity. This capacity is also ‘significant for international organisations and even for subunits of States’.<sup>404</sup> Such a limited capacity however; cannot imply statehood of the subunit in question.<sup>405</sup>

Shen argued that the criterion thus refers to the ‘legal capacity or legal competence of an entity to participate in public international relations, including the legal competence to

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<sup>396</sup> *ibid.*

<sup>397</sup> Brownlie, *Principles of Public International Law* (n 269) 71.

<sup>398</sup> Shaw, *International Law* (n 338) 201.

<sup>399</sup> Vidmar, *Democratic Statehood in International Law, The Emergence of New States in Post-Cold War Practice* (n 365) 39-43.

<sup>400</sup> Crawford, *The Creation of States in International Law* (n 3) 61.

<sup>401</sup> Crawford, ‘The Criteria for Statehood In International Law’ (n 331) 119.

<sup>402</sup> Shaw, *International Law* (n 119) 202.

<sup>403</sup> *ibid.*

<sup>404</sup> Harris, *Cases and Materials on International Law* (n 343) 106. Arguing: ‘units within a federal state may or may not be allowed by the federal constitution some freedom to conduct their own foreign affairs. If, and to the extent that, they are allowed to do so, such units are regarded by international law, as having international personality, such units are not thereby states but international persons *sui generis*’.

<sup>405</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 39-43.

discharge its international obligations'.<sup>406</sup> Relatively, this legal capacity is related with monetary or economic ability or military or political power. Some developing States lack the economic capacity to engage in active relations with other nations, they are however, recognised States.<sup>407</sup> For instance, 'California possesses more than abundant economic power to fully participate in the international system, yet it is not and cannot be recognised as a State in the sense of international law, because it does not possess the legal competence to act as a State on the international plane'.<sup>408</sup>

Thus, it can be said that, the capacity to enter into a full range of international relations can be a useful measure, since such capacity is independent of its recognition by other States and of its exercise by the entity concerned.<sup>409</sup> However, capacity or competence in this sense depends in part on the power of the government, without which, a State cannot carry out its international obligations.<sup>410</sup> The ability of the government to carry out its obligations independently and accept responsibility for them in turn greatly depends on the requirements of effective government and independence.<sup>411</sup> A State cannot be recognised as a State, and enter into relations with other States if it is not recognised.<sup>412</sup> Simply, 'the law of statehood does not impose an obligation upon States to enter into relations with other States if they do not wish to do so'.<sup>413</sup>

Thus, the capacity to enter into relations seems to be in fact a consequence of independence rather than a constitutive element of statehood. Moreover, the capacity to enter into relations, its taking effect, also depends on the attitude of the other States, particularly on recognition. However, Crawford argued that, 'it is precisely within the latter context that the normative character of the criterion seems to lie. An entity may be formally independent, but without being recognised as such it cannot possibly materialise its capacity to enter into relations and, consequently, lacks real independence.'<sup>414</sup> Thus, 'in the sense that the capacity to enter into relations expresses both the ability to enter into the whole scale of international relations and

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<sup>406</sup> Shen, 'Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan' (n 311).

<sup>407</sup> *ibid.*

<sup>408</sup> Crawford, *The Creation of States in International Law* (n 3) 48-49. (Stating that in addition to the ability to exercise in foreign relations, a sovereign state must also have the ability to act independently and of its own accord).

<sup>409</sup> Crawford, *The Creation of States in International Law* (n 3) 61.

<sup>410</sup> A Zadeh, 'International Law and the Criteria for Statehood' (LLM Thesis, Tilburg University 2011).

<sup>411</sup> Crawford, 'The Criteria for Statehood In International Law' (n 3) 119.

<sup>412</sup> Zadeh, 'International Law and the Criteria for Statehood' (n 410).

<sup>413</sup> Raič, *Statehood and the Law of Self-Determination* (254) 73.

<sup>414</sup> Crawford, *The Creation of States in International Law* (n 3) 69.

its actual realisation, thereby giving evidence of a State's full independence, it may be regarded as a useful criterion for statehood.<sup>415</sup>

#### 2.4.2.2. The additional statehood criteria

Some scholars refer to other additional factors that may be relevant as criteria for States, such as independence, sovereignty, respect of the right to self-determination and human rights. Malanczuk argued that these are not generally regarded as constitutive elements for a State and it is agreed that what matters in essence is territorial effectiveness'.<sup>416</sup>

##### 2.4.2.2.1. Independence and (Sovereignty)

Many jurists have stressed independence as a central criterion of statehood. Guggenheim<sup>417</sup> distinguished the State from other legal entities by means which he regards as quantitative rather than qualitative. First, 'the State has a degree of centralisation of its organs not found in the world community. Second, the State must be independent of other legal orders, and any interference by such legal orders, or by an international agency, must be based on a title of international law'.<sup>418</sup> Crawford similarly recognised the importance of the independence element by stating, 'Each State is an original foundation predicated on a certain basic independence'.<sup>419</sup> This was represented in the Montevideo formula by 'capacity to enter into relations with other States'.<sup>420</sup>

It has been argued that, different legal consequences may be attached to lack of independence in certain cases. Lack of independence, as Crawford stated, 'may also be so complete that the entity concerned is not a State but an internationally indistinguishable part of another dominant State'.<sup>421</sup> 'A grant of independence may be a legal nullity in certain circumstances, or an entity may be independent in some basic sense but act in a specific matter under the

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<sup>415</sup> Crawford argued that 'capacity to enter into relations with other States, in the sense that it is a useful criterion, is a conflation of the requirements of government and independence.' See, *ibid* 48.

<sup>416</sup> Malanczuk, *Akehurst's Modern Introduction to International Law* (n 346).

<sup>417</sup> P Guggenheim, *Les Principes de Droit International Public* I (80 Hague Recueil 1952) 83-96.

<sup>418</sup> Brownlie, *Principles of Public International Law* (n 269) 72.

<sup>419</sup> Crawford, *The Creation of States in International Law* (n 3) 47.

<sup>420</sup> *ibid*.

<sup>421</sup> *ibid* 63.



control of another State so that the relation becomes one of agency, and the responsibility of the latter State is attracted for acts of the former'.<sup>422</sup> Here, it is important to differentiate between independence as an initial qualification for statehood and as a condition for continued existence.

A new State formed by secession will have to demonstrate substantial independence, both formal and real, before it will be regarded as definitively created.<sup>423</sup> On the other hand, 'the independence of an existing State is protected by international law rules against illegal invasion and annexation, so that the State may considerably continue to exist as a legal entity despite lack of effectiveness'.<sup>424</sup> Certainly, if an entity has its own executive and other organs, conducts its foreign relations through its own organs, has its own system of courts and legal system and, particularly important, a nationality law of its own then there is prima facie evidence of statehood.<sup>425</sup> However, as Brownlie argued that, there is no justification for ignoring evidence 'of foreign control which is exercised in fact through the outwardly independent machinery of State'.<sup>426</sup> Any economic or political dependence 'that may in reality exist does not affect the legal independence of the State, unless that State is formally compelled to submit to the demands of a superior State, in which case dependent statute is concerned'.<sup>427</sup>

A discussion on the nature and meaning of independence took place in the *Austro-German Custom Union* case<sup>428</sup> before the Permanent Court of International Justice in 1931. The term of 'independence' 'in a treaty is designed to guarantee the continuance of Austria and its separation from Germany; thus the context was that of the putative loss of independence of

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<sup>422</sup> *ibid.*

<sup>423</sup> Crawford, 'The Criteria for Statehood In International Law' (n 331) 120.

<sup>424</sup> Crawford, *The Creation of States in International Law* (n 3) 63.

<sup>425</sup> Brownlie, *Principles of Public International Law* (n 269) 72.

<sup>426</sup> *ibid.*

<sup>427</sup> Shaw, *International Law* (n 119) 211.

<sup>428</sup> Article 88 of the Treaty of Saint-Germain (1919) determined that Austria's independence was inalienable except with the consent of the Council of the League of Nations. Austria was obliged 'to abstain from any act which might directly or indirectly or by any means whatever compromise her independence by participation in the affairs of another Power'. By means of Geneva Protocol No. 1 (1922) Austria had made a similar commitment, in particular to refrain from all 'negotiation and from any economic and financial undertaking calculated directly or indirectly to compromise [its] independence', and not to grant 'to any State whatever a special régime or exclusive advantages calculated to threaten [its] independence'. See, 'Austro-German Custom Union case' (*League of Nations v. Germany and Austria*) [1931] PCIJ Ser. A/B 41. See also G Kreijen, *State Failure, Sovereignty, and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (Developments in International Law)* (Martinus Nijhoff Publishers 2004) 22.

an existing State'.<sup>429</sup> The judgment draws a distinction between independence as a criterion for statehood and independence as a right of States.<sup>430</sup> Hence, the notion of independence in international law implies a number of rights and duties, for example, the 'right to exercise its jurisdiction over its permanent population and territory, or the right to engage upon an act of self-defence in certain situations. It implies also the duty not to intervene in the internal affairs of other States'.<sup>431</sup> Thus, under general State practice what degree of independence is therefore necessary? Arbitrator Huber declared in the *Island of Palmas case*<sup>432</sup>: 'Sovereignty in the relations between signifies independence. Independence concerning a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of the State'.<sup>433</sup>

It has been argued that, 'both independence and sovereignty are used as equivalents. This position has occasionally been adopted in doctrine.'<sup>434</sup> Scholars have distinguished between the two terms.<sup>435</sup> Sovereignty is considered a consequence of statehood, not prerequisite thereof.<sup>436</sup> It is the totality of international rights and duties recognised by international law vested in States.<sup>437</sup> Independence concentrates on the rights, 'which an entity has to the exclusion of other States.'<sup>438</sup> The concepts are different, but interrelated. 'A substantial limitation of sovereignty in favour of a third State leads to loss of independence and therefore loss of statehood.'<sup>439</sup> Thus, since the two terms are distinct, it is better to use the term 'independence' as Crawford argued to 'denote the prerequisite for statehood and 'sovereignty' the legal incident.<sup>440</sup>

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<sup>429</sup>The Court concerned a proposal to create a free trade customs union between the two German-speaking states and whether this was incompatible with the 1919 Peace Treaty (Coupled with a subsequent protocol of 1922) pleading Austria to take no action to compromise its independence. The Court held that the proposed union would adversely affect Austria sovereignty. Judge Anzilotti noted that restrictions upon a state's liberty, whether arising out of customary law or treaty obligations, do not as such affect its independence. As long as such restrictions do not place the state under the legal authority of another state, the former maintains its status as an independent country'. See *ibid* 77. See also Crawford, *The Creation of States in International Law* (n 3) 63. Also, Shaw, *International Law* (n 119) 211.

<sup>430</sup> Crawford, *The Creation of States in International Law* (n 3) 63.

<sup>431</sup> Shaw, *International Law* (n 119) 212.

<sup>432</sup> 'Island of Palmas Case' (*Netherlands v USA*) [1928] IAA Rep 829, 871, 4 ILR 3.

<sup>433</sup> *ibid*.

<sup>434</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373) 120-127.

<sup>435</sup> Crawford, *The Creation of States in International Law* (n 3) 26-27 and 71.

<sup>436</sup> *ibid*.

<sup>437</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373) 121.

<sup>438</sup> *ibid*.

<sup>439</sup> *ibid*.

<sup>440</sup> Crawford, *The Creation of States in International Law* (n 3) 89.

#### 2.4.2.2.2. Respect of the right to self-determination and respect for human rights

The right of self-determination is expressed in the common Article 1 of the ICCPR<sup>441</sup> and the ICESCR.<sup>442</sup> Rather, this right has been declared in other international instruments and treaties<sup>443</sup> 'is generally accepted as customary international law, and could even form part of *jus cogens*'.<sup>444</sup> In the case of the South African 'Homelands' the right of self-determination was not applied to the entire people who would qualify for it and that the initial organisation of the black population of South Africa into *bantustans* was imposed without their participation.<sup>445</sup> Thus, Crawford argued that 'the creation of the 'homelands' States was not an expression of the right of self-determination as maintained by South Africa, but its violation, which attempted to prevent self-determination of a larger unit.'<sup>446</sup> In this regard, the violation of the right of self-determination and the pursuance racist policies, were a source of the illegality of the State-creation.

Furthermore, In the case of Rhodesia, UN Resolutions denied the legal validity of the unilateral declaration of independence on 11 November 1965 and called upon member States not to recognise it.<sup>447</sup> 'No State did recognise Rhodesia and a civil war eventually resulted in its transformation into the recognised State of Zimbabwe.'<sup>448</sup> Rhodesia might have been regarded as a State as Shaw pointed out, 'by virtue of its satisfaction of the factual requirements of statehood, but this is a doubtful proposition'.<sup>449</sup> Thus, to accept the development of self-determination as an additional criteria of statehood, denial of which would obviate statehood. This can only be acknowledged as Shaw argued 'in relation to self-determination situations and would not operate in cases, for example, of secessions from existing States.'<sup>450</sup>

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<sup>441</sup> 'The International Covenant of Civil and Political Rights' (n 19).

<sup>442</sup> 'International Covenant on Economic, Social and Cultural Rights' (n 20).

<sup>443</sup> See for example, '*Case Concerning East Timor*' (n 114). See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*Palestine v Israel*) (Advisory Opinions) ICJ Rep 9 July [2004].

<sup>444</sup> McCorquodale, 'Self-Determination: A Human Rights Approach' (n 248).

<sup>445</sup> W M Faye, 'Transkei: An Analysis of the Practice of Recognition-Political or Legal?' (1977) 18 HARV ILJ 605.

<sup>446</sup> Crawford, *The Creation of States in International Law* (n 3) 128. See also, Raic, *Developments in International Law: Statehood and the Law of Self-Determination* (n 137) 135.

<sup>447</sup> 'GA Res 2024 (XX)', 11 November 1965 and 2151 (XXI), and 'UNSC Res 216 (12 November 1965) UN Doc [1258] 1965'. and 'UNSC Res 217 (20 November 1965) UN S/RES/217'.

<sup>448</sup> M N Shaw, *International Law* (5<sup>th</sup> edn, CUP 2003) 206.

<sup>449</sup> *ibid.*

<sup>450</sup> *ibid.*

On the other hand, the principle of self-determination is itself an aspect of human rights law, however, the question remains of whether human rights plays any significant role in the creation of States. In this regard, Crawford argued:

[There is so far in modern practice no suggestion that as regards statehood itself, there exists any criterion requiring regard for fundamental human rights. The cases are numerous of governments violating fundamental norms of human rights; there is no case where such violations have called in question statehood itself].<sup>451</sup>

In the decolonisation era, there have been references to certain human rights made in relation to the creation of States, ‘but it has been established that human rights standards invoked in this context aimed to foster the exercise of the right of self-determination and were not expressed as conditions for statehood. In connection with Southern Rhodesia, it has been suggested that, the establishment of a racist regime hindered the creation of the State. The General Assembly called upon all States not to recognise Southern Rhodesia ‘without the prior establishment of a government based on majority rule.’<sup>452</sup> The establishment of Bantustans was not recognised by the UN member States because it was designed ‘to consolidate the inhuman policy of apartheid’ and ‘to perpetuate white minority domination.’<sup>453</sup> The independence of the Homelands States was rejected as ‘invalid’.<sup>454</sup> In addition, Crawford argued that ‘States have gone further in some cases intervening whether ‘the results of democratic elections have not been respected or where violence has threatened human rights values’.<sup>455</sup> Likewise, in case of interventions, it has been suggested as a standard by which such interventions may be assessed. Crawford argued ‘but above all the criterion for the lawfulness of interventions of this kind, if they are ever lawful, is that the intervention must be carried out for the humanitarian purpose, cannot entail any acquisition of territory and must be brought to an end as soon as possible once the humanitarian situation has been restored’.<sup>456</sup>

As shown above, the statehood criteria are only relevant in relation to the creation of new States and not in relation to existing ones. Thus, the statehood of existing States could not be disputed because of human rights violations, even if respect of human rights were accepted as

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<sup>451</sup> Crawford, *The Creation of States in International Law* (n 3) 148.

<sup>452</sup> GA Res 2379 (XXIII) 25 October’, 1968.

<sup>453</sup> GA Res 32/105 14 December’, 1977.

<sup>454</sup> GA Res 31/6A 26 October’, 1976.

<sup>455</sup> Crawford, *The Creation of States in International Law* (n 3) 149.

<sup>456</sup> *ibid* 150.

a criterion of statehood.<sup>457</sup> Hence, an entity willing to become a State can simply adopt jurisdiction provisions for the protection of human rights, but there can be no guarantee that it would not violate them in practice.<sup>458</sup> In the decolonisation era, human rights were not a statehood criteria, however, ‘it might be possible to argue that this is not the case when human rights of a *jus cogens* character are in question.’<sup>459</sup> An entity cannot claim statehood if its creation was founded and made possible by the violation of a rule of *jus cogens*.<sup>460</sup> In regard to the illegal creation of Southern Rhodesia, some maintained that it was in fact an illegal State, while others denied the existence of Southern Rhodesia’s statehood.<sup>461</sup> Here, statehood from an overall legal point of view should not be accepted. If the creation of the entity is rooted in a breach of *jus cogens*, this violation should not have any legal effect, especially in the case of a breach of peremptory norms of international law, no legal consequences should be accepted which are to the advantage of those who infringed the rules of *jus cogens*.<sup>462</sup> Thus, the idea is that an entity unwilling or unable to respect human rights, especially the right to self-determination,<sup>463</sup> should be barred from statehood.

On the other hand, State practice provides examples of the link between the compliance with basic human rights and the recognition of new States. At the time of the dissolution of the Soviet Union, ‘the Members of the then The European Commission EC<sup>464</sup> made clear that they saw the respect for certain human rights as a precondition for the recognition of the claims to independence of various republics of the former Soviet Union empire’.<sup>465</sup> A similar policy was followed when the SFRY began to collapse. However, Kreijen argued that, ‘in the light of the State practice there seems to be insufficient evidence that the respect of human rights and self-termination have hardened into criteria for statehood.’<sup>466</sup> Obviously, international law allows certain conditions to be applied in respect of the recognition of new States in order to protect human rights, ‘but to contend that the conditions themselves have

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<sup>457</sup> J Vidmar, ‘Democracy and State Creation in International Law’ (Master thesis, University of Nottingham 2009).

<sup>458</sup> *ibid.*

<sup>459</sup> *ibid.*

<sup>460</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373) 128. See also ‘UNGA Res 2379 (XXIII) 25 October’ (n 452).

<sup>461</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373) 128.

<sup>462</sup> *ibid.*

<sup>463</sup> See for example, ‘*Austro-German Custom Union case*’ (n 428).

<sup>464</sup> See, ‘Declaration of Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted at EC Extraordinary Ministerial Meeting of 16 December 1991 and reprinted in D. Türk, ‘Recognition of States: a Comment’ (1993) 4 *EJIL* 66-72, Annex 1.

<sup>465</sup> Kreijen, *State Failure, Sovereignty, and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (n 428) 24.

<sup>466</sup> *ibid.*

become generally accepted criteria for statehood would carry the matter too far.<sup>467</sup> However, 'it is arguable that in the context of the decolonisation of Africa, self-determination as well the doctrine of *uti possidetis juris*, which was applied in close association with the former right, are constituent elements of statehood.'<sup>468</sup> Rather, it is a matter of fact that basic human rights have been violated in many States around the world. However, these violations *per se* do not seem to cast serious doubts on statehood. Dugard argued that, 'if the systematic denial of basic human rights, including the right to participate in government by means of free elections is to become a bar to statehood, it would mean that many existing States would cease to qualify as States.'<sup>469</sup>

#### 2.4.2.2.3. The prohibition of the illegal use of force

Additionally, the prohibition of use of force and acquisition of territory by means of force acts of aggression are generally accepted to be outlawed by a rule of *jus cogens*. Article 2(4) of the UN Charter expressed the prohibition of the use of force.<sup>470</sup> It prohibits the use of force between States. International law protects 'existing States from having their international personality extinguished, even when the effective situation suggests that a State no longer exists'. In this regard, the UN organs have condemned the Iraqi invasion of Kuwait<sup>471</sup> and the establishment of the Turkish Republic of Northern Cyprus after Turkish armed intervention in Northern Cyprus.<sup>472</sup> Duursma argued that 'the only exception to this rule seems to be a justification under another rule of *jus cogens*'.<sup>473</sup> 'Indian troops aided Bangladesh to become an independent State, which possess the right of self-determination with force of *jus cogens*'.<sup>474</sup> Thus, Evans argued that when a new effective entity emerges because of an illegal use of force, such an entity will not acquire statehood. Indeed, it might be said, of any use of force, 'for the circumstances can hardly be imagined in which the exercise of the right of self-defence could authorise one State to establish a new State on the

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<sup>467</sup> *ibid.*

<sup>468</sup> *ibid.*

<sup>469</sup> J Dugard, *Recognition and the United Nations* (Grotius Publications, Cambridge 1987) 128.

<sup>470</sup> See Article 2 (4) UN Charter.

<sup>471</sup> See, 'UNSC Res 660 (2 August 1990)'.

<sup>472</sup> See, 'UNSC Res 541 (18 November 1983)'.

<sup>473</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373) 130.

<sup>474</sup> *ibid.*

territory of yet another State'.<sup>475</sup> 'If the permanent transfer of territory is not compatible with the use of force, even in self-defence, it is likewise with the creation of a State'.<sup>476</sup> Thus, even if the Turkish intervention in Cyprus was lawful under the Zurich Accords, Evans argued, 'it does not necessarily follow that the creation of a Turkish Republic on Northern Cyprus was also a lawful act'.<sup>477</sup> Finally, this argument was given some cautious support even in the Kosovo Advisory Opinion, where the ICJ held that illegality of a declaration of independence may stem from 'the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)'.<sup>478</sup> However, Vidmar argued that this pronouncement from the ICJ remains ambiguous and does not link to illegality of State creation exclusively to (*jus cogens*).<sup>479</sup> In addition, it remains controversial whether the illegality is really a matter of additional statehood criteria or should better be seen as a matter of recognition requirements.

#### 2.4.2.2.4. Effectiveness and the principle of legality of creating new States

The principle of effectiveness is used in international law to determine whether claimed rights actually exist and consequently must be recognised. Its aim is to give full legal effect to factual situations. Accordingly, effectiveness is a 'precondition' for the attribution of a legal status. Crawford argued that, 'effectiveness plays a crucial role in the concept of statehood. It is 'a characteristic of the classic criteria of permanent population, defined territory, and government 'that they are based on the principle of effectiveness.'<sup>480</sup> However, he demonstrated that 'the view that effectiveness is always central to statehood is not in conformity with modern practice.'<sup>481</sup>

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<sup>475</sup> Evans, *International Law* (n 133) 236.

<sup>476</sup> *ibid.*

<sup>477</sup> Evans argued 'Nor, surely would have any difference in legal terms if Iraq, following its invasion of Kuwait, had purported to create a new state rather than, as it did, incorporate the territory of Kuwait into its national territory. The Security Council called upon states not to recognise this transaction, and it would, doubtless, have called upon states not to recognise any state, had it been Iraq's policy to create one. See further, 'UNSC Res 661 (6 August 1990)'.<sup>478</sup>

<sup>478</sup> 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo'. ICJ Advisory Opinion of 22 July 2010 [2010] ICJ Rep. [hereinafter the Kosovo Opinion] para 122.

<sup>479</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 42-43.

<sup>480</sup> Crawford, *The Creation of States in International Law* (n 3) 76.

<sup>481</sup> *ibid.*

Raič argued that, the importance of the role played by effectiveness is limited to situations where statehood has to be 'proved' or 'claimed'.<sup>482</sup> The attitude of the parent State has to be taken into account, when it consents to the attribution of statehood to a territorial entity by the way of treaty or other source of law'. In the case of Kosovo, the statehood contestation by Serbia requires a strict application of the concept of statehood. At the same time, effectiveness is not strictly applied when the lack of an effective government is the result of an unlawful conduct of the parent State. Thus, in cases relating to colonisation, 'the lack of effective government is compensated by an applicable right of external self-determination'.<sup>483</sup>

Moreover, State practice proves that effectiveness is not the only criteria for statehood. For example, the Baltic States, Ethiopia, Czechoslovakia, Poland, and Kuwait were regarded as States whereas they were not effective entities. On the other hand, Rhodesia, the Turkish Republic of Northern Cyprus and Taiwan, which were regarded effective entities were not regarded as States.<sup>484</sup> In addition, scholars have distinguished between 'effectiveness as the 'traditional criteria' and 'legality' as the 'modern criteria'. The legality has sometimes been rejected, arguing that the non-attribution of statehood to an effective entity because of its illegality will consequently leave this entity in a legal vacuum. In this regard, Crawford argued that 'international law applies as well to 'de facto entities'.<sup>485</sup> For instance, Taiwan, which is considered as an effective entity, but not a State, cannot act contrary to international law. Thus, the purpose of the legality criteria is to prevent the creation of a State, which is in fact an effective entity, but is in infringement of peremptory norms of international law.<sup>486</sup> Raič concluded that 'in the case of formation of States 'from the State non-recognition practice, the legality criterion covers three areas: (a) the prohibition of aggression. (b) the prohibition of the violation of the right of self-determination of peoples (in the colonial context at least and (c) the prohibition of systematic racial discrimination, including the prohibition of *Apartheid*'.<sup>487</sup> Hence, Crawford believed that the violation of a peremptory

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<sup>482</sup> Raič, *Statehood and the Law of Self-Determination* (n 254) 49.

<sup>483</sup> *ibid* 104.

<sup>484</sup> Crawford, *The Creation of States in International Law* (n 3) 97.

<sup>485</sup> *ibid* 99.

<sup>486</sup> Article 53 of the Vienna Convention on the Law of Treaties has defined a peremptory norm as, 'a norm accepted by the international community of States as a whole as a norm of which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' See, 'Vienna Convention on the Law of Treaties, (23 May 1969) 1155 UNTS 331, Art 53.' Although Art 53 deals with treaties, however, relying on the 'International Law Commission', Crawford argued that the scope of Art 53 is not limited to the law of treaties. See, Crawford, *The Creation of States in International Law* (n 3) 105. See also, 'International Law Commission (2011) II, Commentary to ARSIWA, Chap III, para (7).'

<sup>487</sup> Raič, *Statehood and the Law of Self-Determination* (n 254) 156.



norm makes the act invalid and that no State is created. Thus, the criterion of effectiveness is not enough. Raič argued 'Where the effectiveness criteria is fulfilled, the entity is 'an effective territorial entity'<sup>488</sup> but not a State, unless it has been created lawfully. Nonetheless, what remains controversial yet is whether the 'illegality' is really a matter of additional statehood criteria or should be better as a matter of recognition requirements. In this regard, it has been argued that illegal declarations of independence are not, more broadly, illegal States, but they are nevertheless still States, and that the 'additional criteria of legality proposed are not criteria of statehood but merely conditions for recognition, via reasons for not recognising existing States'.<sup>489</sup>

Finally, in addition to the role of effectiveness and the principle of legality in creating a new State, one may encounter such criteria for statehood as a degree of permanence, function as State, willingness to observe international law, and a certain degree of civilization. Brownlie observed that 'as these criteria either relate to peripheral problems or lack common acceptance in modern doctrine they usually do not figure prominently in current discourse on statehood'.<sup>490</sup>

Overall, it seems fair to conclude that, the concept of the additional statehood has not been acknowledged by all scholars and remains controversial. They set legality-based standards for entities wishing to become States and thus look beyond mere effectiveness as adhered to by the traditional criteria. However, this does not mean that traditional criteria are no longer important but rather that the additional set of criteria may prevent effective entities from acquiring statehood. In other words, the additional criteria as discussed above find insufficient support in State practice to justify their characterisation as accepted criteria for statehood, though they may play a decisive role in particular cases.

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<sup>488</sup> *ibid* 154.

<sup>489</sup> S Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: Tertium Non Datur?' (2004) 75 BYB Int'l L 101.

<sup>490</sup> Brownlie, *Principle of Public International Law* (n 269) 75-77.

## 2.5. Recognition

### 2.5.1. The Recognition of States

Recognition constitutes the acknowledgment of statehood, whereas statehood is the gateway to international legal personality, recognition may be seen as the key to statehood. Accordingly, Kreijen argued that ‘recognition indirectly enables a political community to accept the full range of rights and obligations constituted by international law, though it is for the community concerned to decide to what extent it will bind itself.’<sup>491</sup> Okafor explained that, recognition may be seen as a principle of peer review, ‘the process of the determination of the legitimacy of a State, according to the *ipse dixit* or say-so of a given pre-existing society of States without necessary reference to the standpoint of the would-be State, or any of its constituent sub-State groups.’<sup>492</sup> If this is the case, Kreijen demonstrated that, such as, for example, in the ‘colonialism era, recognition is used as a means to exclude. whilst, modern international law rather is inclined to use recognition primarily as a means of inclusion in order to guarantee the existence of a universal community of formally equal and sovereign States.’<sup>493</sup>

The term ‘recognition’ can be used in at least two ways. First, ‘a State may explicitly express its view with regard to the legal status of a certain political community. An example of such an explicit recognition is the recognition of Israel as a sovereign State by the United Kingdom. In April 1950, the government of the United Kingdom declared: ‘His Majesty’s Government have decided to accord *de jure* recognition to the State of Israel’. Secondly, a State may indicate that it considers a community to be a State under international law, by entering into certain relations with that community (for example, by concluding a treaty with the State, by entering into diplomatic relationships, or by beginning a dispute settlement proceeding before the ICJ). Such a form of recognition is also called an implicit or tacit recognition. Whether entering into such relations may be considered the recognition of a

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<sup>491</sup> Kreijen, *State Failure, Sovereignty, and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (Developments in International Law)* (n 428) 13.

<sup>492</sup> O C Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (Brill 2000) 54-65.

<sup>493</sup> Kreijen, *State Failure, Sovereignty, and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (Developments in International Law)* (n 428) 14.

particular political entity as a State under international law, must be inferred from the specific circumstances.<sup>494</sup>

The recognition of a new State or a new government of an existing State is a unilateral act, which the recognising government can grant or withhold.<sup>495</sup> In the eighteenth century, the existence of a State was believed to be founded on its internal sovereignty and did not require recognition by other States or monarch.<sup>496</sup> Under the influence of the positivist theory, 'which is based on the obligation to respect international law on the consent of individual States, effective statehood became more dependent on international recognition.'<sup>497</sup> In other words, once the three classic criteria of a territory, a population, and government are met, 'this factuality must then be confirmed by the existing States, only then, after being constituted, may it enjoy rights inherent in States under international law.'<sup>498</sup> Talmon argued that, 'this interpretation fits within the 19th century positivist view of international law as a purely consensual system, where legal relations may only arise with the consent of those concerned.'<sup>499</sup> The positivist theory believed that the creation of a new State also created legal obligations for existing States.<sup>500</sup> As such, 'the existing States either had to consent to the creation of new State, or to its accession to international law and international community.' This sort of recognition 'considered matters such as, 'the degree of civilization' as measured by Western standards and dynastic legitimacy.'<sup>501</sup>

This argument developed into the constitutive theory in the early twentieth century. According to the constitutive theory, an entity may only become a State by virtue of recognition.<sup>502</sup> Thus, recognition was the only way to give an international personality to the State. The formation of a State remained a question of fact, but whether it could become a subject of international law was a question of law, that is of recognition.<sup>503</sup> Thereafter, the concept of recognition has become much more important because of its results, as each State creation put the concept on the agenda of international community. According to Crawford,

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<sup>494</sup> Zadeh, 'International Law and the Criteria for Statehood' (n 410) Referring to Horbach, Lefeber and Ribbelink, *Handboek Internationaal Recht* (n 332) 177.

<sup>495</sup> Q Wright, 'Some Thoughts About Recognition' (1950) 44 *Ame J Int'l L* 548.

<sup>496</sup> Crawford, *The Creation of States in International Law* (n 3) 10-11.

<sup>497</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373) 110.

<sup>498</sup> Zadeh, 'International Law and the Criteria for Statehood' (n 410) Referring to Horbach, Lefeber & Ribbelink, *Handboek Internationaal Recht* (n 332) 170.

<sup>499</sup> S Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: Tertium Non Datur?' (n 489).

<sup>500</sup> Zadeh, 'International Law and the Criteria for Statehood' (n 410).

<sup>501</sup> Zadeh. Referring to Horbach, N, Lefeber, R & Ribbelink, *Handboek Internationaal Recht* (n 332) 170.

<sup>502</sup> *ibid.*

<sup>503</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373) 110.

‘the beginning of the twentieth century, there were nearly fifty States in the World arena, immediately before the World War II, the number reached approximately seventy-five, and in 2005, there were almost 200.’<sup>504</sup>

Today, recognition doesn’t mean only that the recognised entity has met the required qualifications, ‘but also that the recognising State will enter into relations with the recognised State and let that State enjoy usual legal consequences of recognition such as privileges and immunities within the domestic legal order.’<sup>505</sup> Hence, it has been claimed that ‘the decision whether to recognise or not generally depends on political views rather than legal grounds.’<sup>506</sup> Hence, ‘the relationship between factual situations and the creation of legal rights by the act of recognition remains controversial in international law, since the act has legal consequences, while it is primarily based on political or other non-legal considerations.’<sup>507</sup>

Recognition has been defined as a ‘statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation’.<sup>508</sup> Grant has defined recognition as ‘a procedure whereby the governments of existing States respond to certain changes in the world community.’<sup>509</sup>

Recognition is then an activity of States as a ‘legal person’ of international law.<sup>510</sup> Once recognition occurs, the new situation is deemed opposable to the recognising State that is that pertinent legal consequences will flow.<sup>511</sup> It constitutes, Shaw argued that ‘participation in the international legal process generally while also being important within the context of bilateral relations and, of course, domestically.’<sup>512</sup> However, the key question is whether the formation of a State is dependent or independent of recognition by existing States; in other words, may a political entity be considered a State under international law, even if it is not recognised as such by the existing State? To answer this question the section will argue both constitutive and declaratory theories of recognition.

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<sup>504</sup> Crawford, *The Creation of States in International Law* (n 3) 4.

<sup>505</sup> N Yamali, ‘What is meant by state recognition in international law’, [2010] <<http://www.justice.gov.tr/e-journal/pdf/LW7081.pdf>> accessed 28 March, 2013.

<sup>506</sup> Shaw, *International Law* (n 119) 445.

<sup>507</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 43.

<sup>508</sup> Shaw, *International Law* (n 119) 445.

<sup>509</sup> T D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (GPG 1999).

<sup>510</sup> Yamali, ‘What is meant by state recognition in international law’ (n 505).

<sup>511</sup> Shaw, *International Law* (n 119) 445.

<sup>512</sup> *ibid.*

## 2.5.2. Recognition theories

Recognition of a new State means only that the recognised authority proposes to treat the entity as a State under international law.<sup>513</sup> Traditionally, there are two theories on the nature of recognition in international law: constitutive and declaratory.

### 2.5.2.1. Constitutive theory

The constitutive theory perceives recognition as ‘a necessary act before the recognised entity can enjoy an international personality’<sup>514</sup>, and the creation of a new State depends on the consent of the present State. The theory maintains ‘that it is the act of recognition by other States that creates a new State and endows it with legal personality and not the process by which it actually obtained independence.’<sup>515</sup> Accordingly, the new State will have the rights and duties at the time of being recognised.<sup>516</sup> However, ‘the situation in which one State may be recognised by some States but not by others is an evident problem and thus a great deficiency of the constitutive theory.’<sup>517</sup>

Arguably, in the absence of a central international authority for granting of recognition, this would mean that such an entity does not have an international personality.<sup>518</sup> The theory has numerous weaknesses, for example, what will happen if some existing States recognise the new one and the others do not? Rather, how it could be possible to put in force some restraints, such as the prohibition on aggression, against unrecognised States?<sup>519</sup> Therefore, the majority of scholars have adopted a view that recognition is declaratory.

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<sup>513</sup> Wright, ‘Some Thoughts About Recognition’ (n 495).

<sup>514</sup> J Vidmar, ‘Explaining the Legal Effects of Recognition: When Declaratory and When Constitutive’ (2012) 61 Int'l CLQ 361.

<sup>515</sup> Shaw, *International Law* (n 119) 445.

<sup>516</sup> Yamali, ‘What is meant by state recognition in international law’ (n 505).

<sup>517</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 43.

<sup>518</sup> *ibid.*

<sup>519</sup> Shaw, *International Law* (n 119) 446. It has been argued that, in certain circumstances recognition could be an invalid, this lead Crawford to conclude ‘if that is possible, then the test of recognition must be extrinsic to the act of recognition; that is, established by general international law. And, that is a denial of the constitutive position.’ See, Crawford, *The Creation of States in International Law* (n 3) 19.

For Brownlie, political recognition can be seen as constitutive for the recognised State because the act of recognition is a condition for the establishment of a formal diplomatic relations with the new State.<sup>520</sup> Shaw also concluded that the act of recognition is legally constitutive, because State rights and obligations do not arise automatically as the result of recognition.<sup>521</sup> He further argued that, equally if an entity went very unrecognised, this would not amount to a decisive argument against statehood.<sup>522</sup> Thus, Kreijen concluded that ‘since the act of recognition is perceived as generating a distinctive legal effect, namely the final creation of the State, it is a legal act. From this point of view recognition is one of the constitutive elements of statehood.’<sup>523</sup>

### 2.5.2.2. Declaratory theory

The declaratory theory adopts the opposite approach and is more in accord with practical reality. It maintains that recognition of a new State is a political act, ‘which is, in principle independent of the existence of the new State as a subject of international law.’<sup>524</sup> Shaw explained that under this view, recognition is merely an acceptance by States of an already existing situation.<sup>525</sup> This approach is laid down in the first sentence of Art 3 of the Montevideo Convention 1933, ‘The political existence of the State is independent of recognition by other States’.<sup>526</sup> Thus, in the declaratist’s view, the formation of a new State is a matter of fact. Kreijen argued that, ‘recognition serves as the formal act of acknowledgment of a factual situation and thus is of a declaratory nature only.’<sup>527</sup>

Under the declaratory theory, a State will be formed free from like prohibition on aggression, against the consents of the other States, just after meeting the international requirements.<sup>528</sup> In this regard, Talmon argued that, ‘an entity becomes a State for the reason that it meets all the

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<sup>520</sup> Brownlie, *Principle of Public International Law* (n 359) 89.

<sup>521</sup> M Shaw, *International Law* (4<sup>th</sup> edn, CUP 1997) 298.

<sup>522</sup> *ibid.*

<sup>523</sup> Kreijen, *State Failure, Sovereignty, and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (Developments in International Law)* (n 428) 16.

<sup>524</sup> Crawford, *The Creation of States in International Law* (n 3) 22.

<sup>525</sup> Shaw, *International Law* (n 119) 446.

<sup>526</sup> ‘The Montevideo Convention on Rights and Duties of States’ (n 342).

<sup>527</sup> ‘The essential postulate of the declaratory school is that an entity *ipso facto* and, therefore, automatically becomes a State if it meets the basic requirements of statehood.’ See, Kreijen, *State Failure, Sovereignty, and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (Developments in International Law)* (n 428) 15-16.

<sup>528</sup> Yamali, ‘What is meant by state recognition in international law’ (n 505).

international legal criteria for statehood and the recognising State' merely establishes, confirms or provides evidence of the objective legal situation, that is, the existence of a State'.<sup>529</sup>

Accordingly, a 'State may exist without being recognised, and if it does exist, in fact, then whether or not it has been formally recognised by other States; it has a right to be treated by them as a State.'<sup>530</sup> Here, when recognition actually follows, other States merely recognise a pre-existing situation.<sup>531</sup> According to this view, a new State will acquire capacity in international law not by virtue of the consent of others but by virtue of a particular factual situation, as well as, it will be legally constituted by its own circumstances and efforts and will not have to await the procedure of recognition by other States.<sup>532</sup> Under this view, outside States can choose to recognise the new State, or not, but that decision does not influence the legal determination of statehood.<sup>533</sup> Thus, 'an entity that meets the criteria of statehood immediately enjoys all the rights and duties of a State regardless of the views of other States.'<sup>534</sup>

In its first Opinion on 29 November 1991, the Badinter Commission, which was charged with the task of studying questions relating to the recognition of new States and State succession, which resulted from the dismemberment of the Socialist Federal Republic of Yugoslavia (SFRY), expressed that:

[The principles of public international law serve to define the conditions on which an entity constitutes a State; that is in this respect, the existence of the State is a question of fact; that the effect of recognition by other States are purely declaratory].<sup>535</sup>

It is true that most writers support the declaratory theory under which the international personality of a State is determined by objective criteria of international law only.<sup>536</sup> Thus,

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<sup>529</sup> Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: Tertium Non Datur?' (n 489).

<sup>530</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 43.

<sup>531</sup> *ibid.*

<sup>532</sup> Shaw, *International Law* (n 119) 243.

<sup>533</sup> J Dunoff, S R Ratner and D Wippman, *International Law Norms Actors Process* (2<sup>nd</sup> edn, Aspen Publisher 2006) 138.

<sup>534</sup> *ibid.*

<sup>535</sup> Opinion No I [Disintegration of the SFRY] (1991) 92 ILR 162, 164-165. Affirmed in Opinion No 8 [Extinction of the SFRY] (1992) ILR 199, 201.

<sup>536</sup> Crawford stated that '[a]mong writers the declaratory doctrine, with differences in emphasis, is now predominant', while 'States do not in practice regard unrecognised States as exempt from international law'. See, Crawford states, *The Creation of States in International Law* (n 3) 23. See also, Brownlie, *Principle of Public International Law* (n 269) 90. On the other hand it is argued that 'Only by being granted recognition is a

even if a State is not recognised, it will have international rights and duties opposable to the international community.<sup>537</sup> Whether an entity is a State is then a matter of fact, not recognition.<sup>538</sup> While on the other hand, for the constitutive theorist, an unrecognised State can have no rights or obligations in international law.<sup>539</sup> Similarly, Crawford questioned, can States legitimately refuse to treat entities as States, which do in fact qualify?<sup>540</sup> State practice has not accepted a right of recognition nor a duty to recognise. Recognition, being within the direction of every State, can therefore be withheld, for political or alleged legal reasons, from an entity, which qualifies as a State under general international law.<sup>541</sup> For example, in the case of Rhodesia, Kosovo, Katanga, and East Timor, States looked for a new State having to obey some fundamental standards of the international community in order to obtain statehood.<sup>542</sup> This is the consequences of the declaratory theory. As a result, Duursma pointed out, legitimate but non-recognised States will have more difficulties in being accepted as Member States of international organisations.<sup>543</sup> As well as this, they cannot enter into diplomatic relations with the international community. These are practical, not legal effects.<sup>544</sup>

In fact, since the recognition has a political side, in practice many States prefer a middle way between these two doctrines, in addition to classic qualifications to seek some basic requirements of international law for recognition.<sup>545</sup> Hillgruber argued that, ‘legal personality under international law, which non-recognition was intended to prevent, would already have been acquired, and non-recognition would then in a sense be futile, without this flaw of non-

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new state fully admitted by an existing state into its circle of bilateral relations within the framework of international law; this is precisely what the existing state intends when granting recognition, and what it knows it is preventing when withholding recognition.’ See, Jennings and Watts (ed), *Oppenheim, International Law* (n 362) 129-30.

<sup>537</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373) 110-115.

<sup>538</sup> *ibid.*

<sup>539</sup> Shaw, *International Law* (n 119) 446.

<sup>540</sup> Crawford, *The Creation of States in International Law* (n 3) 100.

<sup>541</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373) 115.

<sup>542</sup> For example: ‘The EU foreign ministers, concerned with the existence and mal-treatment of minorities within the former Soviet Union and the SFRY, announced that one of the criteria of recognition of new states within the EU would be the respect of human rights, as well as the protection of minority rights. See, ‘Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 31 ILM 1486 (1992)’ (n 463). (requiring ‘respect for the provisions of the Charter of the United Nations ... especially with regard to the rule of law, democracy and human rights,’ and ‘guarantees for the rights of ethnic and national groups and minorities’ in order for a new state to be recognised).

<sup>543</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373)

<sup>544</sup> *ibid.*

<sup>545</sup> Yamali, ‘What is meant by state recognition in international law’ (n 505). See also Shaw, *International Law* (n 119) 446.



recognition having any significant legal consequences under international law.<sup>546</sup> In this regard, despite the general perception of recognition as being declaratory, it is also possible to have constitutive elements, since international personality may depend on recognition.<sup>547</sup> Lauterpacht asked for an 'external independence and effective government within a reasonably well-defined territory.'<sup>548</sup> If these objective criteria were complied with, he believed that the international community would be under a duty to recognise the new State.<sup>549</sup> Such a solution would be both constitutive and declaratory, 'since it acknowledges a factual situation, meeting of the statehood criteria, and creates a new legal situation, awards statehood to the entity in question.'<sup>550</sup> This proposal has been challenged for its 'contradictory nature, as well as for insufficient State practice proving that States accept such a duty to recognise entities fulfilling the statehood criteria.'<sup>551</sup>

On the other hand, despite the considerable support for the declaratory theory in international law, the debate between the constitutive and declaratory theories continues, as international law does not have any mechanism for authoritatively determining whether an entity fulfils the factual criteria for statehood.<sup>552</sup> The proponents of the constitutive theory have used this point to argue for the importance attached to recognition by existing States. Kelsen for instance, argued that 'international law provides existing States the freedom to determine in each case separately whether an entity meets the necessary criteria for statehood.'<sup>553</sup> He noted that, 'recognition is a determination of facts: a determination of the existence of a sufficiently effective and independent authority (government) over a territory and a population'.<sup>554</sup> Hence, it would not be possible to speak of the existence of a State under international law, without such an approval. According to this view, the existence of a States is relative: an

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<sup>546</sup> It is only by recognition that the new state acquires the status of a sovereign state under international law in its relations with the third states recognising it as such. If it were to acquire this legal status before and independently of recognition by the existing states, this legal consequence under international law would occur automatically and could no longer be prevented by withholding recognition of the entity as a state. See, C Hillgruber, 'The Admission of New States to the International Community' (1998) 9 *Eur J Int'l L* 491.

<sup>547</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 43.

<sup>548</sup> H Lauterpacht, *Recognition in International Law* (CUP, Cambridge 1948) 31.

<sup>549</sup> *ibid* 6.

<sup>550</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 43.

<sup>551</sup> Lauterpacht, *Recognition in International Law* (n 548) 12-24.

<sup>552</sup> Horbach, Lefeber and Ribbelink, *Handbook in Inteenational Law* (n 332) 179.

<sup>553</sup> *ibid*.

<sup>554</sup> *ibid*.

entity is considered a State by some States (those who have recognised it) and not a State by other States (those who have not recognised it).<sup>555</sup>

The question, which arises here, is what rights such a territorial entity is entitled to, and what is the status of such entity under international law? Is such entity entitled to any form of sovereignty?

In general, an entity claiming to be a State cannot conduct international relations with other States, unless those other States are willing to enter into such relations with that entity.<sup>556</sup> In other words, the conduct of international relations is a two-way street, involving the new 'State' as well as outside actors that have to be willing to accept the new 'State' as their sovereign partner.<sup>557</sup> In fact, no State can exist in a vacuum, a fact well established by international practice. For example, in 1965 when Southern Rhodesia (now Zimbabwe) decided to separate from Great Britain and form an independent State, most of the international community refused to recognise it as a State.<sup>558</sup> Consequently, it remained isolated from the world and was unable to conduct international relations.<sup>559</sup> The non-recognition of Southern Rhodesia by outside actors prevented it from fully exercising the attributes of legal statehood.<sup>560</sup>

Recognition thus, has a direct impact on the pragmatic determination of statehood, whether it is considered as a political or legal act, or whether an entity will be able to truly act as a State on the international scene. Cassese concluded that, 'there have been cases in which it was doubtful that a new State had actually been created, or else a new entity had been set up but in grave breach of international rules.'<sup>561</sup> Rather, other States did not consider it to be independent of the State that had been instrumental in its establishment with the consequence

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<sup>555</sup> Zadeh, 'International Law and the Criteria for Statehood' (n 410).

<sup>556</sup> Arguing that 'if states refuse to acknowledge that an entity meets these criteria... they might continue to treat the claimant as something less than a state'; thus, an unrecognised state may find that its passports are unacceptable to the immigration authorities of other states. See, Dunoff, Ranter, and Wippman, *International Law Norms Actors Process* (n 533).

<sup>557</sup> Jennings and Watts (ed), *Oppenheim's International Law*, (n 362) 133.

<sup>558</sup> The UN Security Council condemned the Southern Rhodesia declaration of independence and declared that it had no legal validity. See, 'UNSC Res 217 (20 November 1965) UN S/RES/217'.

<sup>559</sup> Dunoff, Ratner, and Wippman, *International Law Norms Actors Process* (n 533) 138. (Noting that nearly all states refused to conclude treaties with Southern Rhodesia).

<sup>560</sup> In 1978, following a peace accord, which led to a majority government in Zimbabwe the situation, was resolved. See, *ibid*.

<sup>561</sup> He gave the examples of the case of Southern Rhodesia, from its UDI 1965, to when its internal political system accepted majority rule 1980. In addition, the case of Taiwan (Formosa) as it has all the hallmarks of a State. However, China's claim that it is part of its territory and subject to its sovereignty prevents Taiwan from entertaining intercourse with all other states. See, A Cassese, *International Law* (2<sup>nd</sup> edn, OUP 2005) 76.

that they withheld recognition'.<sup>562</sup> Thus, the strong point of the supporter of the declaratory theory is that 'the formation of a State, at least the acquisition of its basic rights and obligations, takes place independently of any legal act of recognition and justifies the conclusion that the birth of a State is a factual matter.'<sup>563</sup>

Overall, it seems that scholars have advanced a third intermediary view on declaratory and constitutive recognition. The emerging picture rather suggests that recognition is of a composite nature, that it possesses both declaratory and constitutive aspects.<sup>564</sup> Depending on certain circumstances of the particular case, 'the one or the other aspect will appear in front of the footlights. In other words, while recognition is declaratory in principle, it may thus be of great importance in a particular case. For instance, in certain cases of decolonisation'<sup>565</sup>, 'recognition was granted despite the clear non-fulfilment of basic factual criteria, the criteria of effective government in particular, while as regards cases of State failure recognition continues without exception despite the loss of some of the essential hallmarks of statehood, for example, the capacity to enter into relations and effective government.'<sup>566</sup>

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<sup>562</sup> This last instance occurred with regard to the 'Turkish Republic of Northern Cyprus', proclaimed on 15 November 1983 and recognised by Turkey only. The UN SC, the Commonwealth Heads of Government, and the Committee of Ministers of the Council of Europe considered the Declaration of independence 'legally invalid', required its 'withdrawal', and called upon all States 'not to recognise any Cypriot State other than the Republic of Cyprus'. See, 'UNSC Rec 541 (18 November 1983).'

<sup>563</sup> See for example the 'Arab-Israeli conflict' as cited by Brownlie, *Principle of Public International Law* (n 359) 90.

<sup>564</sup> The writers supporting this theory 'advance the argument that recognition is declaratory with regard to certain minimum rights of existence, but constitutive with regard to more specific rights.' Proponents of this group include Guggenheim, Kunz, and Verdross. See, Kreijen, *State Failure, Sovereignty, and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (Developments in International Law)* (n 428) 17.

<sup>565</sup> See for example: Ruanda-Urundi and the Belgian Congo.

<sup>566</sup> See for instance: the case of Somalia. See, Kreijen, *State Failure, Sovereignty, and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (Developments in International Law)* (n 428) 101.

#### 2.5.4. The legal effects of recognition

Although recognition may be regarded as a political act, it also entails important consequences in the legal field. In fact, where States grant recognition to an entity, it means that they will have relations subject to international law on a State-to-State basis.<sup>567</sup> In practice, as claimed by the supporter of the declaratory theory, the political existence of a State is independent of recognition by other States, and thus even an unrecognised State has to act in compliance with the rules of international law.<sup>568</sup> Shaw argued that, such an entity cannot ‘consider itself free from restraints as to aggressive behaviour, nor can its territory be regarded as *terra nullius*’.<sup>569</sup> In addition, States, which have signed international agreements, are entitled to assume that, ‘States which have not recognised but which have signed the agreement are bound by that agreement’.<sup>570</sup>

Moreover, Cassese argued that, it is legally relevant for it proves ‘the recognising States consider that in their view the entity fulfils all the factual conditions considered important for becoming an international subject’.<sup>571</sup> Accordingly, the recognising States would respect the right of the new State, which was indicated in the 1949 International Law Commission Draft Declaration on Rights and Duties of States. For example, the ‘right to independence and hence to exercise freely, right to exercise jurisdiction over its territory and over all persons, right to equality in law with every other State, right of individual or collective self-defence against armed attack’.<sup>572</sup> Thus, engaging in international relations is not the only result of recognition; the recognised State will be also able to enjoy usual legal consequences of recognition such as, immunities and privileges, within the domestic legal order. In this regard, Almqvist concluded that, recognition appears to be an essential condition for the new State to be able to exercise in an effective manner, the international rights and obligations that

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<sup>567</sup> Warbrick, ‘States and Recognition in International Law’ in Malcolm D Evans (ed), *International Law* (n 340) 250.

<sup>568</sup> Shaw, *International Law* (n 119) 471.

<sup>569</sup> *ibid.*

<sup>570</sup> For example, the United Kingdom treated the German Democratic Republic as bound by its signature of the 1963 Nuclear Test Ban Treaty even when the state was not recognised by the UK. See, *ibid.* thus, it can be argued that, under the Vienna Convention only States may be party to treaties. See ‘Vienna Convention on the Law of Treaties, (23 May 1969) 1155 UNTS 331, Art 53’ (n 486).

<sup>571</sup> Cassese, *International Law* (n 561)

<sup>572</sup> UNGA ‘Draft Declaration on Rights and Duties of States’ (6 December 1949) A/RES/375. Link to ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States. UNGA Res 2625 (XXV) (24 October 1970) UN Doc (A/8082) 1970’ (n 23).

correspond to the status of statehood, including entering into international relations with other States, and in this way becoming a full member of the international community.<sup>573</sup>

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<sup>573</sup> J Almqvist, 'The Politics of Recognition, Kosovo and International Law' (2009) <[http://www.realinstitutoelcano.org/wps/wcm/connect/59fc54004f018b9cbaacfe3170baead1/WP-14\\_Almqvist\\_Kosovo\\_International\\_Law.pdf?MOD=AJPERES&CACHEID=59fc54004f018b9cbaacfe3170baead1](http://www.realinstitutoelcano.org/wps/wcm/connect/59fc54004f018b9cbaacfe3170baead1/WP-14_Almqvist_Kosovo_International_Law.pdf?MOD=AJPERES&CACHEID=59fc54004f018b9cbaacfe3170baead1)>accessed 13 May 2014.

## 2.6. Secession as a remedy for the violation of the right to self-determination of peoples

### 2.6.1. Secession

The right of self-determination has been constructed as the right of peoples to determine their own destiny and form of government. For instance, ‘self-determination can be based on a people’s desire to be free of colonial rule. Self-determination may be exercised, *inter alia*, through the establishment of a sovereign independent State, by integration, or by association with another State.’<sup>574</sup>

The right to external self-determination is an aspect that has been causing much controversy in legal theory. The right in its external manifestation was an important feature in the context of decolonisation, that is, self-determination in most cases realised through the formation of an independent State. Raic argued that, this manifestation of self-determination, ‘has led to statements that once independence was achieved by dependent territory, the right was consumed’. For instance, self-determination was regarded as a right which operated only under certain specific circumstances and therefore had an inherently temporary nature’.<sup>575</sup> Thus, McCorquodale argued that, external self-determination ‘was applied most frequently to colonial situations as it concerns the territory of the State, its division, enlargement or change and the State’s consequent international (external) relations with other States’.<sup>576</sup> Hence, the creation of independent sovereign States by colonial people has been considered as an exercise of external self-determination. Conversely, self-determination outside the context of decolonisation has an internal nature that consists of a people’s right to freely pursue their economic, social, and cultural development, ideally through democratic governance.

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<sup>574</sup> Okoronkwo, ‘Self-Determination and the Legality of Biafra’s Secession under International Law’ (n 124).

<sup>575</sup> In 1967, in the context of the debates leading up to the adoption of General Assembly Resolution 2625 in 1970, the representative of Burma stated: [t]he sum total of the experience gained by the United Nations in the implementation of the principle [of self-determination] had clearly and incontrovertibly established its meaning and its purpose, namely that it was relevant only to colonialism and was to be specifically applied in the promotion of the independence of peoples under colonial domination. See, ‘UN Doc. A/AC 125/SR 68, (4 December 1967)’. See also, Raic, *Developments in International Law: Statehood and the Law of Self-Determination* (n 137) 226.

<sup>576</sup> McCorquodale, ‘Self-Determination: A Human Rights Approach’ (n 124) 863.

In fact, the emergence of a new State to the detriment of an older sovereign entity disrupts the composition of international society and challenges the very foundations of its main actors. During the eighteenth and nineteenth centuries, the creation of new States in the Americas, the idea of and consequently, the term ‘decolonisation did not exist.’<sup>577</sup> Consequently, ‘the process of what was the first phenomenon of independence of colonies from their European metropolises took the form of secession.’<sup>578</sup> In other words, no new States were created because of the existence of any right to independence under international law. Kohen argued, their existence ‘came into being as a matter of fact and recognition by the other members of more limited community of States of the time.’<sup>579</sup> However, during the UN era, this approach has drastically been changed. During the second half of the twentieth century, ‘decolonisation, the most important means of creating new States, was not viewed by the international legal order as a case of secession.’ One of the reasons for this was summarised in the Declaration of Principles of International Law embodied in UNGA Resolution 2625 (XXV): ‘the territory of the colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it.’<sup>580</sup> Moreover, another reason lies in the emergence of the principles of self-determination as a right of all peoples. For the first time in history, ‘international law continued a rule granting a right to some communities, those that qualified as ‘peoples’ to create their own independent States. However, despite this completely new phenomenon, secession remained, actually or potentially, as another important way to create States in the contemporary world.’<sup>581</sup>

Secession under international law refers to ‘separation of a portion of an existing State, whereby the separating entity seeks either to become a new State or to join yet another State, and whereby the original State remains in existence without the breaking off territory.’<sup>582</sup> Historically, successful secessions around the world have been rare, because secession seems inherently at odds with the principles of State sovereignty and territorial integrity, which have been core values of international law for centuries.<sup>583</sup> This is without prejudice to any different legal consequences, which might arise from State secession. It has been seen in the

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<sup>577</sup> M Kohen, *Introduction to Secession: International Law Perspectives* (CUP 2006) 1.

<sup>578</sup> *ibid.*

<sup>579</sup> *ibid.*

<sup>580</sup> ‘UNGA Res 2625 (XXV) (24 October 1970) UN Doc (A/8082) 1970’ (n 23).

<sup>581</sup> Kohen, *Introduction to Secession: International Law Perspectives* (n 577) 1-2.

<sup>582</sup> Dunoff, Ranter, and Wippman, *International Law Norms Actors Process* (n 533) 122.

<sup>583</sup> Describing the few successful secessions in international law, which include the secession of Bangladesh from Pakistan in 1971, of Eritrea from Ethiopia in 1993, and of the three Baltic States from the former Soviet Union in 1990. See, *ibid.* Also Scharf, ‘Earned Sovereignty: Juridical Underpinnings’ (n 217).

preceding section that, positions of States have varied. Some accepted the right of secession of minorities that is a distinct people or fraction of a people in a State, while others have been denied. The only textual reference to a justification of the partial or total disruption of the territorial integrity of an existing State can be found in paragraph 7 of the principle of self-determination of General Assembly Resolution 2625 (XXV). ‘The full right of self-determination takes precedence if the government does not represent ‘the whole people belonging to the territory without distinction as to race, creed or colour.’<sup>584</sup> In fact, Paragraph 7 is one of the most important provisions of the Declaration because it makes ‘a bold attempt to reconcile the conflict between the principles of self-determination and territorial integrity of States’.<sup>585</sup> The Paragraph has been generally described as a ‘safeguard clause’.<sup>586</sup> However, Simpson argued that ‘paragraph 7 made the principle of territorial integrity ‘a rebuttable presumption that can only be invoked by States that act in accordance with the principle of self-determination’.<sup>587</sup> Thus, Nanda argued that, ‘The logical reading of the Declaration is that a State must possess a government representing the whole people for it to be entitled to the protection of its territorial integrity against secession’.<sup>588</sup> Moreover, ‘the Declaration does not provide authorisation to infringe the territory of a State, which in particular has a government reflecting the entire population of the territory. Thus, no secession claim can be derived from this clause, even in the event of the most severe human rights violations.’<sup>589</sup>

In fact, the international community has viewed secession unfavourably, it being contrary to the territorial integrity of sovereign States. Some scholars have argued that ‘territorial integrity’ merely safeguards the inviolability of international borders but does not regulate an internal affair such as secession. While others claim that territorial integrity prohibits

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<sup>584</sup> ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States. UNGA Res 2625 (XXV) (24 October 1970) UN Doc (A/8082) 1970’ (n 23 ).

<sup>585</sup> Okoronkwo, ‘Self-Determination and the Legality of Biafra’s Secession under International Law’ (n 124).

<sup>586</sup> See, J Crawford, ‘State Practice and International Law in Relation to Unilateral Secession (85 BYIL 1998) 113.

<sup>587</sup> Simpson, ‘The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age’ (n 249).

<sup>588</sup> V P Nada, ‘Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era’ (1997) 3 J Int’l & Comp L 443.

<sup>589</sup> Krüger argued that ‘this also applies in the event of political discriminations. A different result could only be arrived at by an argumentum *e contrario*, which is not covered by the purposes of the Declaration however. A secession claim for minorities who feel politically marginalised would represent a considerable factor of instability and uncertainty for numerous States and regions worldwide. See, H Krüger, *The Nagorno-Karabakh Conflict: A Legal Analysis* (Springer 2010) 84.



secession because secession dismembers the territory of the State.<sup>590</sup> However, it cannot be said that secession is illegal *per se*. In essence, international law justified secession as a remedy of last resort for persistent and serious injustices. For instance, the ICJ found that Kosovo's Declaration of Independence was not in violation of international law.<sup>591</sup> The Court noted that 'there is no applicable rule of international law under which such declarations can be disallowed. The Court did not say that Kosovo had a right to secede from Serbia. Further, the Court did not rule on the legal consequences of this Unilateral Declaration of Independence UDI. It explicitly refused to say whether or not Kosovo has the status of a State, and did not tell States, whether they should recognise Kosovo as a State'.<sup>592</sup> While some of the UNSC, resolutions have declared certain acts of secession illegal;<sup>593</sup> the act of secession itself is not regulated by any international legal rules. Thus, the absence of an international rule prohibiting secession does not create a positive right to secession, which would oblige citizens or States to recognise it or conform to it. In other words, there is no conclusive body of legal principles or State practice to clarify application of the right to secession, which remains acutely controversial. Crawford demonstrated that 'this is partly due to the dilemma that this would cause indeed, it is difficult to imagine how a seceding entity could manage to act contrary to international law while not being considered an international legal subject'.<sup>594</sup> A frequent question is under what circumstances a minority group seeking to separate from its mother State has the legal right to do so.

For a group to be entitled to exercise its collective right to self-determination, it must qualify as a 'people'.<sup>595</sup> In other words, groups with a common identity and link to a defined territory are allowed to determine their political future in a democratic fashion. Hence, once the determination has been made that a specific group qualifies as a people and thus has the right to self-determination, the relevant inquiry, for the purposes of secession, becomes whether the right to self-determination carries with it a right of secession or to create independence. In

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<sup>590</sup> S Dion, 'Secession and the virtues of clarity' [2011] Macdonald-Laurier Institute for Public Policy 1–12 <[http://www.macdonaldlaurier.ca/files/pdf/Secession\\_and\\_the\\_Virtues\\_of\\_Clarity.pdf](http://www.macdonaldlaurier.ca/files/pdf/Secession_and_the_Virtues_of_Clarity.pdf)>accessed 23 September 2013.

<sup>591</sup> D Akande, 'ICJ finds that Kosovo's Declaration of Independence not in Violation of International Law', 2010 <<http://www.ejiltalk.org/icj-finds-that-kosovos-declaration-of-independence-not-in-violation-of-international-law/>>accessed 20 September, 2013.

<sup>592</sup> *ibid.*

<sup>593</sup> See for example, 'UNSC Res 169 (24 November 1961) UN Doc [S/ 5002] 1961.' And 'UNSC Res 216 (12 November 1965) UN Doc [1258] 1965.'

<sup>594</sup> Crawford, *The Creation of States in International Law* (n 3) 389.

<sup>595</sup> Although the term 'people' is ambiguous and vague under international law, it typically refers to "people who live within the same State... or people organised into a State. See, Scharf, 'Earned Sovereignty: Juridical Underpinnings' (n 217).

other words, as mentioned above, the right to self-determination can take different forms, such as self-government, autonomy, or free association, that are less intrusive on state sovereignty than secession is.

Above all, it can be concluded that, the principle of self-determination lends itself to restrictive or expansive interpretations. 'Some argue that self-determination only allows for the creation of new States in the context of decolonisation'. Many others assert that, the right to self-determination legally entitles peoples subject to extreme persecution to remedy their situation through secession.<sup>596</sup> While most scholars agree that, the definition of the 'People' with collective rights to self-determination is unclear.<sup>597</sup> Here, to say under international law every 'people' is entitled to self-determination leaves unanswered two problems still very much in flux, namely, what is a 'people' and what does 'self-determination' mean? Secession according to the idea of a remedial right was argued by Buchheit to mean that it 'assumes that international law provides a right to secession for people subject to extreme persecution or unable to internally realise their right to self-determination.'<sup>598</sup> This theory Roethke argued, postulates that if a groups falls victim to 'serious breaches of fundamental human and civil rights' through the 'abuse of power,' then international law recognises the right of the afflicted group to secede from the offending State'.<sup>599</sup> In some cases however, Buchanan argued that, 'the grosser injustices are perpetrated, not against the citizenry at large, but against a particular group, concentrated in a region of the State'. Consider, for example, Iraq's genocide policies against Kurds in northern Iraq. Secession may be justified, and may be feasible, as a response to selective tyranny, when revolution is not a practical prospect.<sup>600</sup>

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<sup>596</sup> See for example, Franck, 'Postmodern Tribalism and the Right to Secession' (n 159) 13.

<sup>597</sup> Murswiek, 'The Issue of a Right to Secession - Reconsidered (161) 101-114. See also, *Reference re Secession of Quebec*' (n 21).

<sup>598</sup> Buchheit, *Secession, The Legitimacy of Self-Determination* (n 29) 220-23.

<sup>599</sup> P Roethke, 'The Right to Secede Under International Law: The Case of Somaliland' [2011] Fall J Int'l Service 36.

<sup>600</sup> A Buchanan, 'Theories of Secession' (1997) 26 Philosophy & Public Affairs 31.

## 2.6.2. The aversion of States and the international community to secession

### 2.6.2.1. Secession in international law

Under international law,<sup>601</sup> any attempt at unilateral secession, that is, secession with no agreement negotiated with the mother State, is without legal foundation.<sup>602</sup> International law views secession with doubt, and traditionally, the right to independence or secession as a mode of self-determination has only applied to people under colonial domination or some kind of oppression.<sup>603</sup> However, international law has come recently to embrace the right of non-colonial people to secede from an existing State, ‘when the group is collectively denied civil and political rights and subject to egregious abuses’.<sup>604</sup>

This right has become known as the ‘remedial right to secession’, and has its origin in the infamous 1920 ‘*Aaland Islands Case*’. The League of Nations appointed The Committee of Rapporteurs to investigate aspects of the dispute over the Aland Islands and stated ‘that 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 situation, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees’.<sup>605</sup> Similarly, the 1970 Declaration on Principles of International Law Concerning Friendly Relations strikes a balance between the right to self-determination and territorial integrity by preconditioning the right of non-colonial people to separate from an existing State on the denial of the right to a democratic self-government by the mother-State.<sup>606</sup> A

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<sup>601</sup> Buchanan has divided secession into ‘unilateral and consensual secession that ‘the unilateral right is the right of a group to attempt to form its own independent territorial political unit and seek recognition as a legitimate state in a portion of the territory of an existing state absent consent or constitutional authorization; the consensual right to secede is generated by a process of negotiation or exercised in accordance with constitutional processes. See, A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004) 338.

<sup>602</sup> Dion, ‘Secession and the virtues of clarity’ (n 590).

<sup>603</sup> (Noting that secession is “synonymous with the dismemberment of sates). See, Scharf, ‘Earned Sovereignty: Juridical Underpinnings’ (n 217).

<sup>604</sup> *ibid.*

<sup>605</sup> Once again returning to the *Aaland Islands Case*, the International Committee of Rapporteurs quite neatly summarised the view of secession at the beginning of the 20th century in the following statement: ‘To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of a State as a territorial and political unity’. *Aland Island Case*, ‘League of Nations Official Journal Spec Supp 3, 3’ (n 169).

<sup>606</sup> [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 of political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-

similar clause was inserted in the 1993 Vienna Declaration of the World Conference on Human Rights, accepted by all UN member States.<sup>607</sup> Moreover, other UN bodies have also referred to the right to remedial secession, such as the 1993 Report of the Rapporteur to the UN Sub-Commission against the Discrimination and the Protection of Minorities<sup>608</sup> and the General Recommendation XXI adopted in 1996 by the Committee on the Elimination of Racial Discrimination.<sup>609</sup>

In addition, in the case of *Quebec* the Supreme Court of Canada like the League of Nations, held that a people ‘has a right to internal self-determination first, and that only if that right is not respected by the mother-State, the same people’s right to break off may accrue.’<sup>610</sup> In other words, ‘the right to separate is conditioned on the non-respect of the right to some form of provincial autonomy.’<sup>611</sup> It held that ‘a right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme cases and, even then, under carefully defined circumstances.’<sup>612</sup> In addition, recent developments in international law may also lend credence to the idea that the right to remedial secession has crystallised as a norm. For instance, Scharf argued that ‘in the case of the former Yugoslavia, the republics of Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia were entitled to secede because they had been denied the proper exercise of their right to democratic self-government, and, in some cases, had been subjected to ethnic violence by the central government in Belgrade’.<sup>613</sup> Moreover, in 2010, the ICJ declared in an advisory opinion that in the unilateral declaration of independence, Kosovo did not violate international law. The Court noted that there is no applicable rule in international law under which such declarations can be disallowed.<sup>614</sup> The Court explicitly refused to say ‘whether or not Kosovo has the status of a State, and did not tell States, whether they should recognise Kosovo as a State’. In this regard, the absence of an international rule prohibiting secession

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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]. 'UNGA Res 2625 (XXV) (24 October 1970) UN Doc (A/8082) 1970' (n 23).

<sup>607</sup> ‘Vienna Declaration, World Conference on Human Rights [1993] UN Doc A/CONF 157/24 1993’ <<http://www1.umn.edu/humanrts/instrree/11viedec.html>>accessed 29 March, 2013 (n 91).

<sup>608</sup> ‘UN Doc. E/CN 4/Sub 2/1993/34’ (1993).

<sup>609</sup> ‘Report of the Committee on the Elimination of Racial Discrimination, 48th session, UN Doc. A/51/18’, February 1996.

<sup>610</sup> ‘*Reference re Secession of Quebec*’ (n 21) para 122.

<sup>611</sup> Noting that when ‘the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated,’ only then does the right to external self-determination accrue). See, *ibid*.

<sup>612</sup> *ibid*.

<sup>613</sup> Scharf, ‘Earned Sovereignty: Juridical Underpinnings’ (n 217).

<sup>614</sup> Akande, ‘ICJ finds that Kosovo’s Declaration of Independence not in Violation of International Law’ (n 591).

does not create a positive right to secession, which would oblige citizens or States to recognise it or conform to it.<sup>615</sup>

Thus, it is suggested that if a government is at the high end of the scale of a representative government, the only modes of self-determination that will be given international backing are those with a minimal destabilising effect and achieved by consent of all parties. On the other hand, if a government is extremely unrepresentative and abusive, then much more potentially destabilising modes of self-government, including independence, may be recognised as legitimate. In the latter case, Scharf argued that ‘the secessionist group would be fully entitled to seek and receive external aid, and third-party States and organisations would have no duty to refrain from providing support’.<sup>616</sup>

Finally, the Supreme Court of Canada observed that ‘despite there is no right, under the constitution or at international law, to unilateral secession, this does not rule out the possibility of an unconstitutional Declaration of Independence leading to a *de facto* secession. This ultimate success of such secession would be dependent on [Recognition] by the international community, which is likely to consider the legality and legitimacy of secession’.<sup>617</sup> On the other hand, neither the ‘Political Covenant’ nor any other international law requires the members of the international community to deny recognition to a successful secession. In this regards the Permanent Court of International Justice PCIJ in the *Lotus* case held that ‘an entity may exercise its right to independence, on any matter, even if there is no specific rule of international law permitting it to do so. In these instances, an entity has a wide measure of discretion, which is only limited by the prohibitive rules of international law’.<sup>618</sup>

Moreover, it should be made by explaining, why in some cases unlawful territorial situations become legalised, whereas in others they do not. In other words, if there are no rules in international law prohibiting the act of unilateral secession, how can it be said whether it is lawful or unlawful?

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<sup>615</sup> Dion, ‘Secession and the virtues of clarity’ (n 590).

<sup>616</sup> Scharf, ‘Earned Sovereignty: Juridical Underpinnings’ (n 217).

<sup>617</sup> ‘*Reference re Secession of Quebec*’ (n 21) para 155.

<sup>618</sup> ‘S.S. Lotus’ (*France v Turkey*) [7 September 1927] PCIJ (ser. A) No 10.

In this regard, the Supreme Court of Canada held that ‘the right to secede and the possibility that a certain secession, once factually established, creates legal effects at international level were two different matters from a legal point of view.’

[The legalisation of the effective situation would not change the violating nature of the unilateral secession. However, the concept of legitimacy would present the link between those two gaps between violation and legality. If the purported secession of Quebec was declared in defiance of the Canadian Constitutional principles, democratic principles, federal principle, rule of law, and the fundamental principles of the international community, respect Human rights, peaceful settlement of the disputes...etc...’ The process would most likely be seen as illegitimate and gain only limited if any recognition in the international community].<sup>619</sup>

Hence, the role of effectiveness Milano argued is ‘enhanced by the legitimacy of the claim and the legitimacy of the process through which a claim is articulated’.<sup>620</sup> In fact, ‘legitimacy is not a concept foreign to the law, but it builds on the basic legal principle of a certain community, be it national or international.’<sup>621</sup>

The Supreme Court goes so far as to state that: ‘One of the legal norms which may be recognised by States in granting or withholding recognition of emergent States is the [legitimacy] by which the *de facto* secession is, or was, being pursued’.<sup>622</sup>

Similarly, Buchheit<sup>623</sup> explained the recognition and non-recognition of attempted secessions through the lenses of legitimacy. He defined legitimacy through two criteria: the internal merit of the claim and the disruption factor. The first refers to ‘criteria of effectiveness of the self-determination unit, such as the ethnic and social cohesiveness, the occupation of a distinct territorial basis and the economic viability of a future State.’<sup>624</sup> Whereas the second refers to ‘the potential threat of the secession for regional and international peace and security, and its compliance with fundamental international norms, such as, fundamental human rights and respect for the existence of minorities in the self-governing unit’.<sup>625</sup> Thus, it seems Buchheit envisaged legitimacy built within an international legal framework as being [pre-conditional] to the legalisation of an effective secession.

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<sup>619</sup> ‘Reference re Secession of Quebec’ (n 21) 143 and 144.

<sup>620</sup> E Milano, *Unlawful Territorial Situations in International Law (Reconciling Effectiveness, Legality and Legitimacy)* (Martinus Nijhoff Publishers, Leiden/Boston 2006) 194.

<sup>621</sup> *ibid.*

<sup>622</sup> ‘Reference re Secession of Quebec’ (n 21) para 143.

<sup>623</sup> Buchheit, *Secession, The Legitimacy of Self-Determination* (n 29) 228-238.

<sup>624</sup> *ibid.*

<sup>625</sup> *ibid.*

### 2.6.2.2. Secession and national law

In terms of national law, many States confirm their indivisibility in their constitution or their jurisprudence.<sup>626</sup> For example, United States, France, Spain, Italy, Australia, and Sweden, consider themselves inseparable entities. It is understood that, the rules governing secession from an existing State do not fall under the exclusive domestic jurisdiction of that State.<sup>627</sup>

It is not up to one State to decide whether to reject the secession of a part of its territory, for such a decision involves the balancing between the right of self-determination and the respect for territorial integrity, which should therefore be decided on the basis of international law. International law determines whether a people has the right to self-determination and decides whether the territorial integrity of a state deserves protection.<sup>628</sup> If the decision were left to the discretion of individual States, it would result in the denial of the international charter of the competing rules in questions.<sup>629</sup> In 1991, the Security Council considered the Yugoslavian secession dispute as an internal issue. It is a lack of clarity of international law, Dahlitz argued that, in a matter of secession, which, unjustly, leads to the qualification of the dispute as internal.<sup>630</sup> The right of secession has been incorporated in some national constitutions, which, in all cases, did not require justificative reasons.<sup>631</sup> However, these clauses were frequently deleted from the constitution. Under Soviet law, secession was possible without justification, providing that certain procedural rules were respected.<sup>632</sup>

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<sup>626</sup> Dion, 'Secession and the virtues of clarity' (n 590).

<sup>627</sup> Dahlitz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 89.

<sup>628</sup> Duursma, *Fragmentation and the International Relations of Microstates* (n 373).

<sup>629</sup> See for example; when the Yugoslavia delegation requested the Security Council of the United Nations to impose an arm embargo against it, the members of the Security Council generally considered the Yugoslavian dispute an internal affair. 'UNSC Res 713 (25 September 1991) UN Doc S/23069 1991.

<sup>630</sup> Dahlitz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 90.

<sup>631</sup> *ibid.*

<sup>632</sup> *ibid.*

### 2.6.2.3. Secession and State practice

It has been argued in the preceding section that secession is a concept that has no relevance to decolonisation. In other words, the concept is irrelevant to the on-going entitlement of peoples to self-determination in the post-colonial era. Alternatively, Koskenniemi argued that ‘secession was compliance, and opposing rupture of old colonial State was unlawful.’<sup>633</sup> He further added that ‘Article 19 (3)(b) of the International Law Commission's draft articles on State Responsibility even spoke of this as *jus cogens*’.<sup>634</sup> However, confusion arises when it has been stated that minorities are entitled to self-determination, and that may mean a right to secede. However, the point of departure is incorrect. ‘This is also the clear implication from the Second Opinion of the Badinter Commission’.<sup>635</sup>

Furthermore, Crawford argued that ‘the wealth of State practice in the context of decolonisation demonstrating that the exercise of self-determination has in practice nearly always taken place through agreement with the parent State’.<sup>636</sup> Foster argued that ‘self-determination has been in the first instance a right to which the colonial authority must give effect’.<sup>637</sup> The UN has supported unilateral secession only if the colonial authority has stood in the way of self-determination.

In fact, State practice is extremely reluctant to recognise unilateral secession outside the colonial context. After World War II, no State created by unilateral secession has been admitted to the UN against the declared will of the government of the Predecessor State.<sup>638</sup>

According to State practice, two situations of secession should be distinguished: first, if the secession has been realised after an amicable agreement between the secessionist and remaining parties, the international community has always endorsed this situation.<sup>639</sup> The separation of the Slovak and Czech Republic in 1993 has been conducted on friendly terms

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<sup>633</sup> M Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43 ICLQ 241.

<sup>634</sup> *ibid.*

<sup>635</sup> Pellet, ‘The Opinions of the Badinter Arbitration Committee’, Opinion No 2 (n 186).

<sup>636</sup> Crawford, ‘State Practice and International Law in Relation to Unilateral Secession’, (n 586).

<sup>637</sup> C Foster, ‘Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples’ (2001) 12 EJIL 141.

<sup>638</sup> Dion, ‘Secession and the virtues of clarity’ (n 590).

<sup>639</sup> Such secession based on mutual accord was accomplished by Senegal, which left the Mali Federation in 1960, by Singapore, which seceded from the Malaysian Federation in 1965, and by Syria, which separated from the United Arab Republic in 1961. See, Buchheit, *Secession, The Legitimacy of Self-Determination* (n 29) 89-99.



and based on a mutual agreement.<sup>640</sup> On the other hand, if the authorities of the central State oppose the secession of a part of the territory or the total disruption of its territorial integrity, the reactions of the other States have a great influence on the solution of the problem.<sup>641</sup>

In like manner, it should be observed that, the serious denial of a people's fundamental human rights does not as such legitimate secession automatically. In this regard, the Supreme Court of Canada held that (when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession).<sup>642</sup> However, the Canadian Supreme Court declined to answer the issue of under what circumstances such a right to secession accrues, as it determined that the population of Quebec is entitled to meaningful internal self-determination and thus not in a position to claim the right to external self-determination'.<sup>643</sup> However morally acceptable, it has not been proved a customary rule in international law by a consistent State practice. The denial of group's basic human rights has been invoked in a number of cases. For instance, the massacre and the systematic riot of Ibos living in Nigeria can be mentioned. In 1967, the people of Biafra have tried to secede from the Federation of Nigeria and established the Republic of Biafra.<sup>644</sup> On May 30, 1967, Biafra unilaterally declared its independence from the Eastern region of Nigeria. The declaration came after a series of complicated political upheavals that led to the death of many Biafrans. A series of massacres, oppression, injustice and the expulsion of East Nigerian from regions other than East Nigeria catalysed this movement. The justification for the extreme step of secession Okoronkwo argued 'rests both on the denial of human rights and the dim prospects for the Biafrans' future development'.<sup>645</sup> In other words, the gross violations of the Biafrans' human rights provide a legal justification for Biafra's secession from the Nigerian government. As observed by the Supreme Court of Canada in, 'the right of self-determination has developed largely as [a] human right'.<sup>646</sup> Therefore, 'violations of self-determination are violations of human rights'.<sup>647</sup>

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<sup>640</sup> Dahlitz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 91.

<sup>641</sup> *ibid.*

<sup>642</sup> 'Reference re Secession of Quebec' (n 21) para 126.

<sup>643</sup> See, Dunoff, Ratner, and Wippman, *International Law Norms Actors Process* (n 533) 222.

<sup>644</sup> 'Proclamation of the Republic of Biafra (1967)' <[www.worldstatesmen.org/Biafra.doc](http://www.worldstatesmen.org/Biafra.doc)> accessed 31 March 2013.

<sup>645</sup> Okoronkwo, 'Self-Determination and the Legality of Biafra's Secession under International Law' (n 124).

<sup>646</sup> 'Reference re Secession of Quebec' (n 21) paras 113-122.

<sup>647</sup> See, Thornberry, *International Law and the Rights of Minorities* (n 275) 883.

However, Biafra's attempt to secede from Nigeria did not receive international recognition; as a result, the Nigerian army forcefully regained power in 1970. The situation was not discussed by the UN, which termed the situation an internal affair under Nigerian responsibility. In this secession, many political and economic interests were at stake.<sup>648</sup> It is true that, Biafra was undermined in its efforts, which did not render secession illegal under international law. 'It demonstrates the extent to which the self-interests of the superpower nations could undermine a peoples' genuine attempt to exercise their right of self-determination through secession'.<sup>649</sup> Both the UN and the OAU willingly played as pawns on behalf of the interests of the superpowers.

In addition, we might examine the proclamation of an independent Republic of Nagorno Karabakh, which was confirmed by referendum and formalised in 1992 by a newly elected parliament. The underlying reason for this secession was the long-standing resentment in the Armenian community of Nagorno Karabakh against serious limitations of its cultural and religious freedom by central Soviet and Azerbaijani authorities. However, its statehood has only been recognised by Armenia. Azerbaijan's National Assembly cancelled the autonomy of the Nagorno Karabakh region, placing it under its direct control, and regarded the situation as one of territorial integrity coming under its internal affairs.<sup>650</sup> These examples show that secession will not automatically be recognised in the absence of an accord even if a group's human rights are seriously violated.

As explained above that 'the existence of this right is highly questionable, due to the international community's continued and consistent support for the principle of territorial integrity. In addition, even if a legal source to a remedial right to secession could be found under certain extreme circumstances, as in the case of Kosovo, doubt remains as to whom the recipients of this right would be. Should this right be granted to the Kosovar Albanians exclusively? This problem becomes even more complex in the case of Abkhazia and South Ossetia, due to the absence of caucuses representative of the entire population of these territories-including the ethnic Georgians displaced by the military conflict. In addition, it is questionable whether both Abkhazia and South Ossetia have fulfilled the *de fact* Montevideo criteria; they are in fact dominated by Russia and then cannot be considered sovereign

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<sup>648</sup> Dahlitz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 93.

<sup>649</sup> Okoronkwo, 'Self-Determination and the Legality of Biafra's Secession under International Law' (n 124).

<sup>650</sup> Dahlitz, *Secession and International Law: Conflict Avoiding-Regional Appraisals* (n 14) 94.

subjects of international law.<sup>651</sup> In other words, Russia is their Patron State, with both entities highly dependent politically and economically on Russia. Thus, how can State sovereignty be recognised when one of its primary components, independence is arguably missing? Moreover, Raič defined Abkhazia and South Ossetia's attempts at secession, 'absent fulfilment of the qualifying criteria as an abuse of right and violation of the law of self-determination'.<sup>652</sup> In his view, this is why the international community has not generally recognised these two fledgling States. On the other hand, Fabry argued that, it is contrary to international law liberal thought to force groups, who have shown that they do not wish to co-exist, to do so'. For that reason, he proposed that 'a shift in international practice towards the recognition of de fact independent entities, claiming their sovereignty on grounds of self-determination, would be beneficial to the international community'.<sup>653</sup> Thus, if Kosovo, Abkhazia, or South Ossetia is to be considered, external self-determination on grounds of ethnic oppression and non-viability of co-existing, similar attention must be given to the Kurds in northern Iraq, the Tibetans, Kashmiri, and the Chechens. International law must not treat similar cases differently. The reasons why international law, national law, and State practice have such reservations toward secession are firstly, the States are concerned that their own territorial integrity may not be challenged. The second reason is the constant concern for international law stability.<sup>654</sup> What remains doubtful however; is why international law and State practice have only recognised a right to secession in situations of colonisation and grave breaches of human rights.

The reason is the territorial integrity of the State has always taken precedence over a potential right to self-determination of that State's national minorities, in order to ensure the stability of the international community. Remedial secession on the other hand, may be allowed in extraordinary circumstances, when the internal self-determination of a minority is utterly

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<sup>651</sup> M Fabry, *Recognizing States* (OUP, USA 2010) 180.

<sup>652</sup> Raič, *Statehood and the Law of Self-Determination* (n 254) 450.

<sup>653</sup> Fabry, *Recognizing States* (n 651) 223.

<sup>654</sup> Separatist movements are potential factors of disorder. If the international community is so clearly opposed to recognising unilateral secession as an automatic right outside the colonial context, it is no doubt because it would be very difficult to determine to whom that right should be granted, because such an automatic right to secession would have dramatic consequences on the international community. With some 3000 human groups each claiming a collective identity for itself in the world, and because the creation of each new State would risk mobilising, within the same State, minorities, which would in turn, stake their own independence. See, Dion, 'Secession and the virtues of clarity' (n 590).

frustrated. Thus, in the period since 1945, a part from Bangladesh<sup>655</sup>, only Eritrea and now Kosovo and South Sudan have successfully claimed independence from a formerly recognised sovereign following secessionist conflict, and received significant international recognition.

In extreme circumstances where States refuse to treat a group of citizens equally, and violate their rights to internal self-determination, it is argued that, these peoples have the right to determine their destiny. In other words, groups can qualify as a ‘people’ and obtain the right of self-determination if the groups experiences: (1) external or internal domination;<sup>656</sup> (2) oppression;<sup>657</sup> (3) serious or grave human rights violations<sup>658</sup>; (4) foreign or alien subjugation<sup>659</sup>; (5) great repression<sup>660</sup>; (6) or denial of representation and participation in the government of the State.<sup>661</sup>

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<sup>655</sup> Note that ‘the secession of Bangladesh from Pakistan, a State established through the process of decolonisation, constituted a breach of Pakistan’s territorial integrity and of the principle *uti possidetis juris*.’ see, Crawford, *The Creation of States in International Law* (n 3) 393.

<sup>656</sup> See, ‘Declaration on Friendly Relations’ (n 23).

<sup>657</sup> ‘Reference re Secession of Quebec’ (n 21) paras 122 and 126.

<sup>658</sup> Consider for example the case of Bangladesh and Kosovo, see, ‘Declaration on Friendly Relations’ (n 23).

<sup>659</sup> *ibid*.

<sup>660</sup> *ibid*.

<sup>661</sup> See, *ibid*. See also, ‘Vienna Declaration, and Programme of Action [1993]’ (n 93). And ‘Reference re Secession of Quebec’ (n 21) para 136 and 154.

## 2.7. Conclusion

It was demonstrated that the right of self-determination could be considered the political and legal processes through which a people gain and maintain control over their economy, culture, and society. With the foundation of the UN, self-determination of peoples became an established principle of international law. The right has been conceived as a tool for the preservation of peace and promotion of human rights. However, the concept has been characterised as disruptive because of the principle's mismanagement. Different international instruments and State practice demonstrate that, under some proper conditions, international law recognises secession and legitimates it as a mode of exercising the right to self-determination.

In addition, it was explained that there is no international legal definition of 'peoples', who are entitled to the right of self-determination. The term has been used to describe a population who shares the following characteristics: (1) a common historical tradition; (2) self-identity as a distinctive cultural group; (3) a shared language; (4) a shared religion; and (5) a traditional territorial connection. The right can also be applied also for a people, which are not only deprived of its human rights, but also living under a non-representative or undemocratic government. They base themselves on paragraph 7 of General Assembly Resolution 2625 (XXV) on Friendly Relations among States. Rather, a several denial of the group's human rights is usually required, which means domination, subjugation and exploitation or the violation of human rights identity. Moreover, in case of secession, it was suggested that, the people do not have any alternative in order to preserve its values and that the interests of secession override the interests of the dominant State. However, whatever the definition, minorities do not appear to have the right to self-determination in the form of secession.

Moreover, it was explained in this chapter that once States have obtained statehood, it is difficult to lose it, even in the absence of the traditional criteria. Statehood criteria only apply to newly created States and not existing ones.<sup>662</sup> Accordingly, the traditional criteria are

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<sup>662</sup> Somalia is a clear example, 'which continues to be a state and retains its UN memberships, although its government does not exercise effective control over its territory'. See A Aust, *Handbook of International Law*, (2<sup>nd</sup> edn, CUP 2010) 16. Also, R McCorquodale, 'The Creation and Recognition of States' in R Piotrowicz and M Tsamenyi in S Blay (ed), *Public International Law: An Australian Perspective* (2<sup>nd</sup> edn, OUP 2005)184-203.

criticised for being essentially based on the principle of effectiveness,<sup>663</sup> as international law in the nineteenth century was ready to recognise statehood to any entity fulfilling the traditional criteria and showing sufficient strength of its existence. However, in essence, in contemporary international law, effectiveness is no longer the only principle governing the law of statehood, but there are some additional criteria also considered. They set legality-based standards for entities wishing to become States and thus look beyond mere effectiveness as adhered to by the traditional criteria. Nevertheless, this does not mean that traditional criteria are no longer important, but rather that the additional set of criteria may prevent effective entities from acquiring statehood.

It was further argued that, recognition doesn't mean only that the recognised entity has met the required qualifications, but also that the recognising State will enter into relations with the recognised State and let that State enjoy the usual legal consequences of recognition such as privileges and immunities within the domestic legal order. It has been suggested also that in certain circumstances recognition may have constitutive effects. However, it has been claimed that the decision to recognise or not generally depends on political views rather than legal grounds. In this regard, most writers support the declaratory theory under which the international personality of a State is determined by the objective criteria of international law only. Thus, even if a State is not recognised, it will have international rights and duties opposable to the international community.

Additionally, it was argued that in international law, any attempt at unilateral secession with no agreement with the existing State, is without legal foundation. On the other hand, international law does not prohibit unilateral secession; international instruments contain neither explicit prohibiting nor explicit recognition of such a right. Secession in this regard may simply mean that secession lies in an international law-free zone. Moreover, the ICJ did not express the opinion that there is no permission of secession or no legal entitlement to secession in international (customary) law. Different from secession, a right (entitlement) to secession is a legal category that could be an object of (international) law and thus the question of legality of secession could be posed. Similarly, the right to unilateral secession could be justified in certain circumstances. If 'the people in question have suffered grievous wrongs at the hand of the parent State from which it wishes to secede, consisting of either a serious violation or denial of the right of internal self-determination and serious violations of

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<sup>663</sup> See, Crawford, *The Creation of States in International Law* (n 3) 97.

the fundamental human rights of the people concerned. In addition, there must be no (further) realistic and effective remedies for the peaceful settlement of the conflict.

In addition to this discussion, it was argued that outside the colonial context, State practice is extremely reluctant to recognise unilateral secession. No state created by unilateral secession has been admitted to the UN without the consent of its parent State. At the same time, there is no material customary rule of international law, which can decide the balance process between the right of self-determination and the principle of territorial integrity of a State. Moreover, in extreme circumstances when a people are blocked from the meaningful exercise of its right to self-determination, the right to secession should be recognised. This means, a multinational States must respect secessionist demands, if they are truly clear and within the framework of legality. Finally, Buchanan divides all right to secession theories in two groups: Remedial Right Only and Primary Right theories. These issues will be further considered in the next chapter while discussion theories of secession.

## Chapter Three: Theories of Secession and the Evolution of the Theory of Remedial Earned Sovereignty as a Remedial Approach to the External Right of Self-Determination

### 3.1. Introduction

In accordance with the right of self-determination, all peoples have the right to decide freely and without external political influence on their political status and to structure their economic, social, and cultural development.<sup>664</sup> It is thus unquestionable that ‘peoples are able to set down the conditions for relations within their community, that is, exercise the right to self-determination internally’.<sup>665</sup> On the other hand, there should be no doubt that peoples have the right to be free from subjugation, exploitation and foreign rule and ‘to be able to restructure themselves and the national entity they have set up with validity to the outside, for example by breaking up or secession of individual parts’.<sup>666</sup>

For Dahlitz, the issue of secession arises ‘whenever a significant proportion of the population of a given territory, being part of a State, express the wish by word or by deed to become a sovereign State in itself or to join with and become part of another sovereign State’.<sup>667</sup> Kohen argued that, secession is the ‘creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter’.<sup>668</sup> However, when a new State is formed from part of the territory of another State with its consent, it is a situation of ‘devolution’ rather than ‘secession’.<sup>669</sup> Thus, in recent years, the lack of the consent of the Predecessor State has become the key element that characterises a strict notion of secession.

The creation of States has traditionally been perceived as a matter of fact. The traditional view was, when a secessionist movement when not under foreign control, it was simply an internal affair. According to this view, international law neither encourages secessionism nor

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<sup>664</sup> ‘The International Covenant of Civil and Political Rights’ (n 19).

<sup>665</sup> Krüger, *The Nagorno-Karabakh Conflict: A Legal Analysis* (n 589) 54.

<sup>666</sup> ‘Helsinki Final Act, principle VIII, para 2’ (n 154). Questions relating to Security in Europe, which regards the right of self-determination of peoples in its internal and external dimension.

<sup>667</sup> Dahlitz, *Secession and International Law* (n 14) 6.

<sup>668</sup> Kohen, ‘Secession: International Law Perspectives’ (n 577) 3.

<sup>669</sup> *ibid.*



prohibits it.<sup>670</sup> Thus, secession was a matter of fact: Kohen argued that, ‘if the secessionist forces were able to impose the existence of a new State, then the international legal system was to record the fact of the existence of this new entity’.<sup>671</sup> In recent times, the other cases of some new States, which emerged after the collapse of the Soviet Union and SFRY, did not benefit from international legal support.<sup>672</sup> These States came into being as a matter of fact, a situation which international law, neither sanctions nor prevents. In other words, Corten comes to conclude that, ‘international law’s ‘neutrality’ in this respect is less and less evident, since the mechanisms to protect States from disruption are even stronger today than before’.<sup>673</sup> Franck claimed that, ‘it cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits secession. There is a privilege of secession recognised in international law and the law imposes no duty on any people not to secede’.<sup>674</sup> Thus, Peter argued that, the silence of international law concerning secession may simply mean that secession lies in an ‘international law-free zone’.<sup>675</sup> In addition, Cassese agreed that, while State practice and the majority view of States remained opposed to secession; secession ‘is a fact of life, outside the realm of law’.<sup>676</sup>

At the same time, it has even approved exceptions under certain circumstances and conditions, when the external right to self-determination can prevail over the principle of territorial integrity. This particularly, Cassese argued, affects constellations<sup>677</sup> of colonisation, which has been considered in the previous chapter. The question is rather whether an exception outside the colonial context applies for the benefit of secessionist movements. Seen in terms of international law, this is the decisive point for the legality or legitimacy of the breakaway of the entity from its parent State. In this regard, the Canadian Supreme Court concluded ‘it was clear that international law does not specifically grant component parts of sovereign States the legal right to secede unilaterally from their parent State’.<sup>678</sup> However, the Court admitted that under certain circumstances secession is

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<sup>670</sup> *ibid* 5.

<sup>671</sup> *ibid*.

<sup>672</sup> Dugard and Raic agreed that one will search “in vain” for international rules on secession; international instruments contain neither explicit prohibition of unilateral secession nor explicit recognition of such a right.

<sup>673</sup> O Corten, ‘Are there gaps in the international law of secession?’ In Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006) 231.

<sup>674</sup> Thomas Franck as quoted in S Lalonde, ‘Quebec’s Boundaries in the Event of Secession’ (2003) 3 *Macquarie Law Journal* 129.

<sup>675</sup> A Peters, “Does Kosovo Lie in the Lotus-Land of Freedom?” (2011) 24 *Leiden J Int'l L* 95.

<sup>676</sup> Cassese, *Self-Determination of People, A Legal Reappraisal* (n 25) 123.

<sup>677</sup> *ibid* 129.

<sup>678</sup> ‘*Reference Re Secession of Quebec*’, (n 21) para 265.

implicitly allowed under the right of self-determination of peoples'.<sup>679</sup> Thus, international law is in fact neutral with respect to secession, and in certain circumstances, Lalonde argued, it might well adapt to recognise effective political realities'.<sup>680</sup> Therefore, in the *Quebec* case, many commentators have argued that 'the consequences of a unilateral declaration of independence, if successful, might eventually be regulated internationally'.<sup>681</sup>

It is true that, scholars had long been deeply divided on the issue of self-determination and independence. The demands of secessionist movements, such as in Quebec, Scotland, Kosovo, East Timor, and in Southern Sudan, raise important philosophic issues about the State. Among the most important of these are questions about legitimacy and the authority of the State over territory and its population. Secessionist demands, Copp argued, also raise questions about the moral status of secession, and raise deep questions about democracy and liberalism, since the population might reveal in a democratic plebiscite that its support for secession takes priority over its desire for justice.<sup>682</sup> On the one hand, it is understood that the right of people to self-determination should normally be exercised internally within the framework of an existing sovereign State. Rather, secessionists have always insisted that they met the conditions that giving rise to external self-determination, understood as a right to independence.

The right to self-determination is enshrined in the UN Charter and based on democratic and liberal values. However, until recently, the international community has interpreted this principle very restrictively; it has amounted to little more than the right to be free from European colonialism.<sup>683</sup> However, reviewing ethno-nationalist conflicts around the world, and the collapse of the USSR and SFRY, have given rise to a new thinking about the right to self-determination in political theory.

Many political philosophers working in this area have turned their attention to secession. There has been a wide range of positions-for and against the right of secession. Even so, there

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<sup>679</sup> *ibid.*

<sup>680</sup> Lalonde, 'Quebec's Boundaries in the Event of Secession' (n 674).

<sup>681</sup> According to Crawford, 'secession is 'neither legal nor illegal in international law, but a legally neutral act the consequences of which are, or may be, regulated internationally'. See, Crawford, *The Creation of States in International Law* (n 372) 268.

<sup>19</sup> Thomas Franck, 'Supplément au dossier: Rapports of Experts de *l'amicus curiae*', Tab 3, in the matter of the *Reference re Secession of Quebec*, as quoted in Lalonde, 'Quebec's Boundaries in the Event of Secession' (n 674).

<sup>682</sup> D Copp, 'International Law and Morality in the Theory of Secession' (1998) 2 *The Journal of Ethics* 219.

<sup>683</sup> M Freeman, 'The Right to Self-Determination in International Political: Six Theories in Search of a Policy' (1999) 25 *Rev Int'l S* 355.

has still been no systematic account of the various normative theories of secession. Nor has there been a systematic assessment of the comparative strengths and the weaknesses of the theoretical options. In addition, contemporary scholarship on international law does not contain opposing views on whether or under what conditions there is a legal right to secede.

This chapter reviews theories of secession, and identifies what they have in common and where they differ, bringing together some of the most respected scholars in their field. It will consider the conditions under which a group within an existing community may, with justification, separate from the larger group in order to establish its own self-governing community. In other words, what arguments justify their pleas for secession? The chapter deals with problems of normative and liberal theories, special rights to secede, conditions of groups and ask if constitutions should include a right to secede. It begins the task with the controversial moral debate on secession, evaluating under what grounds and under what conditions may secession be morally justified, if at all. It also evaluates how international law should deal with secession. One of the crucial issues here is whether the international law of self-determination authorises any right to secession as a remedy to violation of the right to self-determination of peoples.

Normative theories of secession provided by Allen Buchanan and Lea Brilmayer will be taken as representative examples of just-cause theories. In this regard, both general unilateral theories of secession provided by Buchanan, primary right theories, and remedial right only theories, will be examined. Primary right theories stipulate that nations also have a general primary right to unilaterally secede in the absence of past injustice if there were a special right to do so. Remedial Right Only theories suggest on the contrary that unilateral secession can only be justified if important harms have been to the seceding nation. Buchanan in his recent work on secession stipulated that, international law should recognise the remedial right to secede but not a general right to self-determination that includes the right to secede for all people or nations. Hence, from the standpoint of international law, Buchanan argued that ‘the unilateral right to secede, the right to secede without consent or constitutional authorisation, should be understood as a remedial right only, a last resort response to serious injustice’.<sup>684</sup> Based on this argument, the chapter will argue that, for all peoples in international law, the right to secede, the right to unilateral secession without the consent of the parent State is

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<sup>684</sup> Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (n 601) 331.

without legal foundation, and should be understood as a remedial right only, a last resort to remedy the harm.

As with the territorial claim theory provided by Brilmayer, she has suggested a new framework, focused on the relative legitimacy of competing territorial claims, as the best way to resolve secessionist disputes. Her imaginative solution to a long-standing tension between the right of States to preserve their territorial integrity and the right of peoples to self-determination will be analysed. The chapter also discusses, the 'Plebiscite approach', which attempts to discuss various arguments regarding the notion whether all people have a right to self-determination as a matter of right, regardless of their current political status. Beran's liberal democratic theories will also be examined. He argued that, liberal nationalist theories might support the right to national self-determination if the victims of serious and persistent human rights violations constitute a nation.

The chapter will turn then to discuss the legal aspects of secession, especially as it relates to the constitutional laws of sovereign States. The chapter will address the theoretical justifications for constitutional secession. Should the right of secession be constitutionalised? If so, what should be the nature of such a right? To answer these theoretical questions, assessment of arguments both for and against constitutionalising secession will be made.

Having evaluated the conceptual field, the chapter will then turn to propose a fresh balanced theory of an external right to self-determination, that of 'Remedial Earned Sovereignty', as a remedial approach to the right of self-determination. This will be robustly interrogated, evaluating both advantages and disadvantages, and drawing some cautious policy implications. Thus, this chapter will be arguing both politics and legal theories of secession, as multidisciplinary approaches seems to be the most effective way to approach secession and self-determination.

## 3.2. Allen Buchanan and normative theories of secession

All theories of secession either understand the right as a remedial right only or recognise a primary right to secede.

### 3.2.1. Primary Right Theories

Primary Right theories argue that certain groups have a general right to secede if these groups believe that it is the most feasible way of existence. They advocate for a people's general right to secede and 'do not make the unilateral right to secede derivative upon violation of other, more basic rights'.<sup>685</sup> They argue that secession is justifiable via association or ascription, through a democratic process by majority votes. Primary Right theories stipulate that some groups may unilaterally secede in the absence of past injustice.<sup>686</sup> They do not limit legitimate secession to being a means of remedying an injustice.<sup>687</sup> They consider peoples or nations, as such, have a collective right to self-determination, and are entitled to secede based on attributes that they have.<sup>688</sup> According to Primary Right theories, there is a general right to secede that is not merely remedial.<sup>689</sup>

According to Buchanan Primary Right theories fall into two main classes: Ascriptive Group theories and Associative Group theories.

#### 3.2.1.1. Ascriptive Group theories:

Under this version of Primary Right theory, it is groups whose memberships are defined by what are sometimes-called ascriptive characteristics that have the right to secede (even in the absence of injustice).<sup>690</sup> This means that it is primarily certain non-political characteristics of

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<sup>685</sup> A Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession,' in H Hannum and Eileen F Babbitt (ed) *In Negotiating Self-Determination* (Lexington Books 2006) 83.

<sup>686</sup> Seymour, 'Secession as a Remedial Right' (n 211).

<sup>687</sup> Buchanan, 'Theories of Secession' (n 600).

<sup>688</sup> Seymour, 'Secession as a Remedial Right' (n 211).

<sup>689</sup> Copp, 'International Law and Morality in the Theory of Secession' (n 682).

<sup>690</sup> Buchanan, 'Theories of Secession' (n 600).

groups that ground the group's right to an independent political association.<sup>691</sup> Accordingly, being a people or a nation is an ascriptive characteristic.<sup>692</sup> In addition, Buchanan argued that, 'no actual political organisation of the group; nor any actual collective choice to form a political association, is necessary for the group to be a nation or people'.<sup>693</sup>

Thus, according to Ascriptive Group theories, people have an intrinsic value and for this reason have a primary right to secede even in the absence of injustice, whether on the nationalist principle or not. In other words, such theories do not require, as a necessary condition of a group's having the right to secede, that it has been subject to injustice.<sup>694</sup> Copp explained that these theories most often have a touch of ethno-nationalism, concentrating on shared cultural characteristics and mutual heritage of history and language as justification for a split.<sup>695</sup> Avishai Margalit and Joseph Raz have defended a theory of this kind as a theory of the moral right to secede.<sup>696</sup>

### 3.2.1.2. Associative Group Theories (Choice Theories)

These 'attribute the right to secede to groups on the basis of the expressed voluntary preference of a sufficient proportion of the members of the group that the group form its own State'.<sup>697</sup> These theories do not require that a group have any ascriptive characteristic in common such as ethnicity or an encompassing culture, even as a necessary condition for having a right to secede.<sup>698</sup> They focus on voluntary political choice of the members of a group, or the majority take a decision to form their own independent political unit. These theories do not require a group to have been treated unjustly, or that it share ascriptive characteristics, although a plausible theory of this kind would require, in Buchanan's view

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<sup>691</sup> *ibid.*

<sup>692</sup> What makes a group a nation or people is the fact that it has a common culture, history, language, a sense of its own distinctiveness, and perhaps a shared aspiration for constituting its own political unit. See, *ibid.*

<sup>693</sup> *ibid.*

<sup>694</sup> Copp, 'International Law and Morality in the Theory of Secession' (n 682).

<sup>695</sup> *ibid.*

<sup>696</sup> Margalit and Raz appear to embrace the Nationalist Principle when they ascribe the right to secede to what they call "encompassing cultures," defined as large-scale, anonymous (rather than small-scale, face-to-face) groups that have a common culture and character that en-compasses many important aspects of life and which marks the character of the life of its members, where membership in the group is in part a matter of mutual recognition and is important for one's self-identification and is a matter of belonging, not of achievement." A Margalit and J Raz, 'National Self-Determination' (1990) 86 *The Journal of Philosophy* 439. See also Buchanan, 'Theories of Secession' (n 600).

<sup>697</sup> Copp, 'International Law and Morality in the Theory of Secession' (n 682).

<sup>698</sup> Buchanan, 'Theories of Secession' (n 600).

that ‘the group have sufficient resources and territory to be able of constituting a viable State’.<sup>699</sup> The simplest version of Associative group theory is ‘the pure plebiscite theory’. According to this theory, a majority in a given association of persons on a given territory that wishes to secede is entitled to do so. In other words, any group that can constitute a majority (or a substantial majority) in favour of secession within a portion of the State has the right to secede.<sup>700</sup> It is not required for secessionists to have any common connection, territory or the historical claim they wish to make into their own State. ‘All that matters is that the members of the group voluntarily choose to associate together in an independent political unit of their own’.<sup>701</sup> Harry Beran and Christopher Wellman have defended these theories.

Beran offered something more, adding that it is necessary that the group will be able to marshal the resources necessary for a viable independent State.<sup>702</sup> He grounded his theory of the right to secede in a consent theory of political obligation.<sup>703</sup> According to Beran, ‘actual (not hypothetical or ideal contract-arian) consent of the governed is a necessary condition for political obligation, and consent cannot be assured unless those who wish to secede are allowed to do so’.<sup>704</sup> Christopher Wellman on the other hand, has another advanced variant of plebiscite theory.<sup>705</sup> According to his version, there is a primary right of political association, or of political self-determination. Wellman’s right of political association becomes the right of any group that resides in a territory to form its own State if (1) that group constitutes a majority in that territory, if (2) the entity it forms will be able to carry out effectively, the legitimating functions of a State (pre-eminently the provision of justice and security); and if (3) its serving the territory from the existing State will not impair the latter’s ability to carry out effectively those same legitimating functions.<sup>706</sup>

In fact, both Beran’s and Wellman’s theories seem to rely on an associative group, rather than an ascriptive group. Because any group, Buchanan argued, that ‘satisfies these three criteria, not just those with ascriptive properties (such as peoples, nations, ethnic groups, culture

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<sup>699</sup> *ibid.*

<sup>700</sup> A Buchanan, ‘Self-Determination, Secession, and the Rule of International Law’, in T J McMahon and R McKim (ed) *The Morality of Nationalism* (OUP 1998) 301.

<sup>701</sup> Buchanan, ‘Theories of Secession’ (n 600).

<sup>702</sup> H Beran, *The Consent Theory of Political Obligation* (London: Croom Helm 1987) 42.

<sup>703</sup> Buchanan, ‘Theories of Secession’ (n 600).

<sup>704</sup> Beran, *The Consent Theory of Political Obligation* (n 702) 42.

<sup>705</sup> C Wellman, ‘A Defence of Secession and Political Self-Determination’ (1995) 24 *Philosophy & Public Affairs* 357.

<sup>706</sup> *ibid.* See also Buchanan, ‘Theories of Secession’ (n 600).

groups, or encompassing groups) is said to have the right to secede'.<sup>707</sup> In addition, Beran and Wellman have argued that, there can be a right to secede based on the need to remedy injustices, and thus to argue against all remedial right only theories.

In sum, primary right theories do not require injustice as a condition for the existence of a unilateral claim or right to secede. They are primary right theories 'because they do not make the unilateral claim or right to secede derivative upon the violation of other, more basic rights, as the remedial right only theories do'.<sup>708</sup> However, according to Buchanan, primary right theories are far from offering an accurate account a right to secede, because ascriptive and associative suffer from serious weakness. For example, they are considered as a direct threat to the territorial integrity of the State by 'authorising the dismemberment of States even when those States are perfectly performing what are generally recognised as the legitimating functions of States'.<sup>709</sup> In addition, associative theories have also been criticised for not focusing on peoples, as an objective, 'and they, do not necessarily invoke a right to self-determination'.<sup>710</sup> Buchanan's main point is 'to uncouple the unilateral claim right to secede from the various legitimate interests that groups including national minorities can have in various forms of self-determination short of statehood'.<sup>711</sup>

Hence, if Buchanan succeeded in justifying unavoidable limitation of the primary right approaches, then he also partially demonstrated the appeal of moral causes to support the remedial right only theory. He proceeded with powerful rebuttals to most of the criticism especially coming from primary right approaches to secession; he manages to list convincing reasons for why remedial theory makes a difference and how it is important for the sake of theory as well as for the world political to have such a position regarding the issue of secession.

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<sup>707</sup> *ibid.*

<sup>708</sup> A Buchanan, 'Secession', [2013] The Stanford Encyclopaedia of Philosophy <<http://plato.stanford.edu/entries/secession/>> accessed 25 April 2013.

<sup>709</sup> Buchanan, 'Theories of Secession' (n 600).

<sup>710</sup> Seymour, 'Secession as a Remedial Right' (n 211).

<sup>711</sup> *ibid.*



### 3.2.2. Remedial Right Only Theories

According to this type of theory, international law provides a right to secession for people subject to extreme persecution or unable to realise their right to self-determination internally.<sup>712</sup> Buchanan demonstrated that secession must be ‘a remedy of last resort for persistent and grave injustices, understood as violations of basic human rights’.<sup>713</sup> Accordingly, he argued that ‘cultural groups may instrumentally acquire a moral value for individuals and can, for this reason, be the subject of collective rights’.<sup>714</sup> They earn such an instrumental value because individual agents treat them as social goods. Therefore, cultural groups are entitled to cultural protection. He also explained that ‘nations’ are just one of many other cultural groups’ (linguistic, immigrant, religious etc...) and as such, they do not deserve the right to self-determination.<sup>715</sup> Thus, he rejected the idea that nations, ‘or for that matter any other cultural group, could have a primary right to secede, that is, a general right to violate the territorial integrity of a State and one that they would have in the absence of past injustice’.<sup>716</sup> However, all cultural groups could legitimately secede if (i): there were systematic violations of basic human rights, as with the Kosovars in Kosovo (ii): serious and persisting violations of intrastate power-sharing or autonomy agreements by the State, as occurred in Chechnya, as well as, the brutal secessionist conflicts that have occurred in Sudan, Eritrea and Kosovo.<sup>717</sup> In these cases, secession would be acceptable only if there were no other solutions, and that secession is the remedy of last resort. However, even if Buchanan added the later condition to his account, there is still not a general primary right to self-determination, there are just general remedial rights to self-determination and secession. In addition, it is important to mention that Buchanan’s remedial theory ‘only concerned the grounds for a unilateral right to secede’.<sup>718</sup> He presumably acknowledged that consensual secessions results from negotiations, agreement, and deliberation between the different

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<sup>712</sup> *ibid.* See also, Buchheit, *Secession, The Legitimacy of Self-Determination* (n 29) 220-223.

<sup>713</sup> Buchanan, *Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession* (n 685) 83.

<sup>714</sup> Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (n 601) 410-415. See also, Buchanan, ‘Self-Determination, Secession, and the Rule of International Law’ (n 700) 1-15.

<sup>715</sup> A Buchanan, ‘What Is So Special About Nations?’ In J Couture, K Nielsen and M Seymour (ed) *Rethinking Nationalism*, 22 Canadian Journal of Philosophy (UCP, Calgary 1998) 283-309.

<sup>716</sup> Seymour, ‘Secession as a Remedial Right’ (n 211).

<sup>717</sup> Buchanan argued that ‘what these otherwise disparate cases have in common is the following sequence of events: Pressures from a minority group eventually result in the state agreeing to an intrastate autonomy arrangement; the state breaks the agreement; in response to the broken autonomy agreement autonomists become secessionists; and then the state violently attempts to suppress the secession’. See, Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (n 601) 357.

<sup>718</sup> Seymour, ‘Secession as a Remedial Right’ (n 211).

parties, are morally acceptable. In what follows, this chapter will be concerned only with unilateral secession as opposed to consensual secession reached between a seceding people and the parent State.

On the other hand, Buchanan has drawn parallels between the remedial right to secession and the remedial right to revolution. The latter is originally based on Locke's theory, according to 'which the people have the right to overthrow the government if their fundamental rights are violated, and more peaceful means have been to no avail'.<sup>719</sup> Revolution as a last resort is also reflected in legal sources, most notably in the UDHR: 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that should be protected by the rule of human rights law'.<sup>720</sup> However, conversely from revolution Buchanan argued that, 'the object of right to secede is not to overthrow the government, but only to sever the government's control over that portion of the territory'.<sup>721</sup>

It is true that Remedial Right Only theories postulates that if a group falls victim to 'serious breaches of fundamental human and civil rights' through the 'abuse of power,' then international law recognises the right of the afflicted group to secede from the offending State. Buchanan would add that there has to be no other option. Accordingly, the 'general right' to secession exists only where the group in question has suffered injustices. However Buchanan pointed out that outside of such extreme conditions, there can be 'special rights' to secede if (1) 'the State grants a right to secede (as with the secession of Norway from Sweden in 1905), or if (2) the constitution of the State includes a right to secede (as does the 1993 Ethiopian Constitution), or perhaps if (3) the agreement by which the State was initially created out of previously independent political units included the implicit or explicit assumption that secession at a later point was permissible (as some American Southerners

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<sup>719</sup> 'Strictly speaking, it may be incorrect to say that Locke affirms a right to revolution, if by revolution is meant an attempt to overthrow the existing political authority. Locke's point is that, if the government acts in ways that are not within the scope of the authority granted to it by the people's consent, then governmental authority ceases to exist. In that sense, instead of a Lockean right to revolution it would be more accurate to speak of the right of the people to constitute a new governmental authority.' See, A Buchanan, 'The international institutional dimension of secession,' in Percy B Lehning (ed), *Theories of Secession* (Routledge, London and New York 2005) 229.

<sup>720</sup> 'Universal Declaration of Human Rights' (n 276).

<sup>721</sup> Buchanan, 'Theories of Secession' (n 600).

argued was true of the States of the Union)<sup>722</sup> Thus, Buchanan concluded that, ‘if any of these three conditions obtain, we can speak of a special right to secede.’<sup>723</sup>

The doctrine of remedial secession is based on general principle of law that applied to the right to self-determination of peoples. In this regard, Ryngaert and Griffioen have argued that ‘what if a State persistently denies a people the fundamental right of internal self-determination? What if a people does not have free choice but is repressed and suffers from gross violations of basic human rights, and all possible remedies for a peaceful solution to the conflict have been exhausted? Should that people not be allowed a ‘self-help remedy’ in the form of external self-determination?’<sup>724</sup> Tomuschat also argued in favour of ‘*ubi jus ibi remedium*’ applying to international law, arguing that, and ‘if international law is to remain faithful to its own premises, it must give victims a remedy enabling them to live in dignity’.<sup>725</sup> It is also submitted that, a remedial theory is primarily based on legal, philosophical, moral and human rights approaches. In this regard, a remedial right to protect human rights, right to self-determination is compliant with the premises of international legal order.<sup>726</sup> Thus, if there is people’s right to self-determination, and that right has been violated, there must be a remedy. In other words, if people’s right to internal self-determination is violated, the right to remedial secession might arise as a remedy to the injustice. In this way, by effecting remedial secession, people may realise to their right to self-determination externally.

Over the past few decades, ‘growing attention has been turned to the treatment dispensed by States to the populations concerned’.<sup>727</sup> This has become a matter of concern in contemporary international law’.<sup>728</sup> Throughout the last decades, the UN General Assembly passed several resolutions reminding States to protect and empower their inhabitants, and prevent them from criminal activities against their population. In this connection, two illustrations will be recalled.

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<sup>722</sup> *ibid.*

<sup>723</sup> *ibid.*

<sup>724</sup> C Ryngaert and C Griffioen, 'The Relevance of the Right to Self-Determination in the Kosovo Matter: In Partial Response to the Agora Papers' (2009) 8 Chinese Journal of International law 573.

<sup>725</sup> C Tomuschat, 'Self-Determination in a Post-Colonial World', in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Springer, 1993) 9.

<sup>726</sup> See, 'Separate Opinion of Judge A.A. Cancado Trindade in Kosovo Case', 523.

<sup>727</sup> *ibid.*

<sup>728</sup> *ibid.*

First: the ‘safeguard clause’ in the UN General Assembly Resolution 2625, considered as an important pillar is used by remedial secession theory proponents to prove the theory’s basis in customary international law. The Declaration states in paragraph 5 (7): that,

[Nothing in the foregoing paragraphs shall be construed as authorising 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*].<sup>729</sup>

The Declaration addresses, *inter alia*, self-determination. Proponents of the remedial secession doctrine claim that an inverted reading of the ‘safeguard clause’<sup>730</sup> of Principle V gives rise to the doctrine.<sup>731</sup> Accordingly, Hannum pointed out that ‘the requirement of representativeness suggests internal democracy’.<sup>732</sup> However, Murswiek argued that, the doctrine of remedial secession authorised secession as a potential option, although in certain exceptional circumstances.<sup>733</sup> Likewise, Cassese emphasised that ‘impairment of territorial integrity is not totally excluded, it is logically admitted’.<sup>734</sup> He argued that ‘a State whose government represents the whole people of its territory without distinction of any kind, that is to say, on a basis of equality, and in particular without discrimination on grounds of race, creed or colour, complies with the principle of self-determination in respect of all of its people and is entitled to be protected of its territorial integrity’.<sup>735</sup> In other words, the people of such a State exercise the right of self-determination through their participation in the government of the State on a basis of equality.<sup>736</sup> Thus, according to the remedial secession doctrine, if the State failed to comply with principles of equal rights and self-determination and denies a people its right to internal self-determination, such State loses the safeguard from dismemberment of its territory and the particulars people may choose secession as a

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<sup>729</sup> ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States’ (n 23) Emphasis added.

<sup>730</sup> Safeguard clause, first articulated in principle 5, paragraph 7 of the Friendly Relations Declaration. The United Nations World Conference on Human Rights held in Vienna in 1993 also reaffirmed it, in slightly different language. See, Crawford, *The Creation of States in International Law* (n 3) 118.

<sup>731</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States (n 23) (Emphasis added).

<sup>732</sup> Hannum, ‘Rethinking Self-Determination’ (n 151).

<sup>733</sup> Murswiek, ‘The Issue of a Right to Secession-Reconsidered’ (n 161) 27.

<sup>734</sup> Cassese, *Self-Determination of People, A legal Reappraisal* (n 25) 119.

<sup>735</sup> *ibid.*

<sup>736</sup> *ibid.*

remedy to injustice. Hence, 'the government of a State which commits grave and systematic violations of human rights ceases to represent the people or population victimised.'<sup>737</sup>

This understanding has been reaffirmed, in even stronger terms, in the second World Conference on Human Rights held in Vienna, by the 1993 Vienna Declaration and Programme of Action (para 2).<sup>738</sup> In fact, the Declaration went further than the 1970 Declaration of Principles, in proscribing discrimination 'of any kind'.<sup>739</sup> In particular, 'the entitlement to self-determination of the victimised population emerged, as the willing victimisers could no longer rely upon the claim to territorial integrity'.<sup>740</sup>

Accordingly, Simpson argued that the Declarations make 'territorial integrity a rebuttable presumption, which can be invoked only by States who act in accordance with the principle of equal rights and self-determination'.<sup>741</sup> Therefore, the right to self-determination arises as a remedy when the State's actions extinguish that presumption. Simpson agreed that 'assertion of the right of secession would be a remedy of last resort for peoples and groups'.<sup>742</sup> In the same way, Tomuschat asserted that, 'secession can only be a step of last resort and should not be granted lightly as remedy'.<sup>743</sup> Buchanan does not derive a right to secession from the 'safeguard clause' but uses a similar logic to the suggested 'rebuttable presumption' in the clause. He argued that 'there is a presumption that existing States that are accorded legitimacy under international law have valid claim to their territories, but such claim can be overridden or extinguished in the face of persistent patterns of serious injustice toward groups within a State'.<sup>744</sup> The validity of a State's claim to territory 'cannot be supported if the

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<sup>737</sup> 'Separate Opinion of Judge Cancado in Kosovo Case' (n 726).

<sup>738</sup> The Declaration states that, [In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, this 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*]. See, Vienna Declaration, and Programme of Action (n 93). In addition, other UN bodies have also referred to the right to remedial secession, See for example, the General Recommendation XXI adopted in 1996 by the Committee on the Elimination of Racial Discrimination. See, Report of the Committee on the Elimination of Racial Discrimination (n 609) Emphasis added.

<sup>739</sup> 'Separate Opinion of Judge Cancado in Kosovo Case' (n 726).

<sup>740</sup> *ibid.*

<sup>741</sup> Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (n 249).

<sup>742</sup> *ibid.*

<sup>743</sup> Tomuschat, 'Self-determination in a Post-Colonial World' (n 725) 10.

<sup>744</sup> Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 685) 85.

remedy that can assure that the fundamental rights of the group will be respected is secession'.<sup>745</sup>

In addition, Dugard and Raic have argued that the Declaration was intended to be addressed to third States.<sup>746</sup> The name of the Declaration and the notion of co-operation between States in accordance with the UN Charter suggest that addresses are the 'States', especially third States not directly engaged. For that reason, they argued that, 'safeguard clause' formula is directed to the States: 'it may be argued a *contrario* that third States would be entitled to support a people which attempts to secede, even if such support eventually leads to infringement of the territorial integrity of the target State'.<sup>747</sup>

Judge Trindade argued in his Separate Opinions in the Kosovo matter that, recent developments in international law and international practice (of States and of international organisations) 'provide support for the exercise of self-determination by peoples, under permanent adversity or systematic repression, beyond the traditional confines of the historical process of decolonisation'.<sup>748</sup> For example, the UNSC resolution 1244 condemned all acts of violence against and repression of, the population in Kosovo.<sup>749</sup> It was clear that the Serbs were responsible for serious human rights violations against the Kosovars, which led to NATO's 1999 intervention and eventually Kosovo's Declaration of Independence. A significant number of States addressed remedial secession in their ICJ written and oral pleadings, such as Germany and Netherlands.<sup>750</sup> They based their theory on the UNGA resolution 2625s 'safeguard clause' which if read a *contrario* imposes the requirements for a State to respect a right to self-determination in order to invoke territorial integrity. The Dutch argued that the right to 'external self-determination must meet two conditions: 1. substantive condition—serious breach of obligation to respect self-determination by the State 2. Procedural condition—all effective remedies must have been exhausted'.<sup>751</sup> In the *Aaland*

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<sup>745</sup> *ibid.*

<sup>746</sup> J Dugard and D Raic, 'The Role of Recognition in the Law and Practice of Secession', in Marcelo G Kohen (ed) *Secession: International Law Perspectives* (CUP 2006) 109-125.

<sup>747</sup> *ibid.*

<sup>748</sup> 'Separate Opinion of Judge Cancado Trindade in Kosovo Case' (n 726).

<sup>749</sup> UNSC Rec 1244 (10 June 1999) UN Doc 1244/1999.

<sup>750</sup> In States '*Opinio Juris*' on secession Both Germany and Netherlands based their theory on the UNGA resolution (2625) 'safeguard clause', which if read a *contrario* provides condition for a state to respect right to self-determination in order to invoke territorial integrity.' See, "The Written Statement of Netherlands (17 April 2009) The Hague" <<http://www.icj-cij.org/docket/files/141/15652.pdf>> accessed 10 February 2014. Also, "Written Statement of Germany, (12 April 2009) The Hague" <<http://www.icj-cij.org/docket/files/141/15624.pdf>> accessed 10 February 2014.

<sup>751</sup> 'The Written Statement of Netherlands' (n 750).

*Island Case*, the Committee of Rapporteurs, states that, ‘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 either the will or the power to enact and apply just and effective guarantees’.<sup>752</sup> The Report does not exclude the possibility of secession as a remedy from State abuses. Dugard and Raic argued that, ‘The commission denied the existence of any absolute entitlement to secession by a minority, but it did not rule out a right of secession under all circumstances’.<sup>753</sup> Crawford concluded that ‘both reports admit the possibility that the principle will apply to territories that are so badly misgoverned that they are in effect alienated from their ‘parent’ State’.<sup>754</sup> Another decision referred to ground remedial secession theory is ‘The African Commission Report on Katanga’.<sup>755</sup> Dugard and Raic pointed out that ‘The Commission was of the opinion that in the case of serious violations of human rights and a denial of internal self-determination, the Katangese people would be entitled to exercise a form of self-determination which would lead to disruption of the territorial integrity of Zaire’.<sup>756</sup> Thus, one must concede that this decision is primarily based on Remedial Right theory. In Sudan, where for years the government engaged in a consistent policy of ethnic war, remedial criteria would conclude that the South had the moral right to secede. However, these circumstances did not create a right to independence under international law.<sup>757</sup> By contrast, in the *Quebec* case, where the Canadian government has granted vast autonomy and procedural equality and self-determination, the remedial approach would lead to the conclusion that Quebec has no moral claim to any sort of hard, external self-determination. The government in Canada relied on the safeguard clause, without committing itself to the idea of remedial secession: the safeguard clause protected law-abiding States against

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<sup>752</sup> ‘*Aland Island Case*’, (n 169).

<sup>753</sup> Dugard and Raic, ‘The Role of Recognition in the Law and Practice of Secession’ (n 746) 107.

<sup>754</sup> Crawford, *The Creation of States in International Law* (n 3) 111.

<sup>755</sup> The African Commission *inter alia* concluded that: ‘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 that is compatible with the sovereignty and territorial integrity of Zaire.’ See, Katangese Peoples, *Congress v Zaire*, (1995) African Commission on Human and Peoples Rights, Comm. No 75/92.

<sup>756</sup> Dugard and Raic, ‘The Role of Recognition in the Law and Practice of Secession’ (n 746) 108.

<sup>757</sup> Vidmar argued that ‘an argument could be made that South Sudan is a matter of independence under the doctrine of ‘remedial secession’, which has some support in academic writings and, possibly, also in the framework of the African regional human rights system. Nevertheless, it can only be said that decades of violence and oppression created political circumstances in which Sudan accepted South Sudanese independence. Secession still was not an entitlement under international law; it clearly followed from domestic constitutional provisions’. See, Vidmar, ‘South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States’ (n 51).

secession.<sup>758</sup> The Court took a similar line, holding that the right to self-determination of people is 'normally fulfilled through internal self-determination, a people's pursuit of its political, economic, social, and cultural development within the framework of an existing State.'<sup>759</sup> The right to external self-determination only appeared 'in the most extreme of cases and, even then, under carefully defined circumstances',<sup>760</sup> 'having regard to the parallel need for respect for the territorial integrity of States'.<sup>761</sup> Following an analysis of potential State practice of remedial secession, in Kosovo, Aaland Islands, Katanga, and Quebec, Vidmar suggested that 'remedial secession has the following function in international law: although not a legal entitlement, remedial secession confers political and normative legitimacy on oppressed secessionist groups and may encourage States to recognise their independence'.<sup>762</sup> Thus, it is important to note that none of the participating States contested the binding effect of UNGA resolution 2625 as a reflection of customary international law. Rather the States have differently interpreted the content of provisions regulating the right to self-determination.

In general, remedial right theorist Buchanan puts 'significant constraint on unilateral secession'.<sup>763</sup> This means that the remedial right to secession as an exercise of self-determination, very strict standards would be met by secessionists. The most comprehensive criteria of remedial secession is provided by Dugard and Raic. They stated that:

(a) There must be a people, which, though forming a numerical minority in relation to the rest of the population of the parent State, form a majority within a part of the territory of that State.

(b) 'The State from which the people in question wish to secede must have exposed that people to serious grievances (*carence de souverainete*), consisting of either

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<sup>758</sup> 'Reference Re Secession of Quebec' (n 21) para 126.

<sup>759</sup> 'After thoroughly reviewing the state of international law on the question of self-determination, the Court determined that 'state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territory integrity under international law and to have that territorial integrity recognised by other states'. See, *ibid.*

<sup>760</sup> *ibid.*

<sup>761</sup> Crawford, *The Creation of States in International Law* (n 3) 119.

<sup>762</sup> Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack Of) Practice' (2010) 6 *St Antony's Int'l Rev* 43.

<sup>763</sup> Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 685) 85.



- (i) A serious violation or denial of the right of internal self-determination of the people concerned (through, for instance, a pattern of discrimination)
- (ii) Serious and widespread violations of fundamental human rights of the members of that people
- (c) There must be no (further) realistic and effective remedies for the peaceful settlement of the conflict'.<sup>764</sup>

In addition, Cassese pointed out that 'there must be gross breaches of fundamental human rights and the exclusion of any likelihood for a possible peaceful solution'.<sup>765</sup> While Borgen claimed that, any attempt to claim secession in order to trump territorial integrity must at least show that: '(a) the secessionists are a 'people' in the ethnographic sense; (b) the State from which they are seceding seriously violates their human rights; and (c) there are no other effective remedies under either domestic law or international law'.<sup>766</sup> Schachter articulated several possible conditions for triggering a right to remedial secession, which command varying degrees of support: (1) the claimant community should have a distinct identity, and inhabit a region that largely supports secession. (2) The community has been subjected to a pattern of systematic economic or political discrimination or (3) The central government has rejected reasonable proposals for autonomy and minority rights of the claimant community.<sup>767</sup> Two additional conditions have been suggested sometimes as important, but they are less supported and difficult to implement in practice: (1) 'secession should not be likely to result in armed conflict between the old and new State; and (2) 'the seceding areas should not have a disproportionate share of the county's wealth'.<sup>768</sup>

Thus, it can be concluded that, a remedial right to secession comes into existence when all these conditions are met:

- 1- Secessionists must qualify as a 'people', for the purpose of ascriptive self-determination.
- 2- There must be serious human rights violations, or a denial of self-determination.
- 3- Secession must be the only solution to remedy the injustice.

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<sup>764</sup> Dugard and Raic, 'The Role of Recognition in the Law and Practice of Secession' (n 746) 109.

<sup>765</sup> Cassese, *Self-Determination of People, A Legal Reappraisal* (n 25) 119.

<sup>766</sup> Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession, and Recognition' (n 244).

<sup>767</sup> O Schachter, *Micronationalism and Secession* (hereinafter Schachter 1995) 183.

<sup>768</sup> *ibid.*

However, this argument is somehow controversial and needs to be clarified. First, it is unclear who constitutes a people, as the meaning of 'people' is somewhat uncertain. Second, what constitutes a denial of self-determination or 'grave humanitarian situation' and what can be considered a remedy? Human rights violations must qualify as 'grave', serious', and such violations must be systematic, persistent and massive. Finally, and most importantly, it is unclear who decides: that secessionists are a 'people', that serious human rights violations and a denial of self-determination were committed, and that the other solution or 'remedies' are not effective or are unavailable.

Thus, even if the international community could agree on which conditions would trigger a right to remedial secession; 'there is as yet no effective mechanism for deciding whether or not the necessary conditions have been met or for adjudicating claims related to the exercise of the right'.<sup>769</sup> Rather, without objective criteria for determining which circumstances could trigger the right, any claim of such a right is likely to be disputed vigorously.<sup>770</sup> In addition, according to the ICCPR, the territorial integrity of governments representing the 'whole people' will be respected, however; what does this representation mean? Should a distinction be made between governments that treat their citizens badly, and governments that provide a measure of democracy and respect human rights?

Thus follows the remedial argument; secessionists should only claim to secede as a last resort remedy. This is because secession that would be incompatible with the right to self-determination as defined in the safeguard clause, which would prevent assistance from other, States and would cause non-recognition of the seceding entity.

In addition, following the collapse of the former Soviet Union and the former Yugoslavia, the EU countries have developed guidelines on the legitimate recognition of new States in Europe. Within the Europe Guidelines, *inter alia*, invoke 'the principle of self-determination,' 'rights of ethnic and national groups 'respect for the inviolability of all frontiers which can and minorities', and only be changed by peaceful means and by common agreement'.<sup>771</sup> The document spells out that, 'The Community and its Member States will not recognise entities which are the result of aggression'.<sup>772</sup> With this requirement, the EC

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<sup>769</sup> C B Ahrens, 'Chechnya, and the Right of Self-Determination' (2004) 42 Colo J Int'l L 575.

<sup>770</sup> *ibid*.

<sup>771</sup> 'Declaration on the `Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (n 464).

<sup>772</sup> *ibid*.

Guidelines follow the obligation to withhold recognition where an entity is created illegally.<sup>773</sup> In addition, new States must ‘have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations’.<sup>774</sup> However, because of the political nature of recognition, States are never under an obligation to grant recognition.<sup>775</sup> Therefore, Vidmar argued that, ‘there may be States, which remain non-recognised, sometimes virtually universally, on political grounds’.<sup>776</sup> Thus, the withholding of recognition is not always a matter of policy, but may be required by international law. This obligation thus makes the political act of recognition an act, which is at least partly governed by law, in the sense that States are not always free to grant recognition.

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<sup>773</sup> See for example, '*Namibia Opinion*' (n 125).

<sup>774</sup> 'Declaration on the `Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (n 464).

<sup>775</sup> Raic argued that ‘The obligation of non-recognition has a declaratory character in the sense that States are considered to be under a legal obligation not to recognise a specific situation which is already legally non-existent. Thus, the obligation of withholding recognition is not the cause of the fact that an illegal act does not produce the intended results, that is, legal rights for the wrongdoer. Non-recognition merely declares or confirms that fact and the obligation not to grant recognition prevents the validation or ‘curing’ of the illegal act or the situation resulting from that act.’ See, Raic, *Developments in International Law: Statehood and the Law of Self-Determination* (n 137) 105.

<sup>776</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 44.

### 3.3. Normative Justifications of the Right to Choose Secession

#### 3.3.1. Choice and Liberal Democratic Theories of Secession

According to choice theory, 'in some important sense, the State is a voluntary association into which citizens and groups of citizens can enter and form which they can exist by their own choice'.<sup>777</sup> Norman argued that this approach derives from an application or extension of the notion of liberal democracy, although it is also applied to concepts of nationalism and national self-determination.<sup>778</sup> Many theorists use the analogy of divorce, as one can choose, unilaterally, to divorce a person, so one can choose unilaterally to secede from a State. It is also assumed that the choice citizens' face is an informed and free choice between remaining in the parent State and withdrawing from it.

Moreover, it is argued that, self-determination through secession represents an extension of liberal democratic rights.<sup>779</sup> It is thus, incompatible to advocate one principle without defending the other. In this regard, Philpott proposed that, both plebiscitary right and democracy to secede are justified by the value of individual autonomy. He stated that, 'any group of individuals within a defined territory which desires to govern itself more independently enjoys a *prima facie* right to self-determination, a legal arrangement which gives it independent statehood or greater autonomy within a federal State'.<sup>780</sup> He added, 'that this *prima facie* right to self-determination is fundamental to the individual's 'political' self is accepted almost intuitively: 'Self-determination is inextricable from democracy; our ideals commit us to it'.<sup>781</sup> Copp, on the other hand demonstrated that a fundamental and equal respect for persons justifies both notions.<sup>782</sup> Whereas, Buchanan disagreed by stating that both views can be mutually invalidated since, in a democracy, it is not the case that each individual is self-governed; rather, individuals are governed by the majority of the

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<sup>777</sup> A Pavkovic and P Radan, *Creating New States: Theory and Practice of Secession* (Ashgate 2007) 201-202.

<sup>778</sup> W Norman, 'The Ethics of Secession as a Regulation of Secessionist Politics', in Margaret Moore (ed), *National Self-Determination and Secession* (OUP, 1998) 36-41.

<sup>779</sup> For more details see, Bruno Coppieters and Richard Sakwa, *Contextualizing Secession: Normative Studies in a Comparative Perspective* (OUP 2003) 72-73.

<sup>780</sup> D Philpott, 'In Defense of Self-Determination' (2008) 105 *Ethics* 352

<[http://nw18.american.edu/~dfagel/Philosophers/TOPICS/SelfDetermination/In Defense of Self-Determination\\_Phipott.pdf](http://nw18.american.edu/~dfagel/Philosophers/TOPICS/SelfDetermination/In%20Defense%20of%20Self-Determination_Phipott.pdf)>accessed 9 June 2014.

<sup>781</sup> *ibid.*

<sup>782</sup> Copp, 'International Law and Morality in the Theory of Secession' (n 682).

community.<sup>783</sup> Thus, it can be argued that the proponents of choice theory share these two ideas about the nature of the State and choice, they differ in their views on: first, the procedures of choice and second, the type of group entitled to the choice.<sup>784</sup> In other words, who is to decide on the competition of the overall group that should vote on the question of secession? Coppieters and Sakwa argued ‘equal respect for all individuals would indicate an all-encompassing group, rather than a select group which happens to correspond to the demanding secession in the first place’.<sup>785</sup>

One may argue that Beran’s liberal theories deals not with a loosely defined notion of self-determination but rather with the act of secession. He stated that, ‘liberal political philosophy requires that secession be permitted if it is effectively desired by a territorially concentrated group within a State and is morally and practically possible’.<sup>786</sup> In his view, democratic theory assumes the majority decision-making procedure as the only legitimate procedure through which secession becomes admissible. He argued that ‘for a group to be entitled to a territory and thus to the right to secede, it is sufficient: that the territory has been in common habitat for a few generations, that it does not depend on other groups for its everyday needs, and that a majority of the group decided to secede from the parent State’.<sup>787</sup> Accordingly, the group’s entitlement to territory is mostly derived from its historical settlement. The majority decision can be reached ‘through either their representative bodies or plebiscite’.<sup>788</sup> This theory ensures that all groups have equal rights; it also ensures that smaller groups have equal rights within the majority including the right to secession from the host State. Hence, the unity of the State has to be based on the willingness of its citizens to be part of it. Accordingly, groups, which have the right to occupy the territory on which they live, must have a collective right of self-determination, including secession.<sup>789</sup> Similarly, Buchanan explained that, ‘the liberal State is the agent of the people, and in liberal theory, it cannot plausibly be claimed that this agency relationship is irrevocable’. Therefore, all rights the State holds, including the right to territory, must be derived from the people whose agent it is.

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<sup>783</sup> A Buchanan, ‘Democracy and Secession’, in Margaret Moore (ed), *National Self-Determination and Secession* (OUP, 2003) 14–34.

<sup>784</sup> Pavkovic and Radan, *Creating New States: Theory and Practice of Secession* (n 777) 202.

<sup>785</sup> Coppieters and Sakwa, *Contextualizing Secession: Normative Studies in a Comparative Perspective* (n 779) 73.

<sup>786</sup> H Beran, ‘A Liberal Theory of Secession’ (1984) 32 *Political Studies* 21.

<sup>787</sup> *ibid.*

<sup>788</sup> *ibid.*

<sup>789</sup> *ibid.*

Thus, 'if a part of a State's population no longer wishes the present State to be its agent; it may terminate the agency relationship and remove itself from the State with its land'.<sup>790</sup>

However, Pavkovic and Radan argued that this theory would allow a 'continued change in the number of States and the unimpeded secession of wealthy territories and groups from poorer ones'.<sup>791</sup> Although, in 1998, Beran suggested that 'an international adjudicating body should ensure a just distribution of wealth between the remaining and the seceding State, without, however, impeding the secession of wealthy territories from poorer ones'.<sup>792</sup> Wellman on the other hand, demonstrated that 'any group choosing to secede has a primary right to secede if the seceding group and the rump State 'are capable of maintaining a secure and just political environment'.<sup>793</sup> He thus, dispensed with the requirement of a 'common habitat' and of an international body remedying economic injustice.

Thus, it can be argued that the choice theories restrict both the holders of the right of secession and the exercise of that right. For example, Philpott's theory restricts the rights of a group, which desires to enhance their political participation, for instance, through direct democracy.<sup>794</sup> Margalit's and Raz's, theory restricts the right to 'encompassing group', groups which are larger than families but share a common cultural (and which include nations).<sup>795</sup> While Miller's theory restricts 'the right to national groups because a nation-State provides a national/cultural background against which more individual choice about how to live can be made'.<sup>796</sup> In the same way, the entitlement of the territory appears to be derived either from a group's shared national or cultural characteristics or from a group's political preferences, such as, for enhanced political participation. Hence, Pavkovic and Radan argued, 'since the choice appears to be restricted to a specific group, the right to secession is denied to groups or individuals which do not possess the required characteristics or preferences; this breaches the liberal principle of equal rights'.<sup>797</sup> Thus, since the democratic procedure is not deemed important, all restricted choice theories (except for 'Margalit and Raz') also breach the principle of majoritarian decision-making.

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<sup>790</sup> A Buchanan, 'Toward a Theory of Secession' (1991) 101 *Ethics* 322.

<sup>791</sup> Pavkovic and Radan, *Creating New States: Theory and Practice of Secession* (n 777) 202.

<sup>792</sup> H Beran, 'A Democratic Theory of Political Self-Determination: For a New Political Order', in Percy B Lehning (ed) *Theories of Secession* (Routledge, London and New York, 2005) 33.

<sup>793</sup> C H Wellman, *A Theory of Secession: The Case for Political Self-Determination* (CUP, New York 2005) 36.

<sup>794</sup> Philpott, 'In Defense of Self-Determination' (n 780).

<sup>795</sup> Margalit and Raz, 'National Self-Determination' (n 696).

<sup>796</sup> D Miller, *On Nationality* (OUP 1995) 84-85.

<sup>797</sup> Pavkovic and Radan, *Creating New States: Theory and Practice of Secession* (n 777) 203.

Nonetheless, all choice theorists have insisted on avoiding certain harmful consequences of secession. For example, Margalit and Raz argued that a justified secession must avoid 'a large scale new minority problem in the new State, disrespect for the basic rights of all inhabitants of the new State and any substantial damage to the interests of inhabitants of other countries'.<sup>798</sup> For Philpott, 'secession should not augur evil consequences'.<sup>799</sup> However, unlike remedial theories, choice theories did not explain why some sorts of harms are acceptable and others not. It is also not clear, in the case of secession attempts, if harm is to be avoided or prohibited, who is to prohibit and enforce them?

In fact, democracy and liberalism are both, of course, open to challenge. Democratic theory is a view of legitimate power, and locates such power in the people, whereas the logic of liberalism is grounded in individual-related values, such as human rights or autonomy. In other words, democratic theory grants power to the people rather than the government, whether it is liberal or not, and it is reluctant to limit the power of democratic government, whereas, liberalism puts limits on the legitimate power of governments, whether they are democratic or not. In this regard, Gewirth argued that liberal-democratic theory 'seeks to show either that liberal premise about individuals' values entails democratic political conclusion, or that the collective value of democratic politics entails liberal conclusions'.<sup>800</sup> However, Freeman pointed out that, these approaches may lead to different conclusions. For example, 'liberal democrats, tend to favour the constitutional protection of individual rights against the decision of majorities, while democratic liberals prefer disputes about rights to be settled by democratic means'.<sup>801</sup>

It is true that the majority of modern national self-determination theories are democratic rather than liberal. Philpott for example, has proposed that 'self-determination was invented by liberal democrats, and its intellectual history is a discussion among them'.<sup>802</sup> He emphasised that self-determination has traditionally been a liberal democratic right. However, he argued that individual moral autonomy is the basis of both democracy and liberalism.<sup>803</sup> This theory is not very different from Beran's liberal theory, although to some extent it

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<sup>798</sup> Margalit and Raz, 'National Self-Determination' (n 696).

<sup>799</sup> Philpott, 'In Defense of Self-Determination' (n 780).

<sup>800</sup> A Gewirth, *The Community of Rights* (Chicago UP 1996) 318-348.

<sup>801</sup> Freeman, 'The Right to Self-Determination in International Political: Six Theories in Search of a Policy' (n 683).

<sup>802</sup> Philpott, 'In Defense of Self-Determination' (n 780).

<sup>803</sup> Philpott argued that, 'Democracy we may think of as the activity of governing oneself, of exercising one's autonomy in the political realm. It consists of two elements: participation and representation. See, *ibid.*

emphasises the democratic rather than the liberal. Particularly, as the right to national self-determination has been interpreted as the right to a democratic government.<sup>804</sup> The democratic case for national self-determination, however Cassese argued requires, a consideration of communitarianism.<sup>805</sup>

Accordingly, it can be argued that the liberal democratic theory of national self-determination is about a given right which primarily depends on the choice of the secessionist groups. Such groups generally make claims on separation due to preserving or asserting their identity and culture, to resist tyrant regimes and to save their lives under any legal institution. Consequently, the motivation of separatist movements is not achieving statehood, and the level of gradation is context-bound and may change accordingly. However, Moore argued that liberal approaches, unlike nationalist claims are mainly arguing about just distribution of goods and resources: 'they haven't become so responsive to the issues of group identity, membership in the State became so responsive to the issues of (inclusion/exclusion policies), or cultural biases of the State'.<sup>806</sup> Unlike Buchanan, Moore has a positive assessment of national and cultural identity. She argued that 'theory of secession should be concerned primarily with the legitimacy of nationalist claims and with the potential problems attached to conferring political rights on nations'.<sup>807</sup> Thus, it can be argued that, in practice both democratic and liberal theories of national self-determination, capture attention to the promotion of a right to secede that should be qualified and circumscribed in order to reduce further injustice. Accordingly, in light of these difficulties with the theory, the approach taken by Buchanan and Moore seems to be the correct one.

As a democratic theory in action, plebiscite theory is found in human rights treaties intended to have universal applicability. According to the plebiscite approach, all people are entitled to self-determination as a matter of right, regardless of their current political status.<sup>808</sup> Judge Dillard, in his separate opinion in *the Western Sahara* case, indicated that 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people'.<sup>809</sup>

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<sup>804</sup> Cassese, *Self-Determination of Peoples, legal Reappraisal* (n 25) 101-133.

<sup>805</sup> According to communitarianism theories, nations are communities, most people are born into their nation, and it forms part of their identity. Accordingly, if there is a right to self-determination, it must be a communal right. See, J Raz, *The Morality of Freedom*, (OUP 1979) 207-209. Also, Freeman, 'The Right to Self-Determination in International Political: Six Theories in Search of a Policy' (n 683).

<sup>806</sup> Margaret Moore, *The Ethics of Nationalism* (OUP 2001) 2.

<sup>807</sup> *ibid.*

<sup>808</sup> Ahrens, 'Chechnya, and the Right of Self-Determination' (n 769).

<sup>809</sup> *Western Sahara Case* [1975] ICJ Rep 12, Separate Opinion of Judge Dillard 122.



Under the plebiscite notion people have a right to determine their political status by means of a plebiscite or similar approach, even if that preference is outright independence. This understanding is broadly derived from the Human Rights Covenants (the covenants, consisting of the ICCPR and the ICESCR). ‘All people have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development’.<sup>810</sup> Accordingly, increasing numbers of secessionist groups have asserted that they, too, should have the right to declare independence, and to control territory, exercise autonomy, and enjoy all the prerogative statehood.<sup>811</sup> The plebiscite approach asserts their right to do so.

However, for the purpose of plebiscite theory it is not clear how people belonging to multiple sub-groups would be categorised. In this regard, Hannum enquired that, since the world is not divided neatly into homogenous enclaves, what should be done with the settler population?<sup>812</sup> In addition, what are we doing with a ‘people’ who desire self-determination but who also evidence an intention to discriminate against and deny the right to others within their territory?<sup>813</sup> Here the problem arises when the ‘people’ in question in part define themselves by a legacy of historical injustice and violence, which can lead to confrontation. Thus, allowing all ‘people’ to freely determine their political destiny would imply chaos and endless territorial disputes, and it would rather create perverse incentives.

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<sup>810</sup> See Art 1 (1) from ‘International Covenant on Economic, Social and Cultural Rights’ (n 20). And The International Covenant of Civil and Political Rights’ (n 19).

<sup>811</sup> Ahrens, ‘Chechnya, and the Right of Self-Determination’ (n 769).

<sup>812</sup> Hannum provided as examples Indian living in Fiji and Russian living in the former Soviet Republics. See, Hannum, ‘Rethinking Self-determination’ (n 151) 36-37.

<sup>813</sup> Suggesting that [in certain circumstances], the right of secession is paramount so long as that exercise of self-determination does not abridge the rights of other groups to self-determination. See, D A Valentine, ‘Note, The Logic of Secession’ (1980) 89 Yale L J 802.

### 3.3.2. The Territorial claim

It is argued that self-determination is not merely about creating a self-governing region or a new State; it also places the territory under a new kind of sovereignty. This raises a general question about self-determination: must a group establish a claim to land rather to its claim to a new government? In fact, both Brilmayer and Buchanan argued that a territorial claim is important and present methods for establishing it. For Buchanan, a group making a territorial claim must either (1) ‘show the ill-begotten nature of the larger State's dominion and demonstrate its own historical claim or (2) evince a threat of genocide, discriminatory redistribution of wealth, or the erosion of its distinctive culture’.<sup>814</sup> Whereas Brilmayer provided a ‘historical grievance’ as the most conjecturally appealing and direct justifications, for a group making a territorial claim.<sup>815</sup> In her opinion, ‘politically self-conscious, geographically concentrated ethnic groups that differ significantly from the rest of the population in the State in which they reside might reasonably claim to constitute the peoples at issue’.<sup>816</sup> In the case of Crimea’s controversial secession from Ukraine, she wrote that ‘what makes a secessionist claim successful in the eyes of the international community, indeed, in the eyes of the people fighting for secession, is the existing of a historical grievance over territory, no such claim can be made surrounding Crimea’.<sup>817</sup> Accordingly, she built her opinion upon a claim to territory; people must have a ‘legitimate historical claim’ to the territory.

It is notable that international law cannot be completely relied upon secession. As Brilmayer has rightly stressed, ‘secession is not simply the formation of a new political association among individuals or the repudiation by a group of persons of their obligation to obey the State's laws’.<sup>818</sup> She stated:

[The principle of self-determination of peoples suggests that every ‘people’ has a right to its own nation-State. While the positive law status of this norm and its applicability to the secessionist context are debatable, on a rhetorical level few deny the principle's appeal. Unfortunately, it seems directly contrary

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<sup>814</sup> Buchanan, *Secession: The Morality of Political Divorce Fort Sumter to Lithuania and Quebec* (n 53) 104-114.

<sup>815</sup> Brilmayer, ‘Secession and Self-Determination : A Territorial Interpretation’ (n 46).

<sup>816</sup> *ibid.*

<sup>817</sup> L Brilmayer, ‘Why the Crimean Referendum Is Illegal,’ *The Guardian* (London, 14 March 2014).

<sup>818</sup> Brilmayer, ‘Secession and Self-Determination : A Territorial Interpretation’ (n 46).

to another, equally venerable, principle of international law, which upholds the territorial integrity of existing States.]<sup>819</sup>

Brilmayer's framework focused on the relative legitimacy of competing territorial claims as the best way to resolve secessionist disputes. In her view, the legitimate foundation of the secessionist claim is the territorial sovereignty. This approach focuses on 'the degree of control exercised over a territory'.<sup>820</sup> In addition, she identified an active dispute between rights of people and territorial claims. Even so, the two concepts work together to compose a valid claim for the separate group, with the claim to territory being the core of the argument.<sup>821</sup> In Brilmayer's opinion, a distinct cultural argument does not itself represent a valid case for secession; without a claim to territory; the argument is illegitimate.<sup>822</sup> She argued that 'international law concentrates on the distinctiveness of the oppressed group, overlooking the importance of a valid claim to territory. She contended that 'the crux of the argument is not bilateral, between the distinct people and the State, rather it is a trilateral relationship combined of people, State and territory'.<sup>823</sup> From political theory, Brilmayer correctly rejected the notion that democratic principles support a right of ethnically distinct peoples to secede. Instead, she maintained, the critical question is whether such peoples have a legitimate historical claim to the land on which they seek to establish their new State.<sup>824</sup> She believed that 'all sufficiently cohesive and distinct sub-state ethnic groups could form their own State, if they have been a victim of historical injustice'.<sup>825</sup> She argued that every separatist movement is built upon a claim to territory, usually based on a historical grievance<sup>826</sup>, and that without a normatively sound claim to territory; self-determination arguments do not form a plausible basis for secession.<sup>827</sup> Brilmayer believed that, this approach resolves the tension between self-determination and territorial integrity 'because it

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<sup>819</sup> *ibid.*

<sup>820</sup> Mccorquodale, 'Self-Determination: A Human Rights Approach' (n 248).

<sup>821</sup> Brilmayer, 'Secession and Self-Determination : A Territorial Interpretation' (n 46).

<sup>822</sup> *ibid.*

<sup>823</sup> *ibid.*

<sup>824</sup> D Wippman, 'Secession, Territorial Claim, and the Indeterminacy of Determination' (2000) 25 YJ Int'l L 287.

<sup>825</sup> *ibid.*

<sup>826</sup> Brilmayer provided examples to illustrate her point, but which may also suggest why her thesis has not been widely adopted. As example of historical grievances that may justify secession, she mentioned the Soviet Union's forcible annexation of the Baltic States and European forcible acquisition of colonies in Africa and Asia. In each case, she noted that independence provided a remedy for a clear historical wrong, and a wrong of a particular kind: one that deprived the occupying and colonial states of a legitimate claim to sovereignty over the territory. See Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (n 46).

<sup>827</sup> *ibid.*

permits secession only when a State's sovereignty over the territory at issue is illegitimate, that is only in situations in which territorial integrity properly understood is not at issue'.<sup>828</sup>

In fact, there is no general agreement between philosophers of the arguments that secession is based on rights of self-determination and secession is founded on a territorial claim. It is argued that a focus on legitimacy of past territorial injustice may obscure other important issues.<sup>829</sup> Territorial sovereignty provides a more legitimate claim for secession than the right of people in the self-determination argument. Hence, the concept of territorial sovereignty does not permit the State to maintain control over territory, without legitimate ownership.<sup>830</sup> Territorial demands, asserted by secessionist groups that they have a valid claim to a specific territory exists; however, these claims must be based on solid grounds and the importance should be acknowledged in international law. Brilmayer pointed out those secessionist territorial claims based on historic grievances are more striking and self-evident.<sup>831</sup> However, in most cases, an assessment of historical wrong does not provide much practical help in resolving secessionist claims. Under this, we would assess territorial claims based on the law of the relevant period. Thus, only a few cases involve historical grievances such as Kosovo, Kurdistan and those involved in colonialism or the annexation of the Baltics. Those cases may generally be resolved without the reference to self-determination or secession.<sup>832</sup>

Generally, Brilmayer provided two different perspectives in evaluating secessionist claims. Traditionally, theorists had focused on the cohesiveness of the group asserting the claim, whether the group in question was a distinct 'people' in the religious, linguistic, or ethnic sense.<sup>833</sup> There is another issue however; the objective validity of the claim to a particular piece of territory espoused by the group.<sup>834</sup> She believed that the legitimacy of claims to a

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<sup>828</sup> Wippman, 'Secession, Territorial Claim, and the Indeterminacy of Determination' (n 824).

<sup>829</sup> Wipman argued that 'While territorial disputes invariably accompany separatist claims, the driving force behind such claims usually combines the opportunism of political leaders with the genuine fears of social, political, and economic marginalisation of vulnerable groups. Any attempt to resolve such problems by redrawing borders to fit a particular critical date reflecting a particular historical grievance is unlikely to succeed.' See, *ibid*.

<sup>830</sup> Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (n 46).

<sup>831</sup> *ibid*.

<sup>832</sup> When Iraq purported to annex Kuwait, its claim to territorial sovereignty over its new province was widely rejected, not on self-determination grounds but because Iraqi control over Kuwait was achieved by use of force in obvious violation of the UN Charter. In addition, even the Baltic States assert, with some justification, that their independence was not an example of secession, but rather the end of an unlawful occupation by the Soviet Union. See, Wippman, 'Secession, Territorial Claim, and the Indeterminacy of Determination' (n 824).

<sup>833</sup> Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (n 46).

<sup>834</sup> *ibid*.

particular piece of territory will depend on a historical claim to land.<sup>835</sup> Regardless of the identity of the group making the claim, ‘the claim itself might be more or less persuasive, depending on historical fact, legal and moral justifications, and so forth’.<sup>836</sup> Thus, all separatist claims are valid when they possess a legitimate claim to specific territory. The group must be able to explain why they should own this territory. Brilmayer concluded that ‘a fully grasped comprehension of territorial integrity would embrace the principle of self-determination. Secession disputes always focus on the quest for independent territory’.<sup>837</sup> In her view ‘the principle of territoriality defines who the members of a particular political entity are, thus membership is construed not along lines of identity, but residence’.<sup>838</sup>

Thus, this approach has explained when a self-determination seeking people should be allowed to form a new State, and cause a reduction of the parent State’s territory. However, the validity of the historical claim alone cannot explain the results of secessionist struggles over the past few decades. In other words, secessionist claims to independence are only convincing if the secessionist group can prove that their territory was illegally annexed into the parent State,<sup>839</sup> and they have a legitimate and historical claim over the territory. Nonetheless, in Kosovo, the international community did not regard this as an abstract theory to justify secession.<sup>840</sup> Accordingly, secession could be construed as consistent with the norm of territorial integrity because international law truly deals with secessionist claims by evaluating the people’s claim to a particular territory.<sup>841</sup> In addition, the problem with this approach is that it tends to ignore internal self-determination and focuses on the exercise of external self-determination. In many situations, secession or total independence from the parent State is not the only or even necessary means of exercising the right of self-

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<sup>835</sup> *ibid.*

<sup>836</sup> *ibid.*

<sup>837</sup> *ibid.*

<sup>838</sup> *ibid.*

<sup>839</sup> The Baltic States argued that they were illegally conquered by Soviet Union’ Tibet says the same about China; and Eritreans fought for decades to reserve their illegal annexation by Ethiopia. See, Brilmayer, ‘Why the Crimean Referendum Is Illegal’, (n 817).

<sup>840</sup> In Kosovo, the international community did not regard Kosovo’s incorporation into Serbia as an illegal annexation of territory precludes the applicability of this abstract theory to Kosovo’s secession. See, Sterio, *The Right to Self-Determination under International Law: Selfistsans, Secession, and the Rule of the Great Powers* (n 140) 177. She gave more examples such as, ‘The Bosnian Serbs, the Turks in Northern Cyprus, the Chechens, the South Ossetians, and the Abkhaz may have historical claims to their territories that are as sound as those asserted by the East Timorese, the Kosovar Albanians, and the South Sudanese. In addition, many of the successful peoples that have recently gained independence have significant minority groups living within their newly formed states; such minority groups could, in turn, assert perfectly legitimate historical claims to their bits of the new secessionist state.’ See, *ibid* 179.

<sup>841</sup> *ibid* 176.

determination, and there is a strong presumption against secession in non-colonial situations. In addition, Chaulia argued that the territorial approach does not discuss how the influence of great powers has affected the alteration of territory, either to accommodate a people or to preserve the territorial status quo of the parent State.<sup>842</sup>

Furthermore, it is assumed that the idea behind this approach is that the self-determining group is somehow taking land that belongs to the larger State. However, it is argued that the State does not own the territory, and that a person owns land. Brilmayer agreed with Buchanan when he said that, ‘the relationship between the State and its territory is not the same as that between a person and the land, which is in her private property’. In his opinion that the State governs, not owns, it is a matter of government not land, and that does not translate into a right of self-determination.<sup>843</sup> A group must still make a territorial claim by ‘demonstrating particular grievances and threats-discriminatory redistribution, cultural endangerment, and so on’.<sup>844</sup> For him these criteria establish the right of self-determination and secession. However, one can still ask, why are these important? Once the right to secede has been founded, why does an additional territorial claim have to be made? Would it not be subsumed with that claim of an entitlement to secede? In what context is land an issue beyond the sense in which government is an issue?<sup>845</sup>

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<sup>842</sup> Chaulia pointed out that ‘peoples that struggle for independence from strong, powerful states will not succeed because “large and powerful countries with stable polities such as Russia, China, and India can defend their territorial integrity and are unlikely to become candidates for Kosovo-type challenges.” See, S Chaulia, ‘A World of Selfistans? After Kosovo’s Declaration of Independence, Is the World Heading toward a Proliferation of New States?’ (*Foreign Policy In Focus*, 2008) <[http://fpif.org/a\\_world\\_of\\_selfistans/](http://fpif.org/a_world_of_selfistans/)> accessed 17 February, 2014.

<sup>843</sup> Buchanan, *Secession: The Morality of Political Divorce From Sumter to Lithuania and Quebec* (n 53) 108.

<sup>844</sup> *ibid.*

<sup>845</sup> For more details see, Philpott, ‘In Defense of Self-Determination’ (n 780).

### 3.3.3. The theoretical justifications for constitutional secession

The section will address arguments about how the right of secession should be constitutionalised. Should there even be any constitutional right of secession at all? To this end, an assessment of arguments both for and against constitutionalising secession will be made.

Some countries with secessionist movements appear to have been influenced by prevailing liberal democratic doctrines, when it comes to the issue of inserting a right of secession into their constitution. Some countries have affirmed the right of secession, and improved measures how this right should be exercised, such as the constitution of Ethiopia and Austria.<sup>846</sup> On the other hand, there are countries that are potentially or actually affected by secessionist movements such as, China, Georgia, Moldova, Romania, Russia, Slovakia, Spain, Sri Lanka, and Ukraine, and they have been resolutely opposed to the notion. They declare their States to be indivisible, and explicitly prohibit secession. Some other countries are consulting a range of experts to help guide them. For example, the government of Canada consulted with noted Rawlsian political philosopher and secession scholar Allen Buchanan on the Supreme Court of Canada's handling of the constitutionality of secession and its relation to liberal democratic political values.<sup>847</sup> In relation to the territorial integrity of Quebec in the event of possible accession of sovereignty, the five experts, Frank, Shaw, Higgins, Pellet and Tomuschat have concluded that 'in the case of Canada and Quebec, 'the territorial integrity of the latter is guaranteed before independence by the constitutional rules of Canada, and would be after a possible sovereignty by the well-established and peremptory principles of general international law. There is no room for any intermediate situation in

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<sup>846</sup> Article 39(1) of the Ethiopian Constitution states that 'every nation, nationality, and people in Ethiopia has the unconditional right to self-determination, including the right to secession'. See, 'Article (39) 1 of the Ethiopian Constitution' <[http://www.africa.upenn.edu/Hornet/Ethiopian\\_Constitution.html](http://www.africa.upenn.edu/Hornet/Ethiopian_Constitution.html)>accessed 20 February 2014. The current Ethiopian Constitution in fact includes such a right to secede that requires not only two super-majorities in favour of secession, but also a waiting period. See further, K Roepstorff, *The Politics of Self-Determination* (Routledge 2013) 106-107. Moreover, The Austrian Federal Constitution states that, 'A change in the federal territory, which is at the same time a change in State territory, just as the change of a State boundary within federal territory, can, apart from peace treaties, only be effected by corresponding constitutional laws of the Federation and the State whose territory undergoes change'. The Federal government determines the secession referendum question and the national population (including both the seceding and non-seceding groups) votes on the question. See, "Article 3 of The Austria Constitution" <[http://www.servat.unibe.ch/icl/au00000\\_.html](http://www.servat.unibe.ch/icl/au00000_.html)>accessed 20 February 2014.

<sup>847</sup> A Buchanan, 'The Quebec Secession Issue: Democracy, the Rule of Law, and Minority Rights,' paper presented for Department of Intergovernmental Affairs, Office of the Privy Council, Government of Canada, 2000.

which different rules would apply'.<sup>848</sup> Crawford and Wildhaber, on separate opinion, have denied that 'the right carries with any right to unilateral secession from an independent State, in particular, for those whose rights to democratic participation within the State are respected on a bases of equality'.<sup>849</sup> In addition, both Albert and Shaw have emphasised that 'while the ability to exercise a choice undoubtedly lies at the very heart of the principle of the right to self-determination, it does not at all follow that sovereignty constitutes in every case one of the elements of this choice'.<sup>850</sup>

Gewirth argued that, democratic theory shows either that liberal premises about individual values entail democratic political conclusions or that the collective value of democratic politic entails liberal conclusions.<sup>851</sup> The two different approaches however may lead to different policy considerations. Liberal democrats, for instance, tend to favour the 'constitutional protection' of individual rights against the decisions of popular majorities, whereas liberal democratics prefer disputes about rights to be settled by democratic procedures.<sup>852</sup>

Liberal-democratic theory views the existence of a State, and in particular, a constitutional democratic State, as the necessary means for establishing a society that functions based on certain principles of justice.<sup>853</sup> This view of the State is the modern embodiment of the Hobbesian paradigm<sup>854</sup>: 'The State results from a social contract among the people themselves to be ruled by a sovereign monarch or democratic legislative body and membership in such State is permanent and irrevocable'.<sup>855</sup> As such, the probability of incorporating a legal right of secession into the constitutional framework of the State is highly problematic. Daniel McCarthy has explained that:

[The logic of liberal democracy is that there must be a supreme arbiter, the State, to uphold a universal set of rights. It follows from that that the State must be universal as well. If multiple arbiters are permitted in

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<sup>848</sup> A F Bayefsky (ed), *Self-Determination in International Law, Quebec and Lessons Learned, Legal Opinions Selected and Introduced by Anne Bayefsky* (Kluwer, The Hague 2000) 6-9.

<sup>849</sup> *ibid* 326.

<sup>850</sup> *ibid* 248.

<sup>851</sup> Gewirth, *The Community of Rights* (n 800) 311-341.

<sup>852</sup> Freeman, 'The Right to Self-Determination in International Political: Six Theories in Search of a Policy' (n 683).

<sup>853</sup> A Kreptul, 'The Constitutional Right of Secession in Political Theory and History' (2004) 17 *Journal of Libertarian Studies* 39.

<sup>854</sup> The Hobbesian paradigm involves a contract among "egoistically motivated individuals" within a state of nature who unanimously consent to transfer their individual sovereign wills to that of a third-party ruler. See, *Ibid*.

<sup>855</sup> *ibid*.



the world, if there are other states (or non-states) with different procedures and values, then the authority of the liberal democratic State is in question. For the same reason, liberal democracy cannot permit secession].<sup>856</sup>

John Rawls<sup>857</sup> on the other hand, has another view; he wrote of distributive justice, where individuals participate in a hypothetical contract to form the 'basic structure of society'. A constitutional democratic State, according to Rawls, must necessarily be a 'just state' since it is the only kind of political organisation that can protect and secure basic human and political rights. He further added, 'a constitutional democracy possesses the institutional structure required to distribute the economic products of society in such a way that the only permissible inequalities are those that result in providing a minimal standard of living to the least well-off members of society'.<sup>858</sup>

In addition, since a constitutional democratic State's jurisdiction depends on secure territory, Buchanan treated the indefinite preservation and maintenance of the State's territorial integrity under modern international law as a fundamental political value.<sup>859</sup> In this regard, he derived a strong presumption against secession, rebuttable only by oppression imposed by the State or gross human right violations. Here, for Buchanan, the primary utility of preserving the territorial integrity of perfectly just constitutional democracies is to ensure the 'effective exercise of political authority over those within it' because 'all citizens have a morally legitimate interest in the integrity of political participation'; he considered territorial integrity as vital to the enforcement of constitutional democracy.<sup>860</sup> Scott Boykin, by contrast argued that 'because only persons have the ability to determine the legitimacy of the State's jurisdiction over territory, once a group of persons has rejected such jurisdiction through an act of secession, any claim by that State over territory will be dismissed'.<sup>861</sup> Daniel Philpott has proposed the additional argument that 'individual moral autonomy is the basis of both liberalism and democracy'.<sup>862</sup> He argued that 'once a group demonstrates a grievance with the existing State and a right of secession is established, it makes no sense to require the

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<sup>856</sup> D McCarthy, 'Who Wants to Die for Liberal Democracy?' (*Lew-rockwell.com*, 30 October 2001) <<http://www.lewrockwell.com/dmccarthy/dmccarthy22.html>> accessed 25 May 2013.

<sup>857</sup> J Rawls, *A Theory of Justice* (rev edn, Cambridge, Mass: HUP 1999) Chap 1-3.

<sup>858</sup> *ibid.*

<sup>859</sup> Kreptul, 'The Constitutional Right of Secession in Political Theory and History' (n 853).

<sup>860</sup> Buchanan, 'Theories of Secession' (n 600).

<sup>861</sup> S Boykin, 'The Ethics of Secession', in David Gordon (ed), *Secession, State & Liberty* (Transaction Publishers, New Brunswick 1998) 76.

<sup>862</sup> Freeman, 'The Right to Self-Determination in International Political: Six Theories in Search of a Policy' (n 683).

group to make an additional claim to the territory in question before the secession of both persons and territory can be fully achieved'.<sup>863</sup> Thus, liberal democrats consider the world's constitutional democracies as real-world examples of the 'perfectly just state', in which secession would not be justified or even thought desirable.<sup>864</sup> Accordingly, in light of these difficulties with the theory, the approach taken by Buchanan and Philpott seems to be the correct one.

The obvious question is this: if these States are reasonably or perfectly just, what explains the emergence of secessionist movements in these very States? For example, countries like the United Kingdom, Spain, Italy, Germany, and even the United States, all have secessionist movements.<sup>865</sup> At present, most of these secessionist movements are politically weak, yet they exist nonetheless. Hence, the main problem faced by liberal democrats in the context of underplaying the secession option is to explain why secessionist movements emerge within perfectly just constitutional democracies.

### 3.3.3.1. Liberal democrats and constitutional secession

Liberal political theorists of secession are split on the issue of constitutionalising secession. Cass Sunstein, who argued against granting any constitutional right of secession has claimed that 'a right of secession would promote strategic behaviour by political subunits that are supposed to obediently carry out their democratic burden of providing the State with benefits necessary to carry out distributive justice'.<sup>866</sup> For example, economically rich regions like the Canadian province of Alberta would try to avoid the hard work of creating a healthy democracy by not supplying the democratic State with the economic resources necessary to dispense justice to the citizenry.<sup>867</sup> Sunstein believed that constitutionalising secession would further threaten 'constitutional pre-commitment strategies, in ways that both protect and constrain the excesses of majoritarian democratic politics'.<sup>868</sup> For him, 'if the right to secede

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<sup>863</sup> Philpott, 'In Defense of Self-Determination' (n 780).

<sup>864</sup> Kreptul, 'The Constitutional Right of Secession in Political Theory and History' (n 853).

<sup>865</sup> For more details on the principles of secession and existing secessionist movements, see Secession.Net <[www.secession.net](http://www.secession.net)> accessed 14 June 2014.

<sup>866</sup> C R Sunstein, *Designing Democracy: What Constitutions Do* (OUP, USA 2003) 102-104.

<sup>867</sup> *ibid.*

<sup>868</sup> Pre-commitment strategies refers to the 'set of rights entrenched within a constitution designed to insulate minority groups from majoritarian politics'. See, *ibid* 96-101.

exists, each subunit will be vulnerable to the threat of secession by the other'<sup>869</sup>, that would mean a disabling or disruption of the democratic process. Thus for a liberal democrat, the occurrence of multiple secession movements among subunits of a larger democratic State resulting from a constitutional secession right would spell political disaster. Therefore, Sunstein concluded that the best way to deal with secessionist demands is to rely primarily on the internal mechanism provided by constitutional democracy.<sup>870</sup>

In favour of constitutionalising the right of secession, many philosophers agree with Sunstein that a constitutional right to secession in democratic States should be avoided if at all possible because they believe that most Western-style democracies are already 'reasonably just'.<sup>871</sup> For Rawlsians, 'if most democratic States do a reasonably good job and guarantee minority rights<sup>872</sup> (distributive justice), as liberal democrats claim, then no moral reason exists to justify the secession of any groups of individuals from such a State.'<sup>873</sup> Norman has defended Sunstein's point of view about the pernicious effects of secessionist politics on democratic deliberation and political stability.<sup>874</sup> Norman gave several arguments as to why liberal democrats should or should not consider inserting a right of secession into a democratic constitution. In his opinion, a constitutional secession right is meant to act as a procedural means of forcibly keeping secessionists within the prevailing territory of the democratic State.<sup>875</sup> In the first place, assuming that secessionists are better off staying within the existing reasonably just democratic State, Norman suggested designing a secession procedure in such a way that it serves as a 'choking mechanism' for secession.<sup>876</sup> Such mechanisms according to Kreptul included 'enforcement of minority rights within a democratic State and the brutal suppression of minority or ethnic secessionist leaders in non-democratic States'.<sup>877</sup> Notably, Norman's

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<sup>869</sup> *ibid* 103.

<sup>870</sup> Internal mechanisms provided by constitutional democracy: 'Federalism checks and balances entrenchment of civil rights and civil liberties, and judicial review.' See, *ibid* 112.

<sup>871</sup> *ibid*.

<sup>872</sup> Both Norman and Weinstock use the term 'reasonably just' to describe a well-functioning Western-style liberal democracy analogous to Allen Buchanan's use of the term 'perfectly just.'

<sup>873</sup> Kreptul, 'The Constitutional Right of Secession in Political Theory and History' (n 853).

<sup>874</sup> Norman writes: 'The issue here is not whether secessionist politics is bad for democracy and justice, but rather, what can be done through the constitutional engineering of a multinational state to take away the incentives for minority leaders to engage in secessionist politics. See W Norman, 'Domesticating Secession', in Stephen Macedo and Allen Buchanan (ed), *Secession and Self-Determination* (NUP, New York 2003) 193-237.

<sup>875</sup> Wayne Norman, 'Secession and (Constitutional) Democracy', in F Requejo (ed) *Democracy and National Pluralism* (London: Routledge 2001) 4.

<sup>876</sup> Norman has in mind 'vanity secession', which he defines as 'secessions by groups lacking just cause.' 'As an example of this, one could think of a group of relatively well-off citizens within a democratic state who no longer consent to being economically exploited (taxed heavily) and who vote to secede and form their own government'. *ibid* 6-7.

<sup>877</sup> Kreptul, 'The Constitutional Right of Secession in Political Theory and History' (n 853).

‘choking mechanism’ ‘would establish a high threshold supermajority requirement, most likely a two-thirds vote in a secession referendum’.<sup>878</sup> Second, he argued that, constitutionalising a right of secession serves to ground an instrumental mechanism to minimise the chance of disruption and violence to the democratic process’. He recognised that, if there were no constitutional right of secession, a victory for secessionists in a referendum amounts to little more than the strengthening of the secessionists’ hand in a game of power politics’.<sup>879</sup> In other words, the constitutional right to secession should be treated as an essential institutional response to breakaway possesses and as compatible with constitutionalism.<sup>880</sup> In Norman’s opinion, ‘secessionists should not be given an advantage over the central government in claiming the legitimacy to secede in a situation in which there are no legal rules in place to govern secession’.<sup>881</sup> Thus, he argued it is better to have constitutional rules in place for secession than to have no rules at all. In addition, Norman makes a third argument for constitutionally entrenching a clause it would be ‘evidence that the State is united by consent and not force’.<sup>882</sup> Therefore, instead of concluding that a constitutional right of secession should be a right used by non-consenting minority groups to correct the injustice of non-consent, Norman ‘instead justifies the legal right to secede as a tool to strengthen the seceding group’s consent to the existing democratic State’.<sup>883</sup> Weinstock on the other hand, tries to rebut Sunstein’s theory that such a constitutional right would have unfavourable consequences. He argued that in ‘the case of constitutionalisation, potential secessionists would be tempted to use the threat of secession as the strategic tool of their politics’.<sup>884</sup> He reasoned for a legal right to secede, which is both moral and pragmatic.<sup>885</sup> On the one hand, legalising secession in his opinion, would present secessionists with ‘a cold and lucid cost/benefit analyses of seceding versus remaining in the existing State, giving them the difficult legal obstacles they would have to clear before they could successfully secede.’<sup>886</sup> On the other hand, he based his ethical discussion on the

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<sup>878</sup> Norman, *Secession and (Constitutional) Democracy* (n 875) 4.

<sup>879</sup> In Norman’s opinion ‘secessionists should not be given an advantage over the central government in claiming the legitimacy to secede in a situation in which there are no legal rules in place to govern secession.’ see, Norman, ‘Domesticating Secession’ (n 874) 198.

<sup>880</sup> Norman, ‘Secession and (Constitutional) Democracy’ (n 875) 5-6.

<sup>881</sup> *ibid.*

<sup>882</sup> *ibid.* In addition Norman argued that ‘Even in the democratic world, almost none of the existing national minorities ever gave their initial, democratic as-sent to their membership in the larger state; and few have had a formal opportunity to assent since. See Norman, ‘Domesticating Secession’ (n 874) 193-237.

<sup>883</sup> Kreptul, ‘The Constitutional Right of Secession in Political Theory and History’ (n 853).

<sup>884</sup> D Weinstock, ‘Constitutionalising the Right to Secede’ (2001) 9 *Journal of Political Philosophy* 182.

<sup>885</sup> D Weinstock, ‘Toward a Proceduralist Theory of Secession’ (2000) 13 *Can J L & Jurisprudence* 251.

<sup>886</sup> *ibid.*

argument that the 'participants to a constitutional contract are placed behind a national veil of ignorance.'<sup>887</sup> Because they do not know which side, they will fall as a national group within a multinational State. So that, he argued, they would not make secession too easy, because they would be forgoing advantages of democratic cooperation. On the contrary, they would not want secession made too hard, because if they were actually discriminated against, they would not be able to legitimately leave the remaining State. So that, he suggested that, 'a balanced right of constitutional secession would be desired, which would necessarily entail the imposition of procedural hurdles'.<sup>888</sup> Thus, Weinstock argued 'a carefully regulated right to secede actually removes some of the incentives which are presented to political actors in an unregulated State'.<sup>889</sup>

To conclude, it seems that liberal democrats are split on whether to constitutionalise a right of secession. Norman and Weinstock argued for legalising secession because it could serve to ruin the secession process itself. Whereas, Sunstein argued against a constitutional right of secession because he thinks that legalising a right of secession could be used to sabotage the democratic process. On the other hand, Norman like Buchanan holds that under certain circumstances and strict conditions it is both desirable and feasible to use constitutional principles to bring secession under the rule of law. However, Buchanan goes further to suggest that it may be important to supplement constitutional processes with international involvement. Accordingly, one must concede that, liberal democracy depends on the structure of the centralised State as the necessary means to carry out its values of egalitarianism and distributive justice. Hence, Kreptul argued that 'constitutional democracy is the best method to guarantee the universal and equal human rights of individuals and groups, as well as a free entry for all in the arena of democratic politics'.<sup>890</sup> Thus, no matter how liberal democrats drawback or argue the merit of constitutional secession, both arguments are derived from the same premise, protecting the territorial integrity of the democratic State. Accordingly, in light of these difficulties with the theory, the present author agrees with the approach taken by Buchanan and Norman when they insisted on having constitutional rules in place for secession and to supplement constitutional processes with international involvement.

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<sup>887</sup> *ibid.*

<sup>888</sup> Weinstock suggested some of the procedural hurdles 'include mandatory waiting periods between referenda and mandatory waiting periods between referendum calls and the actual vote, in order to prevent impulsive, public-opinion-driven secessions.' See, *ibid.*

<sup>889</sup> Weinstock, 'Constitutionalising the Right to Secede' (n 884).

<sup>890</sup> Kreptul, 'The Constitutional Right of Secession in Political Theory and History' (n 853).

Overall, constitutionalising rights of secession may serve as a strategy to prevent parties from issuing unjust blackmail. It may potentially overcome the problems that can lead to secession. It may undermine democratic equality, especially in a society already characterised by inequalities of wealth and power. This right will eventually incentivise secessionist incitement on the part of nationalist entrepreneurs, which may undermine political stability and obstruct ordinary politics. However, the existence of a constitutional right of secession gives no guarantee that secession could be particularly achieved in a legitimate and peaceable way. Because, such secession provisions can always be designed and influenced by the central government, in such a way that the secession of a political unit with constitutional status, like a State or province, is made virtually impossible. On the other hand, the government can always choose to use force against secessionists, to prevent them from the withdrawal of the State.

### 3.4. Remedial Earned Sovereignty (RES) as an alternative remedial approach to the right of self-determination

There are believed to be over fifty sovereignty-based conflicts throughout the world.<sup>891</sup> The majority of these conflicts entail a high degree of violence, and a number of these conflicts are associated with territory and self-determination.<sup>892</sup> The international community has generally failed to respond adequately to these conflicts, and in many instances may have participated in further violence. To remedy this, the international community is facilitating a new evolving process where sovereignty exists as a framework with a range of different sovereign statuses as part of the continuum.<sup>893</sup>

The international community realises the notion of 'sovereignty', but inherent difficulties exist with the term.<sup>894</sup> In the *Corfu Channel* case, Judge Alvarez pointed out that 'by sovereignty, we understand the whole body of rules and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States'.<sup>895</sup> Crawford on the other hand observed that, in its most modern usage, sovereignty is the term for the 'totality of international rights and duties recognised by international law, as residing in an independent territorial unit'.<sup>896</sup> The term Crawford argued, is not itself a right, nor is it a

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<sup>891</sup> Countries involved in violent sovereignty-based conflicts include for example Russia, China, Spain, France, the United Kingdom, India, Pakistan, Sri Lanka, Macedonia, Sudan, Israel, Indonesia, Papua New Guinea, Turkey, Mexico, Morocco, and the Philippines. See, Michael P Scharf and James R Hooper Paul R Williams, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach Of Earned Sovereignty' (2011) 31 *Denv J Int'l L & Pol'y* 349. In addition, [Over one third of the Specially Designated Global Terrorists identified by the US Department of Treasury are associated with self-determination movements. Of increasing concern is the globalization of terrorism arising from sovereignty-based conflicts in terms of methods, mission, and cooperation. For example, while the Tamil Tigers have limited their attacks to the Island of Sri Lanka, they are credited with the dubious accomplishment of perfecting a method of suicide bombing that has been widely replicated in other conflicts. Further, the chronic status of the Israel/Palestine conflict has fostered a wave of mission solidarity, resulting in the proliferation of dangerous Islamic groups who readily resort to terrorism as a means of political expression]. See, Williams and Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination' (n 74).

<sup>892</sup> See, 'US Department of Treasury, Office of Foreign Assets Control, Cumulative List of Recent OFAC Actions' (2002) < [Http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/OFAC-Recent-Actions.aspx](http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/OFAC-Recent-Actions.aspx) > accessed 25 February 2014.

<sup>893</sup> For more details see, P R Williams and K Heymann, 'Earned Sovereignty: An Emerging Conflict Resolution Approach' (2004) 10 *ISLA J Int'l & Com L* 437.

<sup>894</sup> L M Graham, 'Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination into Practice and into Peace' (2000) 6 *ILSA J Int'l & Comp L* 455. (Stating that redefining sovereignty will be "the defining issue in international law for the 21st century"). It is also argued that (discussing the conflict in the defining the term sovereignty and the implications of the definition) See, Hannum, *Autonomy, Sovereignty and Self-Determination The Accommodation of Conflict Rights* (n 174) 14-15.

<sup>895</sup> *Corfu Channel Case (U.K. v Albania)* (9 April 1949) ICJ Rep, Para 39.

<sup>896</sup> See, Crawford, *The Creation of States in International Law* (n 3) 32.

criterion of statehood; it is an attribute of States, not a precondition, ‘but a firmly established description of statehood’.<sup>897</sup> As a legal term, ‘sovereignty refers to the totality of powers that States may have under international law. Conversely, as a political term, its concepts are those of unrestricted authority and power and it is in such discourse that the term can be problematic’.<sup>898</sup> Similarly, Raič argued ‘denotes the totality of competences attributed to the State by the international legal system, that is, the State’s status of full international legal person’.<sup>899</sup> Hence, the term, as observed by Crawford is ‘a brief term for the State’s attribute of more-or-less plenary competence’.<sup>900</sup> On the other hand, Raič pointed out that, the term ‘independence’ ‘is often used as a synonym for State sovereignty, while the word independence is also employed to describe a criterion for statehood and *vice versa*’.<sup>901</sup> However, Brownlie argued that ‘if only for reasons of juridical clarity, it must be deemed favourable to use the term ‘independence’ as a requirement for the acquisition of statehood, and sovereignty as the legal incident’.<sup>902</sup> Thus, when one refers to a State as a ‘sovereign’ entity, Raič argued, ‘one in fact alludes to a full international legal person, that is to say, to an entity, which possesses statehood’.<sup>903</sup> Therefore, Crawford demonstrated that ‘it has correctly been observed that no further legal consequences attach to sovereignty than attach to statehood itself’.<sup>904</sup>

In addition, Krasner argued that the concept of sovereignty is not an ‘inseparable set of rules’ as we often witness it deployed to define the position of unrecognised entities; but it is a rather a more complex and evolutionary system for interactions between actors in international society.<sup>905</sup> His conclusion is illustrated in 2011 papers, the complexity of sovereignty as a historical concept within international relations, by identifying sovereignty as being far removed from representing a static, conventional norm. He wrote that:

[New rules could emerge in an evolutionary way because of trial and error by rational but myopic actors. However, these arrangements, for instance, international policing, are likely to coexist with rather

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<sup>897</sup> *ibid.*

<sup>898</sup> *ibid.* 33.

<sup>899</sup> Raič, *Statehood and the Law of Self-Determination* (n 254) 25-26.

<sup>900</sup> Crawford, *The Creation of States in International Law* (n 3) 32-33.

<sup>901</sup> Raič, *Statehood and the Law of Self-Determination* (n 254) 27.

<sup>902</sup> Brownlie, *Principle of Public International Law* (n 269) 76.

<sup>903</sup> Raič, *Statehood and the Law of Self-Determination* (n 254) 27.

<sup>904</sup> Crawford, *The Creation of States in International Law* (n 3) 33.

<sup>905</sup> S D Krasner, ‘Abiding Sovereignty’ (2001) 22 *Int’l PS Rev* 248. See also, Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (PUP 1999) 9-25 (Explaining the four meanings of sovereignty that Krasner describes. This section is concerned with what Krasner labels ‘International Legal Sovereignty’).



than supplant conventional sovereign structures. Sovereignty's resilience is, if nothing else, a reflection of its tolerance for alternatives].<sup>906</sup>

Accordingly, this 'tolerance for alternative' at the heart of the question of sovereignty reinforces some of the core hypotheses which propose that it is not the object (apropos sovereignty) which is of primary importance for solving the many theoretical problems concerning ambiguous state-like entities.

In many instances, either an entity is sovereign and independent, or it is not, and, therefore, has no sovereign rights.<sup>907</sup> Problems arise however because solutions to conflicts cannot turn on such a black-or-white distinction.<sup>908</sup> In fact, in the past few years, the nature of conflicts, has led to an expansion of the concept of sovereignty.<sup>909</sup> However, the propensity of international lawyers to adhere to a narrow understanding of the term sovereignty remains. Therefore, in conflict negotiations, the parties often have a difficult time understanding that a different level of sovereignty can be gained at varying phases, not necessarily always leading to total independence or statehood.<sup>910</sup> Simply, parties may walk away from negotiations, because they cannot get past the use of the term sovereignty.<sup>911</sup>

Today, sovereignty is evolving into a set of powers that may be granted and refused. Although, the traditional legal rules of sovereignty generally control, innovative approaches are emerging. The intensity and severity of sovereignty-based conflicts, their relationship to increasing levels of terrorism, and the lack of effective legal norms and principles have given rise to the need for a new approach to resolving sovereignty-based conflicts.<sup>912</sup> A new approach, called ' Remedial Earned Sovereignty' (RES) has evolved.<sup>913</sup> According to this approach, a self-determination seeking people must have demonstrated to the outside world that it is worthy of achieving statehood and that it has 'earned' its sovereignty. This approach

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<sup>906</sup> Krasner, 'Abiding Sovereignty' (n 905).

<sup>907</sup> (noting the absolute quality that some writers give to the term "sovereignty") see, Hannum, *Autonomy, Sovereignty and Self-Determination The Accommodation of Conflict Rights* (n 174) 15.

<sup>908</sup> Heymann, 'Earned Sovereignty For Kashmir: The Legal Methodology To Avoiding A Nuclear Holocaust' (n 77).

<sup>909</sup> Hannum, *Autonomy, Sovereignty and Self-Determination The Accommodation of Conflict Rights* (n 174) 26.

<sup>910</sup> Heymann, 'Earned Sovereignty For Kashmir: The Legal Methodology To Avoiding A Nuclear Holocaust' (n 77).

<sup>911</sup> (Observing that the inability to see beyond the legally accepted definition of sovereignty may have been at the root of many conflicts, such as Bosnia); Scharf further added that (noting the trouble caused by an inability to negotiate outside of the terms "independence" or "sovereignty"). See Michael P Scharf, 'Earned Sovereignty: Juridical Underpinnings' (n 217).

<sup>912</sup> Williams and Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination' (n 74).

<sup>913</sup> Scharf, 'Earned Sovereignty: Juridical Underpinnings' (n 75).

provides that, a people in a particular territory must show to the international community that it has already been ruled and administrated separately from its parent State, which has facilitated power sharing between the people and the parent State, and which has engaged in institution building and capacity-development for self-determination seeking people. Most importantly, such group must have shown that their central government is relatively weak and causing violence and unrest, and that its independence was needed to preserve or re-establish peace and security.

Accordingly, the idea of RES is that a breakaway entity does not merit recognition as a new State immediately after its separation or quest to separate from its mother State, but that such an entity needs to earn its sovereignty.<sup>914</sup> In other words, 'RES' implies that only those peoples who have struggled for independence through legitimate means, by engaging in responsible arrangement with the State, and that have proven to external States that they would be a reliable new sovereign partner, will ultimately become sovereign States. In other words, those people that have been classified as violent and that have arguably used illegal means to assure their independence, would not be able to benefit from RES, examples would be Chechnya, Northern Cyprus, and The Republic of Srpska. Accordingly, for a legitimate claim to statehood, people must have shown to the international community that they can function and behave as a good world citizen. That political entity should have sovereignty. Finally, such an entity must have enjoyed significant support from the international community mainly from the great powers. Thus, the role of super power States would be fundamental for a successful ES process, as they exert influence and pressure on the parent State to let go of secessionist people. 'RES' as a conflict resolution process demonstrates that a new player on the international scene needs to show to the outside world that it is worthy of achieving statehood and that it has earned its sovereignty. Today, the need of this approach is required, in part, to the irrelevance and inadequacy of existing international principles and legal norms, including the right of self-determination of peoples. As a way to facilitate status determination, RES can promote and ensure human rights, minority rights, and the creation of valid democratic structures. In other words, as a remedial approach to the external right of self-determination, RES can be considered as the most useful viable mechanism, based on the long-term success and minimization of short-term violence.

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<sup>914</sup> J R Hooper and P R Williams, 'Earned Sovereignty: The Political Dimension' (2003) 31 *Denv J Int'l L & Pol'y* 355.

In 2007, Malanczuk concluded that, although rooted in sources of international law, thus far the international community has only applied 'ES' prospectively in peace agreements and has not yet made such normative theories treaties or customary international law.<sup>915</sup> Since then, ES, as a conflict-resolution approach, has become a tool for resolving the centuries-old tension between self-determination and sovereignty by managing the devolution of sovereign authority and functions from a State to a sub-state entity.<sup>916</sup> As developed in recent State practice 'ES' as a technique for conflict resolution or management entails conditional and progressive devolution of sovereign powers and authority from a State to a sub-state entity under international supervision.<sup>917</sup> For example, the sub-state entity may acquire sufficient sovereign authority and functions, which will then enable it to seek international recognition. Alternatively, in others the sub-state entity may be granted sufficient authority and functions to enable it to operate within a stable system of internal autonomy.<sup>918</sup> The concept of 'ES' enables negotiation on both external and internal sovereign rights.<sup>919</sup> For example, the sub-state entity may not have the ability to defend itself externally or have sovereign immunity, but it does have the legal right to govern itself, by making laws, impose taxes, could sign international agreements, and be represented in international organisations.

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<sup>915</sup> Malanczuk, *Akehurst's Modern Introduction to International Law* (n 346) 48-56. (Outlining the requirements, which must be met before a legal standard can be considered customary international law, and providing an overview of additional sources of international law).

<sup>916</sup> P R Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (2003) 31 *Denv J Int'l L & Pol'y* 387.

<sup>917</sup> Williams and Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination' (n 74).

<sup>918</sup> Scharf further argued that 'Today, ES is a political approach that grew from the need to structure creative and workable solutions to conflicts arising from the tension between self-determination and sovereignty, it is well-founded in the most basic principles of international law. See, Scharf, 'Earned Sovereignty: Juridical Underpinnings' (n 75).

<sup>919</sup> Williams and Heymann have identified what the external and internal sovereignty may include. External sovereignty may include, the right to territorial integrity, the right to defend the state through the use of force, the right to govern by establishing, applying and enforcing law; Eligibility for international organisations; The capacity to act as a legal entity for owning, purchasing transferring property, etc, Grant of sovereign immunity for non-commercial activities and consular relations; Capacity to sign international agreements; The duty to respect other nations; and The obligation to abide by international law. On the other hand, a state or sub-state's internal governing rights may consist of Taxation; Determining governing structure and political policies; providing for social welfare; regulating the judicial system; Creating internal law; and managing state infrastructures. See, Williams and Heymann, 'Earned Sovereignty: An Emerging Conflict Resolution Approach' (n 893).

### 3.4.1. Debates on ‘sovereignty first’ approaches and ‘self-determination first’ approaches

Williams and Pecci argued that traditional approaches to resolve sovereignty based-conflicts can be characterised as either 'sovereignty first' approaches or 'self-determination first' approaches.<sup>920</sup> The 'sovereignty first' approach is based primarily upon the principle of sovereignty, territorial integrity and political independence.<sup>921</sup> Here, sovereignty is considered as the essential element of the political existence of a State, and forms the basis for international relations. Hence, Beitz argued that, sovereignty is the exclusive jurisdiction of a State to exercise political authority within its borders and to exercise all necessary rights to preserve its territorial integrity from internal and external threats.<sup>922</sup> This approach is often adopted by mediators for appeasing aggressor regimes, for example, the preference of the UN Secretary General for a negotiated outcome and his aversion to the use of force against aggression in the former Yugoslavia.<sup>923</sup> It is firmly rooted in the UN Charter provisions on peaceful settlement of disputes.<sup>924</sup> The ‘self-determination first’ approach is based on the legal principles relating to self-determination and the protection of human rights.<sup>925</sup> This approach is evolved within the context of decolonisation, is based upon the principle that dependent peoples are entitled to exercise self-determination.<sup>926</sup> Accordingly, ‘all self-identified groups with a coherent identity and connection to a defined territory are entitled to

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<sup>920</sup> Williams and Pecci, ‘Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination’ (n 74).

<sup>921</sup> *ibid.*

<sup>922</sup> Charles observed that a theory of international politics should include a revised principle of state autonomy based on the justice of a state's domestic institutions and a principle of international distributive justice. Specifically, the UN Charter recognises the centrality of sovereignty through its principle of non-interference, by virtue of which states are considered independent in all matters of internal politics and free to determine their political life without undue interference by other states. See, Charles R Beitz, *Political Theory and International Relations* (Princeton University Press, New Jersey 1979) 125. See also, UN Charter, Article (2) para 7. Expresses the principle of non-interference in relation with the domestic jurisdiction of member states and as a corollary of principle of sovereign equality of all members of the United Nations.

<sup>923</sup> For more details see, G A Geyer, 'How the Conscience of the West Was Lost,' in Stjepan G Mestrovic (ed), *The Conceit of Innocence: Losing the Conscience of the West in the War against Bosnia* (Texas A&M University Press 1997) 74.

<sup>924</sup> See, UN Charter, Chapter VI: 'Pacific Settlement Of Disputes'

<<http://www.un.org/en/documents/charter/chapter6.shtml>>accessed 17 June 2014.

<sup>925</sup> Williams and Pecci, ‘Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination’ (n 74).

<sup>926</sup> In comparison with Resolution 1514 that provided for independent statehood for people under colonial rule, but at the same time limited that right by emphasising the principle of territorial integrity of states, Resolution 1541 determined different options of full self-government for the people under colonial rule. Therefore, self-government was understood as a form of self-determination See, UNGA Res (1514) (XV) (n 94). And UNGA Res 1541 (XV) (n 137).

collectively determine their political destiny in a democratic fashion and to be free from systematic persecution'.<sup>927</sup> Self-government is generally achieved through the creation of an autonomy province within the parent State, or through secession in certain circumstances. In this regard, States eager to preserve their territorial integrity rely on the 'sovereignty first' approach, and secessionist movements rely on the 'self-determination first' approach. Examples from human rights abuses committed by parent States in the course of preserving their sovereignty and territorial integrity, the violation of Kurdish human rights in Iraq and Turkey, the Russian aggression in Chechnya, Southern Sudan, Kosovo, and Indonesia's brutal occupation of East Timor.

In fact, these two approaches have failed to provide acceptable options for structuring peaceful resolutions to conflicts based on claims of sovereignty. The problem with strictly adopting the 'sovereignty first' approach is that it can justify the actions of regimes that pursue unlawful action against their own people under the auspices of maintaining territorial integrity and sovereignty.<sup>928</sup> For example, the mantra of sovereignty has been used by States to shield themselves from international action resulting from human rights abuses committed as part of their attempts to stifle self-determination movements.<sup>929</sup> On the other hand, the 'self-determination first' approach can be criticised as well. The approach has been abused in the past and is often used by oppressed groups to justify violence, and sometimes outside self-determination context. In other words, the 'self-determination first' approach if it is to work needs to be dependent on the sub-state entity to support a claim for heightened autonomy or secession, and to justify the use of force to defend its people against the parent State.<sup>930</sup> For example, 'the mantra of self-determination has been used to justify the use of armed force, and frequently terrorism, by groups such as the Tamil Tigers, the Free Aceh Movement, the Moro Islamic Liberation Front, and the Jammu Kashmir Liberation Front in their efforts to achieve greater autonomy within or independence from the parent State.'<sup>931</sup> For that reason, the 'RES' approach seeks to bridge the inherent flaws with the self-determination first' approach and the 'sovereignty first' approach, and to create an opportunity to resolve the conflicts and reduce human rights violations.

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<sup>927</sup> See, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States (n 23).

<sup>928</sup> Williams and Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination' (n 74).

<sup>929</sup> *ibid.*

<sup>930</sup> *ibid.*

<sup>931</sup> *ibid.*

### 3.4.2. The concept of 'Earned Sovereignty'

The concept of 'earned sovereignty' was initially developed by the Public International Law and Policy Group (PILPG) and the International Crisis Group (ICG) in 1998, as a policy prescription and conflict resolution strategy for Kosovo. Then it has become a core element of the Rambouillet Peace Accords and UN Security Council Resolution 1244. Building on the remedial position, their 1998 report before of the NATO intervention, reasoned that Kosovars were entitled to heightened sovereignty because of past abuses by the Serbian Regime. However, they were required to 'earn full sovereignty at the end of an interim period by demonstrating their commitment to democratic self-government, to the protection of human rights, and the promotion of regional security'.<sup>932</sup> They required accordingly that the international community should intervene and oversee a three-to-five-year period of transition. During this transitional period, Kosovo would assume increasing levels of sovereign authority and functions, so long as it met certain conditions.<sup>933</sup> The approach was described as an 'intermediate sovereignty', thereafter; it was referred to as 'phased recognition', 'provisional statehood', 'conditional independence', 'supervised independence'.<sup>934</sup> Thereafter, a number of expert commissions and think tanks further developed the approach, including the Goldstone Commission for Kosovo, the Centre for Strategic and International Studies, the International Crisis Group and the current UN doctrine of Standards before Status. Accordingly, ES was refined in response to developments in Kosovo, seven contemporaneous 'sovereignty conflicts' also drew on elements of earned sovereignty in efforts to deal with their disputes.<sup>935</sup> Thus, through its application and development, the 'ES' approach competed for influence with the alternative approach of stability through accommodation and was shaped by the compromises inherent in the foreign policy decision-making process.<sup>936</sup>

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<sup>932</sup> Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (n 916).

<sup>933</sup> *ibid.*

<sup>934</sup> *ibid.*

<sup>935</sup> As it has been mentioned the territories in question were Serbia and Montenegro, Bougainville, Northern Ireland, East Timor, Bosnia-Herzegovina, Israel/Palestine, Kosovo, Sudan, and Western Sahara. For more details see, P R Williams, M P Scharf, J R Hooper, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach Of Earned Sovereignty' (2011) 31 *Denv J Int'l L & Pol'y* 349.

<sup>936</sup> Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (n 916).

ES is described as entailing ‘the conditional and progressive devolution of sovereign powers and authority from a State to sub-state entity under international supervision’.<sup>937</sup> Defined as comprising three core elements (shared sovereignty, institutional building, and a determination of final status), and three optional elements, phased sovereignty, conditional sovereignty and constrained sovereignty.<sup>938</sup> In addition, Williams and Heymann have defined ES as a conflict resolution process that creates an opportunity for the parties to agree on basic requirements that sub-state entity must meet during an intermediate phase in order to attain or discuss final status.<sup>939</sup> The need for this approach to solving sovereignty-based conflict is required, in part, to the irrelevance and inadequacy of existing international principles and legal norms, including the right of self-determination of peoples. In addition, as a way to facilitate status determination, ES can also promote and ensure human rights, minority rights, and the creation of valid democratic structures.

Heymann suggested that, as a form of conflict resolution, ES allows the parties to agree on basic requirements that the sub-state must meet before the parent State will grant various sovereign powers, such as the right to govern and sign international instruments.<sup>940</sup> Williams argued that, as a formula for progressive devolution of power, it could allow for greater negotiation power regarding democratic principles and the protection of human rights, because the sub-state is capable of exercising sovereign powers while ensuring democracy and human rights.<sup>941</sup> Moreover, ES could protect minority rights by conditioning the grant of full sovereignty or further grant of individual sovereign powers on the protection of these rights.<sup>942</sup> It also supports the building of feasible democratic structures for popular representation of the people.<sup>943</sup>

ES as a negotiated process has evolved without name or structure through its use by international negotiators and State parties to agreements. Examples given of recent precedents to support the argument that there is an emerging State practice and therefore, a

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<sup>937</sup> Williams and Pecci, ‘Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination’ (n 74).

<sup>938</sup> See generally, Williams, Scharf and Hooper, ‘Resolving Sovereignty-Based Conflicts: The Emerging Approach Of Earned Sovereignty’ (n 935).

<sup>939</sup> Williams and Heymann, ‘Earned Sovereignty: An Emerging Conflict Resolution Approach’ (n 893).

<sup>940</sup> Heymann, ‘Earned Sovereignty For Kashmir: The Legal Methodology To Avoiding A Nuclear Holocaust’ (n 77).

<sup>941</sup> Williams, ‘Earned Sovereignty: The Road to Resolving the Conflict over Kosovo’s Final Status’ (n 916).

<sup>942</sup> *ibid.*

<sup>943</sup> Heymann, ‘Earned Sovereignty For Kashmir: The Legal Methodology To Avoiding A Nuclear Holocaust’ (n 77).

legal basis for ES, range from peace agreements in Northern Ireland and East Timor, Kosovo and Bosnia-Herzegovina,<sup>944</sup> the Western Sahara (the Baker Plan)<sup>945</sup> and the peace proposal for Israel/Palestine the so called (Roadmap).<sup>946</sup> In Kosovo, the ('UNMIK') supported the use of ES when it laid out its 'standards before status approach'. The two central statements of the approach were that a return to Serbian control was not in Kosovo's future, and that UNMIK would establish a set of 'benchmarks' that Kosovar institutions must meet'.<sup>947</sup> Thus, in recent years, Scharf, Hooper and Williams argued that, the increasing number of States and sub-state entities willing to consider a process of ES for resolving self-determination conflicts is corresponded by the increasing ability of the international community to help States in institution building and transfer of sovereign powers and authority.<sup>948</sup> For example, the UN with the creation of mechanisms to ensure the protection of human rights and implementation of the rule of law, while the EU is now possesses a significant experience with the creation of new State institutions.

Overall, the new approach of 'RES' seeks to address the inherent flaws with the 'sovereignty first' approach and the 'self-determination first' approach.<sup>949</sup> Accordingly, the idea of the concept of 'ES' is that a break-away entity does not merit recognition as a new state immediately after its separation or quest to separate from its mother state, but that such an entity needs to earn its sovereignty. In other words, the break-way entity must demonstrate to the outside world that it is capable of functioning as independent State, that would be a reliable sovereign partner, and that it is worthy of recognition.

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<sup>944</sup> 'Interim Agreement for Peace and Self-Government in Kosovo' (Rambouillet Accords), UN Peacemaker (23 February 1999)" <<http://www.jstor.org/stable/info/10.2307/2535706>> accessed 16 June 2014.

<sup>945</sup> 'Report of the Secretary-General on the Situation Concerning Western Sahara', UN Doc S/2003/565, 23 May 2003 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/356/98/IMG/N0335698.pdf?OpenElement>>accessed 16 June 2014.

<sup>946</sup> 'A Performance-Based Roadmap To A Permanent Two-State Solution To The Israel-Palestinian Conflict' <<http://www.un.org/news/dh/mideast/roadmap122002.pdf>>accessed 16 June 2014.

<sup>947</sup> The UN Mission in Kosovo's emphasised that Kosovo must reach the standards demanded by its people and the international community before the parties can reach any determination regarding its future status. See, 'Implementing Standards before Status Policy Core Political Project, UN Kosovo Mission' (6 February 2004) UNSC/7999 <<http://www.un.org/News/Press/docs/2004/sc7999.doc.htm>>accessed 3 March 2014.

<sup>948</sup> Scharf, Hooper and Williams, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty' (n 935).

<sup>949</sup> P S Hadji, 'The Case of Kurdish Statehood in Iraq' (2009) 41 Case W Res J Int'l L 513.



### 3.4.3. Earned sovereignty elements

As a dispute settlement approach, ES seeks to promote peaceful coexistence between a State and sub-state entity by establishing an acceptable power sharing arrangement, and promoting democracy and institution building in a disputed territory. Most importantly, ES may prevent the majority in a State from using a guise of State sovereignty and territorial integrity to justify committing horrible acts against the sub-state entity or the minority. It may also address some of the inherent problems with strict application of the self-determination first approach. This approach has been refined as an inherently fixable process implemented over a different period. Accordingly, as mentioned earlier ES is defined as comprising three core elements, shared sovereignty, institution building, and a determination of final status.<sup>950</sup> It may also encompass three optional elements: phased sovereignty, conditional sovereignty, and constrained sovereignty.<sup>951</sup> These optional elements have been employed to tailor the ES process to the particular needs of the parties and to the exceptional circumstances of each conflict, such as conditional and constrained sovereignty.<sup>952</sup> Thus, as a peace process ES can be implemented in these ways:

First: this approach endorses the international supervision of the self-determination unit both before and after sovereignty is achieved. In Kosovo, in pre-sovereignty phase ES prescribes an internationally monitored initial period of ‘shared sovereignty’ between the sub-state and the parent State or international institution.<sup>953</sup> In this stage, the State and sub-state entity may exercise sovereign authority and function over a defined territory.<sup>954</sup> The international community may occasionally exercise sovereign authority and functions rather to or in lieu of the parent State.<sup>955</sup> Hence, Williams argued that, an international institution will be

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<sup>950</sup> Scharf, 'Earned Sovereignty: Juridical Underpinnings' (n 75). Also, Williams and Pecci, 'Earned Sovereignty : Bridging the Gap Between Sovereignty and Self-Determination' (n 74).

<sup>951</sup> *ibid.*

<sup>952</sup> Conditional sovereignty may be applied to the accumulation of increasing sovereign authority and functions by the sub-state entity, or to the determination of the sub-state entity's final status. For example, in 2002, the UN had determined that before Kosovo could undertake final status negotiations to secure independence it must meet a number of benchmarks or standards. Whereas constrained sovereignty, indicates to the continued limitations on the sovereign authority and functions of new state, such as continued military presence and/or international administration, and limits on the right of the state to undertake territorial association with another states. For more details see, *ibid.* Also, Hooper and Williams, 'Earned Sovereignty: The Political Dimension' (n 914).

<sup>953</sup> Comprehensive Proposal for the Kosovo Status Settlement, (26 March 2007) UN Doc S/2007/168, para 5.

<sup>954</sup> Williams and Heymann, 'Earned Sovereignty: An Emerging Conflict Resolution Approach' (n 893).

<sup>955</sup> Scharf, Hooper and Williams, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty' (n 935).

responsible for monitoring the parties' exercise of their authority and functions.<sup>956</sup> Whereas, in the post-sovereignty phase, Williams and Pecci demonstrated that, the element of so-called constrained sovereignty that may be deployed to place 'limitation on the sovereignty authority and functions of the new State'.<sup>957</sup> For example, the Roadmap plan establishes a timetable for the possible creation of an independent Palestinian State subject to an enhanced international role in monitoring transition with the active, sustained, and operational support of the Quartet.<sup>958</sup> In Kosovo, the Report of the Special Envoy of the Secretary-General has recommended that 'Kosovo Status should be independence, to be supervised for an initial period by the international community'.<sup>959</sup> More radically, Drew argued that, the 2007 'Comprehensive Proposal for the Kosovo Status Settlement' 'set forth a basic formwork for governing a post-independent Kosovo, the implementation of which is to be monitored'<sup>960</sup> by 'international civilian military presence'.<sup>961</sup>

A second feature of the ES approach is the optional element of 'conditional sovereignty', or 'conditional independence'. Hopper and Williams argued that, sovereignty refers to the fact that the sub-state entity must meet certain benchmarks, such as protecting human rights, developing democracy, respecting the rule of law, and supporting regional stability, before its sovereignty may be increased.<sup>962</sup> In Kosovo, the Independent Commission of Kosovo Report and encapsulated in UNMIK's catchy (in popular) slogan, 'Standards before Status'.<sup>963</sup> This approach renders the exercise of self-determination conditional on self-determination unit meeting certain benchmarks such as 'halting terrorism, instituting rule of law, protecting minority rights, and human rights, and promoting regional stability'.<sup>964</sup> It rather suspends any discussion of final status until after certain standards are met.<sup>965</sup> For example, under the

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<sup>956</sup> Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (n 916).

<sup>957</sup> Williams and Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination' (n 74).

<sup>958</sup> See, 'A Performance-Based Roadmap To A Permanent Two-State Solution To The Israel-Palestinian Conflict' (n 946). See also, Williams and Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination' (n 76).

<sup>959</sup> UN Doc S/2007/168, para 5 (n 953).

<sup>960</sup> C Drew, 'The Meaning of Self-Determination: The Stealing of the Sahara Redux?' In Karin Arts and Pedro Pinto Leite (ed), *International Law And The Question Of Western Sahara* (Oporto 2007) 99.

<sup>961</sup> UN Doc S/2007/168, para 6.

<sup>962</sup> Hooper and Williams, 'Earned Sovereignty: The Political Dimension' (n 914).

<sup>963</sup> Benchmarks relating to: democratic institutions, sustainable returns and the rights of communities, freedom of movement, the rule of law, the economy, property rights; dialogue with Belgrade; and the Kosovo protection corps. For more details see, Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (n 916).

<sup>964</sup> Hooper and Williams, 'Earned Sovereignty: The Political Dimension' (n 914).

<sup>965</sup> Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (n 916).

Roadmap, 'progress towards the creation of an independent Palestinian State depends on the Palestinians meeting a certain conditions relating to the cessation of violence and terrorism, constitutional reform, restructuring of the security services, elections, and so forth'.<sup>966</sup>

A third, way in which the approach of ES can be implemented is the determination of final status for the sub-state entity, involves either a referendum to determine such final status, or a negotiated settlement between the mother-state and the sub-state entity, with the help of international mediation.<sup>967</sup> William and Pecci argued: 'The options for final status range from substantial autonomy to full independence. This decision is generally made through either some sort of referendum or instructed negotiations, but invariably involves the consent of the international community'.<sup>968</sup> Examples of peace agreements, which suggest referenda, include those for, Montenegro, Sothern Sudan, as well as the Baker Plan for Western Sahara. Examples of agreements, which provide for structured negotiations include, the Road Map, and the Rambouillet Accord in relation to Kosovo.<sup>969</sup> Accordingly, Drew argued that, a review of the final status determination of the peace agreements and proposal, which endorse, and were endorsed by, an ES approach reveals a 'tipsy topsy' 'world legally speaking, in which entities with no recognised right to external self-determination have been granted a right to a referendum including independent statehood as an option'.<sup>970</sup> For instance, under the Road Map, the Palestinians are recognised as entitled to the fullest expression of the right to self-determination under international law are conditionally entitled to negotiate a settlement that 'will result in the emergence of an independent, democratic, and viable Palestinian State'.<sup>971</sup> In many instances, the parties may agree upon final status during the initial stages of the process, such as in East Timor, whereas in others such as Kosovo it may be determined after a period of shared sovereignty and institutional building. Ultimately, the final status will be determined by a referendum, it may also be determined through a negotiated settlement between the State and sub-state entity, often with international

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<sup>966</sup> 'A Performance-Based Roadmap To A Permanet Two-State Solution To The Israel-Palestinian Conflcit' (n 946).

<sup>967</sup> Hooper and Williams, 'Earned Sovereignty: The Political Dimention' (n 914).

<sup>968</sup> Williams and Pecci, 'Earned Sovereignty : Bridging the Gap Between Sovereignty and Self-Determination' (n 76) .

<sup>969</sup> *ibid.*

<sup>970</sup> Drew, 'The Meaning of Self-Determination: The Stealing of the Sahara Redux?' (n 960) 99-100.

<sup>971</sup> 'A Performance-Based Roadmap To A Permanet Two-State Solution To The Israel-Palestinian Conflcit' (n 946).

mediation.<sup>972</sup> Thus, once the final status has been determined, Hooper and Williams argued, ‘constrained sovereignty applies limitations on the sovereign authority and functions of the new State, such as continued international administration and/or military presence, and limits on the right of the State to undertake territorial association with other States’.<sup>973</sup> Williams and Pecci pointed out that, ‘the core and optional elements of earned sovereignty should be adopted by mutual consent’. However, they acknowledged that, in some cases, as in the case of Kosovo the international community may impose these elements against the will of the host State or sub-state entity.<sup>974</sup>

The supporters of ES argue that, the consideration of sovereign rights as individual negotiating points and the ability to consider and discuss the elements allows the flexibility in negotiation to solve this problem.<sup>975</sup> In addition, it is clear that the approach requires conclusive discussions regarding the powers the sub-state will initially hold, the speed with specified powers would devolve, and the determination of final status.<sup>976</sup> For instance, it is obvious that the immediate discussions on Kosovo’s status was affected Serbia and this would potentially create an opportunity for reigniting violence.<sup>977</sup> The second argument against the use of ‘ES’ is the domino theory. States and scholars worry that allowing phased sovereignty and conditional independence for sub-state entity would induce a fight for similar results in other multi-ethnic State. The Kosovo Commission maintained, however, that conditional independence in Kosovo would not give rise to the domino theory, arguing that ‘ES’ is a legal rule that simply is not applicable to every fact situation.<sup>978</sup> Consequently, without parameters in each case, it is too easy for the agreement to cause further conflict in the future.<sup>979</sup> Moreover, it is argued that, from a traditional self-determination perspective the method of final status determination ignores the distinction between the different categories of self-determination claims and beneficiaries under international law, between

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<sup>972</sup> Scharf, Hooper, and Williams, ‘Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty’ (n 935).

<sup>973</sup> Hooper and Williams, ‘Earned Sovereignty: The Political Dimension’ (n 914).

<sup>974</sup> Williams and Pecci, ‘Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination’ (n 891).

<sup>975</sup> Williams and Heymann, ‘Earned Sovereignty: An Emerging Conflict Resolution Approach’ (n 893).

<sup>976</sup> Independent International Commission on Kosovo, *Why Conditional Independence? The Follow-up of the Kosovo Report* (Global Reporting Books 2001) 28-31. Addressing the three main arguments the Kosovo Commission anticipated from critics of conditional independence). The third argument concerns the ability to get the proposal past Russia’s U.N. Security Council veto.

<sup>977</sup> *ibid* 29-31.

<sup>978</sup> *ibid* 30. (Responding to the domino theory argument and maintaining that other states cannot necessarily make the same legal claims of systematic abuse of human rights that existed in Kosovo).

<sup>979</sup> Heymann, ‘Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust’ (n 77).

decolonisation, alien occupation, and secession; between the Palestinians and Sahrawi and the Kosovars.<sup>980</sup> Consequently, there is an erosion of legal entitlements.

Therefore, in order to overcome the weakness of ES the collaboration between the party seeking independence and the parent State is required. In addition, as explained earlier that 'remedial secession' provides a theoretical framework for evaluating the root causes of the governance and sovereignty problems emanating from the gross violations of human rights, and the violation of internal rights to self-determination including the abolition of autonomy. However, remedial secession provides limited guidance in resolving the problems it so accurately predicts.<sup>981</sup> This gap is filled by ES, which identified six elements for analysis. Although, they overlap Bolton and Visoka argued, 'a cautious application of these elements to Kosovo facilitates a comprehensive analysis of the different phases and shifting focus of the international administration of Kosovo, including supervised independence'.<sup>982</sup> Nevertheless, ES does not address violations of internal self-determination and human rights abuses, these conditions constitute the root of the problem that ES aims to resolve.

Accordingly, the causal factors and conclusion of sub-state's entity path towards successful legitimate independence can be explained by what we describe as 'Remedial Earned Sovereignty' (RES). Under this deviant approach, people in a sub-state entity may have to earn their internal sovereignty first. This refers to the efforts of people within a sub-state entity to comply with all conditional mechanisms to achieve the statehood capacities and to engage in good faith with final status negotiations. Eventually, this can be facilitated externally by independent sovereign States by the act of recognition. Externally, designed sovereignty relates to the set of norms and actions imposed by international administration in order to create the political, social, and economic infrastructure whereby the entity consolidates its statehood abilities with the capacity to make law, functioning democratic institution, a self-reliant market economy and contribute to regional stability. However, for constructing a long-term resolution of the self-determination seeking group dispute several considerations can be made. First, either domestic law or the federal constitution would need to make some provision for secession, whether through adoption of legislation specifically allowing it or some other methods. Secondly, it is necessary that there be a creation of

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<sup>980</sup> For more discussion see, Drew, *The Meaning of Self-Determination* (n 960) 99-100.

<sup>981</sup> See, G Bolton and G Visoka, 'Recognizing Kosovo's Independence: Remedial Secession or Earned Sovereignty?' (2010) 11 *South East European Studies* 24.

<sup>982</sup> *ibid.*

mechanisms for joint co-operation between the sub-state entity government and the parent State government. Third, the making of specific commitments on the part of the sub-state entity and the parent State is required, in the area of human rights and minority rights, and engaging in a series of defined confidence building measures. The final requirement is the preparation for status determination with possible assistance of the international community. Most importantly, the determination of the international mechanism would be based on self-determination seeking group's compliance with the commitments undertaken during the interim period, take into consideration parent State's compliance with its commitments as well, and the results of referendum held in sub-state entity.

### 3.5. Guidelines for the Recognition of Entities Created Through Secession After Exercise of the Right to Self-Determination.

While self-determination is known as a right under international law, scholars disagree whether the right includes a right of secession and if so, under which circumstances. It is true that international law provides for a right to independent statehood in the context of decolonisation. Whereas outside the context of decolonisation it has been argued that, the right has to be exercised within the boundaries of the existing State.<sup>983</sup> In this regard, the Supreme Court of Canada in the *Quebec* case held that ‘the exercise of any self-determination right ‘must be sufficiently limited to prevent threats to an existing State’s territorial integrity or the stability of relations between sovereign States’.<sup>984</sup> However, it is still questionable whether some groups may be entitled to full independent and statehood under certain conditions. For example, secession may be accepted in cases where it constitutes a group’s only option to protect itself from gross human right violations committed by an oppressive State, as the case of South Sudan and Kosovo. Thus, despite the disagreement over the status of secession within international law and UN system, Kohen argued, ‘when secession actually occurs, international law imposes certain rules with regard to the procedural aspects of the creation of States, the territorial scope, governance, human rights and State succession’.<sup>985</sup>

On the other hand, it cannot be argued today that international law prohibits secession. It cannot be denied that international law permits secession.<sup>986</sup> There is a privilege of secession recognised in international law and the law imposes no duty not to secede. In recent years, State practice has shown that no rule in international law contained prohibition of declarations of independence unilateral secession. Accordingly, an entity may exercise its right of independence, on any matter, even if there is no specific rule of international law permitting it to do so. In these instances, an entity has a wide measure of discretion, which is only limited by the prohibitive rules of international law.<sup>987</sup>

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<sup>983</sup> Hannum, 'Rethinking Self-determination' (n 151).

<sup>984</sup> 'Reference Re Secession of Quebec' (n 21) para 127.

<sup>985</sup> Kohen, *Introduction to Secession: International Law Perspectives* (n 577) 19.

<sup>986</sup> Report by James Crawford, 'State Practice in Relation to Unilateral Secession', in Anne F Bayefsky (ed), *Self-Determination in International Law, Quebec and Lessons Learned* (n 848) 31-32.

<sup>987</sup> See, S.S. Lotus (*France v Turkey*) (n 618).

In the *Quebec* case, the Supreme Court of Canada held that: ‘The right to secede and the possibility that a certain secession, once factually established, creates legal effects at international level were two different matters from a legal point of view. If the purported secession of Quebec was declared in defiance of the Canadian Constitutional principles, democratic principles, federal principle, rule of law, and the fundamental principles of the international community, respect Human rights, peaceful settlement of the disputes...etc..’. The process would most likely be seen as illegitimate and gain only limited if any recognition in the international community’.<sup>988</sup> The Court goes so far as to state that: ‘one of the legal norms which may be recognised by States in granting or withholding recognition of emergent States is the legitimacy by which the *de facto* secession is, or was, being pursued.’<sup>989</sup>

In this regard, Franck argued that: ‘it cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits secession. There is a privilege of secession recognised in international law and the law imposes no duty not to secede’.<sup>990</sup> Therefore, the legal vacuum might confer as a positive entitlement to secede; peoples have a right, understood as a privilege, to secession.

Buchheit has defined legitimacy through two criteria. First, the internal merit of the claim, which refers to the criteria for effectiveness of the self-determination unit, such as the ethnic and social cohesiveness, the occupation of a distinct territory and the economic viability of a future state. Second, the disruption factor: this refers to the potential threat of the secession for regional and international peace and security.<sup>991</sup> On the other hand, Roepstorff argued that, secession can be legitimate if it was as a remedy of last resort for large-scale, persistent violations of basic human rights of a particular group residing on a particular territory.<sup>992</sup> Under this view, other States are required to recognise the new political entity as having all rights and privileges, immunities and obligations this status entails. Rather, Buchanan argued that, before the new political entity should be recognised as a legitimate State, it is required for the new entity to provide a credible assurance that it will respect the rights of minorities

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<sup>988</sup> ‘Reference Re Secession of Quebec’ (n 21) para 90.

<sup>989</sup> *ibid*, para 143.

<sup>990</sup> T M Frank, *Report for the Amicus Curiae* (1998) 3-16.

<sup>991</sup> For example, compliance to respect Fundamental human rights, Minorities, maintenance of regional and international peace and security. See, Buchheit, *Secession, The Legitimacy of Self-Determination* (n 29) 216-220.

<sup>992</sup> Roepstorff, *The Politics of Self-Determination* (n 846) 113-114 .



within its territory.<sup>993</sup> Thus, it seems scholars to envisage legitimacy built within an international legal framework as being pre-conditional to secession. Apparently, when it comes to the question of legitimacy of secession, scholars differentiate between consensual and unilateral secession. Roepstorff argued that, ‘cases of consensual secession are less disputed than cases of unilateral secession and do not raise the same legal and moral problems’.<sup>994</sup> Accordingly, most scholars agree that the cases of unilateral secession are more controversial and more likely to escalate into a secessionist conflict.

Even if there is no right, under the constitution or at international law to unilateral secession, this does not rule out the possibility of an unconstitutional declaration of independence leading to a *de facto* secession. The ultimate success of such secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession.<sup>995</sup> In other words, if an entity fails to secede from its parent State in democratic fashion, through either a constitutional framework or essential agreement within the State, an entity then must demonstrate to the outside world that it’s capable to functioning as an independent entity, and earn its ‘internal sovereignty’, such sovereignty then can be facilitated externally by an independent sovereign States by the act of recognition.

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<sup>993</sup> Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (n 601) 234.

<sup>994</sup> ‘Consensual secession deals with secessions that result either from a negotiated agreement between the State and the separatists or through constitutional processes. Whereas, unilateral secession refers to secessions that are undertaken without the consent of the State and without constitutional legitimation, has been subject to moral considerations.’ See, Roepstorff, *The Politics of Self-Determination* (n 992) 106.

<sup>995</sup> ‘*Reference Re Secession of Quebec*’ (n 21) paras 123, 124, 125.

### **3.5.1. Modern Day Guidelines for the Recognition of Entities Created After Exercise of the Right to Self-Determination: The Criteria that a Self-Determination Seeking Group Must Fulfil In Order to be Able to Legitimately Gain Some Degree of Self-Determination.**

Drawing from present-day international law, the aforementioned arguments and theories of secession, and the admittedly erratic practice of States in this area, it is clearly important for a would-be State to be able to obtain international legitimisation. It is, after all, a territorial anomaly. I propose the following principled guidance for States in dealing with post-colonial situations where a people seek to exercise the external aspect of the right to self-determination through secession; these obviously also serve as guidance to would-be States as to what they need to be or to have in order to gain the desired legitimisation. It should be observed that this guidance is not necessary when the parent State has consented to the secession.

#### **1. A 'people'**

The group in question is indeed a 'people' entitled to the right to self-determination.

For a group to be entitled to a right to collectively determine its political destiny, it must possess a focus of identity sufficient for it to attain distinctiveness as a people.<sup>996</sup> In addition, such 'people' should have a homeland or being linked to a specific territory.

#### **2. An exceptional situation**

The right to self-determination has been grossly violated within the existing framework of the State. The situation must be exceptionally serious.

The self-determination seeking group must prove that it has been oppressed, that its central government consistently and flagrantly violates human rights of the people concerned, and that they have been blocked from meaningful exercise of its right to self-determination internally. Accordingly, the degree of oppression and suffering of the separatist people by its parent State plays a determinative role in self-determination quests.

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<sup>996</sup> For more details see, P Thornberry, 'The Democratic or Internal Aspect of Self-Determination', in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993) 102-124.

### **3. Responsible behaviour**

The would-be entity has behaved responsibly within the existing framework of the State, including in consideration of the rights and entitlements of other groups within the larger unit, and has not itself violated any fundamental rights in the course of the dispute. If it has used force, it must have used force within the limits of the law of armed conflict and international human rights law. For successful legitimate secession, the self-determination seeking group must show the legality of its declaration of independence. Territorial illegality arises under a serious breach of certain fundamental norms of international law, in particular *jus cogens*, [for instance, the use of force or other egregious violations of norms of general international law].<sup>997</sup> Where declaration of independence is issued in violation to *jus cogens*, it is illegal and other State under Articles 40 and 41 of ILC Articles on State Responsibility have a duty to withhold recognition.

### **4. Either secession is the only option, or the option of secession is the choice of the majority of the population in the entity [obviously can't be both]**

#### **a. Secession is the only option**

All efforts at negotiation within that internal framework have failed and the continued relationship is impossible. There are no other realistic and effective remedies - secession is the only solution to the problem. In other words, if the central government has engaged in a consistent policy of ethnic war, remedial criteria would conclude that the self-determination seeking group has the moral right to secede. In this case, secession must be the only remedy to exercise it by secession (to remedy the harm). In a like manner, in the case of Quebec where the Canadian government has granted procedural equality and vast autonomy, no moral claim to any somewhat hard, external self-determination.

#### **b. Choice**

Secession should be the choice of the majority of the population in the entity in question. In this regard, public consultation would be essential for successful free democratic choice, having a mandate from the people to pursue certain political steps including the final one of

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<sup>997</sup> The ICJ in Kosovo advisory Opinion states that 'the illegality attached to some other declarations of independence... stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *jus cogens*'. See, The *Kosovo Advisory Opinion*, Para 81.

self-determination through secession. In other words, there must be a consensual agreement for independence. The best way for a population concentrated on a territory to make such a choice is, without any doubt, through a referendum or a plebiscite of all eligible voters.

### **5. Capacity for self-governance and ability to provide and protect**

The entity must be able to demonstrate capacity for self-governance. It must be able to meet the basic requirements of, and provide essential protections to, those within its jurisdiction. The entity must show that it is functioning separately of the parent State going beyond the federal structure, is the level of independence such that there is a '*de facto*' state within a State—it is on a separate path—political, cultural, economic, linguistic, social, etc... [From the parent State]. In other words, a people that chose to exercise an external right to self-determination may need to demonstrate to the outside world that it satisfies the criteria of statehood, and function as an independent sovereign State. Most importantly, it must demonstrate that they are capable of protecting its population from violence, and consider itself required and under the obligation in accordance with the human rights conventions and United Nations Charter to protect its population from violence.

### **6. The entity must demonstrate that its government is committing abuses, and cannot properly administer the people's province or region.**

It is important for the self-determination seeking group to show that its central government is unrepresentative, abusive, and relatively weak, and cannot protect and secure its population and borders from violence. Consequently, such groups have been marred by violence and civil unrest, so that to have any kind of stability they must be allowed to break away.

### **7. Contemporary standards of recognition**

In addition to the aforementioned, States should be guided by contemporary standards for recognition of States such as respect of human rights; minority rights and contribute to regional stability. These require evidence of the following:

- Respect for the provisions of the Charter of the United Nations and Helsinki Final Act, respect of minority rights
- Unconditional commitment to international law and being a 'good partner'
- Effective government

- Ability to protect its population and borders
- Contribution to the regional stability
- Economic stability, sufficiently, and viability
- Sharing a democratic values and the rule of law
- A negotiated determination of new boundaries, and provision of security and defence.<sup>998</sup>

**Finally:** and most importantly, the self-determination-seeking people must prove that external actors, including the Great Powers, view its struggle as legitimate, and that they are ready to embrace it as a new sovereign partner. In other words, peoples whose struggles are not viewed as legitimate by the Great Powers will never be able to garner Security Council support for the creation of some form of an international administration within their region.<sup>999</sup>

Thus, for an entity seeking to join the family of nation-States it is important to rely more on the compliance with other fundamental principles of international law to justify legitimisation of a territorial situation produced by the act of secession. It must have proven their viability by establishing [rightful authorities], and with that have earned its sovereignty. It must then demonstrate that it merits recognition by external actors, and that it will be a reliable legitimate State on global sense. In addition, they should provide credible assurances that it will respect the rights of minorities within its territory. Eventually, such group must show that their quest warrants respect, and that their proposed territorial units should be treated as sovereign entities. Consequently, the international community including the Super-Power States may recognise the new political entity as having all the rights, immunities, privileges, powers, and obligations this status entails.

Under RES approach, the primary aim is cooperation between the party seeking independence and the parent State. The process has two requirements. First, the parent State constitution and domestic law would need to make some provision for secession—whether through adoption of legislation specifically allowing it or some other method. Second, an entity would need to engage in ‘principled negotiations’ with the parent State government on the issue of independence. Such sort of discussion within the State would need to take to

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<sup>998</sup> For more details see, ‘European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States’ (1992) 31 ASIL 1485 <<http://www.jstor.org/stable/20693758>>accessed 20 November 2013 (n 464).

<sup>999</sup> Sterio, ‘On the Right to External Self Determination: ‘Selfistans,’ Secession and the Great Powers’ Rule’ (n 99).

successfully gain independence, including a national referendum, addressing the rights of minorities and the interests of an entity and the parent State government. Means, the issue of independence within the State, cannot be accomplished without the principled negotiations with other participants within the existing constitutional framework.

Thus, despite there being no rule, under the constitution or at international law, to unilateral secession, this does not rule out the possibility of an unconstitutional Declaration of Independence leading to a *de facto* secession. Accordingly, an entity may exercise its right of independence, on any matter, even if there is no specific rule of international law permitting it to do so. In these instances, an entity has a wide measure of discretion, which is only limited by the prohibitive rules of international law. In this regard, international law may ‘adapt to recognise a political and/or factual reality, regardless of the legality of the steps leading to its creation’ draws some support from previous State practice<sup>1000</sup>. In this regard, ‘if successful in the streets, right will lead to the creation of new State’<sup>1001</sup>. Here, the ultimate success of secession will depend on recognition by the international community, which is likely to consider the legitimacy and legality of secession.

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<sup>1000</sup> *Reference re Secession of Quebec* (n 21) para 141.

<sup>1001</sup> *ibid*, para 142.

### 3.6. Conclusion

It was argued that, international law does not regulate secession as such because secession is a fact. However, scholars have neglected the distinction between secession and a right to secession. Significantly, as secession falls in an international 'free zone', the international legal system is not neutral to the causes and legal consequences of secession. Any illegitimacy connected to secession might qualify secession to be unlawful.

It has been argued that, if a theory of secession is to be of any function and value as guidance for international reform, international law must be taken into greater account. Buchanan has also shown that the arguments of political theory can be used to justify or prohibit secession, to locate the right to secede within the border context of contemporary political theory. According to the progressive interpretation of the theories of secession in recent years, the principle that the territorial integrity of existing States is not to be violated applies only to legitimate States, and not all existing States are legitimate. There is always disagreement about how strict the relevant notion of legitimacy is.

Today, different considerations can count for or against a theory of the right to secede. The most urgent and significant task for political theory at this time is to answer the question, when and under what circumstances a right of secession may be justified, and may be feasible. In other words, which theory of secession is preferable to justify a right of secession?

It was demonstrated that, secession can be a consequence of the exercise of the right to self-determination. Under the doctrine of remedial secession, existing States have legitimacy under international law and have a valid claim to their territory. However, such claim can be overridden when the State persistently and seriously violates the rights of groups within the State. The idea is that the validity of the State's claim to territorial integrity cannot be sustained when secession is the only remedy that can assure the respect of fundamental rights of the group. Thus, large-scale serious and persistent violations of basic human rights and the violation of internal rights of self-determination of the groups within a State may be a sufficient reason to justify unilateral secession under the doctrine of remedial secession. In other words, Buchanan argued that 'a remedial right only theory legitimises a unilateral claim-right to secede only in severe cases of injustice and gross human rights violations and

is capable of capturing the reality of competing claims and entitlements'.<sup>1002</sup> He further emphasised that secession should not result in non-compliance with the territorial integrity and the unity of the legitimate state since 'individual rights, the stability of individuals' expectations, and ultimately their physical security, depend upon the effective enforcement of a legal order'.<sup>1003</sup>

It was explained that, the proponents of primary right theories, on the other hand, argue that a group can have a unilateral right to secede over and above whatever remedial right there may be. Primary right theories Buchanan argued; do not make the unilateral claim-right to secede derivative of the violation of basic human rights, but as a matter of majority rule. Primary right theories include ascriptivist theories as well as associative theories of secession. ascriptive characteristics are ascribed to individuals as members of a distinct people who as such are entitled to a right to an independent State. Accordingly, Buchanan argued that national self-determination theories fall into this category. In contrast, associative-group theory requires that a group have any ascriptive characteristic, such as ethnicity or having an encompassing culture, even as a necessary condition for having a right to secede. Buchanan demonstrated that what 'confers the right to secede on a group is the voluntary choice of members of the group to form an independent State; no grievances are necessary.' However, it is argued that Primary right theories proposed by Buchanan authorise the dismemberment of States even when those States are performing what are generally recognised as the legitimate sovereign functions. In contrast, remedial right only theories advance a more restricted right to secede, they are less of a threat to the territorial integrity of an existing State. In other words, remedial approach places major constraints on unilateral secession as unilateral secession that requires substantial justification. As such, Buchanan argued that the remedial approach allows for a reasonable explanation of how a State can lose its entitlement to its territory by balancing competing claims and rights, 'by not fulfilling its obligations towards its citizens, the government loses legitimacy and therewith its legitimate control over the territory'.<sup>1004</sup>

However, it has been argued that remedial right only theories have been criticised for being irrelevant to the concerns of many groups seeking self-determination. It is argued that, in

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<sup>1002</sup> Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (n 601).

<sup>1003</sup> Buchanan, 'Theories of Secession' (n 600).

<sup>1004</sup> Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (n 601) 354.



most cases, nationalism causes the demand for self-determination, not grievances of injustice as such. Accordingly, a *prima facie* right of nations to independent statehood can be supported in two ways. First, Buchanan demonstrated that, nations need to have their own States in order to be able to protect themselves from external intervention and either form forces that threaten their distinctive character, or in order to create a strong and functioning political community.<sup>1005</sup> Second, it is argued that States need to be mono-national. This argument has two aspects; on the one hand, Roepstorff argued that, ‘democracy can only function in mono-national States, because multinational States lack trust and solidarity that democracy requires for functioning properly.’ However, it can be argued that there are cases of multinational democratic States such as Switzerland Canada and Belgium that are stable and able to defend themselves from external threats and aggression, and they have democratic institutions and successful democratic mechanisms in resolving self-determination issues. These examples call into question the ‘argument that each nation needs its own State and serious objections can be raised against the argument that States need to be mono-national in order to function’.<sup>1006</sup> On the other hand, Miller argued that States need to be mono-national in order to provide for distributive justice, ‘because distributive justice requires solidarity among citizens who are only willing to redistribute wealth if they see each other as members of the same nation’.<sup>1007</sup> However, these arguments do not justify a general right of all nations to full independence and unilateral right to secession. The most reasonable strategy Roepstorff argued, ‘would be to ensure that States respect the human rights of their minorities and to encourage intrastate autonomy agreements rather than promoting homogeneous states’.<sup>1008</sup>

In addition, it was examined that the choice theories restrict both the holders of the right of secession and the exercise of that right. They have insisted on avoiding certain harmful consequences of secession. On the other hand, Democratic theory is a view of legitimate power, and locates such power in the people, whereas the logic of liberalism is grounded in individual-related values, such as human rights or autonomy. At the same time, Beran’s Liberal theories deal not with a loosely defined notion of self-determination but rather with the act of secession. He provided a liberal argument of secession based on the right to free political association. However, Beran’s theory has been criticised for being unrealistic,

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<sup>1005</sup> *ibid* 383.

<sup>1006</sup> Roepstorff, *The Politics of Self-Determination* (n 846) 110-111.

<sup>1007</sup> Miller, *On Nationality* (n 796) 80-85.

<sup>1008</sup> Roepstorff, *The Politics of Self-Determination* (n 846) 110-112.

Buchanan on the other hand has proposed another liberal approach to secession,<sup>1009</sup> derived from a variety of moral considerations. The first feature of his theory is that it emphasises economic discrimination, and the second feature is the low value that it accords to the preservation of cultural, as both relatively strong grounds for secession.<sup>1010</sup> Hence, the desire to develop a practicable theory of self-determination leads Buchanan towards the remedial theory.<sup>1011</sup> His theory thus balances between realism and liberalism that is unsympathetic to specifically nationalist considerations.

It was also argued that, Brilmayer's approach justified separatist claims when they possess a legitimate claim to specific territory. She argued that, secession is not simply the formation of a new political association among individuals or the refusal by a group of persons of their obligation to obey the State's laws. It is the taking of a part of the territory claimed by an existing State. There are however; some issues at stake in her account, such as whether the group in question was a distinct 'people' in the religious, linguistic, or ethnic sense, and the objective validity of the claim that the particular group espouses. Moreover, it is argued that, the problem with this approach is that it tends to ignore internal self-determination and focuses on the exercise of external self-determination. Besides, secession or total independence is not the only or even necessary means of exercising the right of self-determination, and there is a strong presumption against secession in non-colonial situations. To this end, the territorial approach does not discuss how the influence of Great Powers has affected the alteration of territory, either to accommodate a people or to preserve the territorial status quo of the parent State.

It was further argued that, all people under the 'Plebiscite Approach' are entitled to self-determination as a matter of right, regardless of their current political status. However, on a practical level there are different arguments advanced in support and opposition of this approach. It is obvious that an international community would never accept the Plebiscite approach, since States are aware of their territorial boundaries. Rather, allowing all people to determine their political destiny has the potential to introduce a high level of instability into the international system.

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<sup>1009</sup> Buchanan, *Secession: The Morality of Political Divorce Fort Sumter to Lithuania and Quebec* (n 53) 48.

<sup>1010</sup> *ibid* 48-51.

<sup>1011</sup> Buchanan, *Justice, Legitimacy, and Self-Determination* (n 601). Also, Buchanan, 'Self-Determination, Secession, and the Rule of International Law' (n 700). See also, Buchanan, 'Theories of Secession' (n 600).

Furthermore, it was demonstrated that liberal democrats are split on whether to constitutionalise a right to secession. Sunstein argued against a constitutional right to secession because he fears that the right could be used to sabotage the democratic process, whereas Norman precisely argued in favour of legalising secession because it could serve to sabotage the secession process itself. Buchanan argued that ‘well-designed procedural hurdles such as waiting periods or super-majorities, for example through interim settlements, can make secession sufficiently difficult to prevent an unacceptable risk of premature exit while still making secession possible under appropriate conditions’.<sup>1012</sup> Norman, on the other hand, argued some considerable advantages to provide for the resolution of conflicts over secession in the constitution. The Supreme Court of Canada supported this view finding on the question concerning the secession by Quebec, which argued that the potentially disruptive process of secession could be subjected to the rule of law by a process of negotiation and constitutional amendment.<sup>1013</sup> Thus, constitutionalising the right of secession may be potentially overcome with the problems that can lead to secession, and undermine democratic equality, especially in a society already characterised by inequalities of wealth and power.

Last, it was argued that, the changing faces of international conflicts necessities, the development, and exploration of evolving a new conflict resolution approach. The RES approach has proposed to assist the SState and sub-state entity involved in sovereignty based-conflicts, and future peace negotiators to identify an emerging approach, which may be well suited to help them in the resolution of their particular conflict. The new approach may be attractive enough to those seeking to exercise the newly recognised right of remedial secession, who have grown unsatisfied with the prospect of simple autonomy. Similarly, as Scharf argued that, the possibility of permanent ES status may prove palatable to parent States, which oppose complete secession. ‘This approach challenges the weakness of the ‘remedial secession’ and views support for the sub-state entity as arising from the fulfilment of the relevant conditions. The approach has successfully been applied for the Timorese, the Kosovars, and the Southern Sudanese peoples, however, it remains to be seen whether other cases can fulfil the same conditions. The recent developments in Kosovo, Montenegro and Iraq have indicated that the time has come to embrace *de jure* the new reality of RES that is emerging from diplomatic practice.

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<sup>1012</sup> M Weller and S Wolff (ed), ‘Autonomy, Self-Governance, Conflict Resolution: Innovative Approaches to Institutional Design in Divided Society,’ in M Weller (ed), *Self-Governance in Interim Settlements: The Case of Sudan 2005* (Abingdon Routledge 2005) 158.

<sup>1013</sup> ‘Reference Re Secession of Quebec’ (n 21) para 105.

Eventually, it has been explained that, in light of the insufficiency and irrelevance of existing international legal norms and principles, including the right of self-determination of peoples, RES is suggested as an alternative approach to solving sovereignty-based conflicts. The new approach demonstrates that a new player on the international scene needs to show to the outside world that it is worthy of achieving statehood and that it has earned its sovereignty. Accordingly, those peoples that have struggled for independence through legitimate means, and that have proved to the international community that they would be a reliable new sovereign partner, will eventually become sovereign legitimate States. The process would entail first both the provision of a level of sovereignty for a sub-state entity consistent with its right to self-determination, and the creation of mechanisms for joint co-operation between the sub-state government and the parent State government. The second phase would entail the establishment of specific agreements and commitments, provide for the protection of human rights and minority rights, and engage in a series of defined confidence building measures. Consequently, the determination of the final status would be based on the sub-state's compliance with the commitments undertaken during the interim period, taking into consideration parent State's compliance with its commitments as well, and the results of referendum held in the sub-state entity.

Thus, RES is appealing; it is politically, legally, and morally pleasing to assert that those peoples that have shown their ability to become a good world citizens should become entitled to their sovereignty. In other words, this theory would grant independence and statehood to those peoples that have been labelled as peaceful, that have engaged through peaceful means with the international community, and that have used legal means to assert their independence, such as Kosovar, Albanians or the East Timorese, would have earned their right to exist as sovereign independent States.

Accordingly, it is important for a people seeking self-determination and recognition to rely more on the compliance with other fundamental principles of international law to justify legitimisation of a territorial situation produced by the act of secession. The modern day criteria that a people must fulfil in order to be able to legitimately gain some degree of self-determination and recognition. The chapter has suggested that for a people to benefit from the RES approach, they must satisfy several guidelines. Significantly, it is important for self-determination seeking groups to demonstrate to the outside world that it has achieved statehood, and view its struggle as legitimate to the superpower States. In other words, the

Great Powers' support for any self-determination-seeking movement has become an important criterion of dispositive value for any people's struggle for autonomy from its mother State. In this way, the ultimate success of secession will depend on recognition by the international community, which is likely to consider the legitimacy and legality of secession. Thus, one must concede that today the right of self-determination entails a mixture of political and legal criteria, the latter often privileges over the former.

## Chapter Four: Emerging State Practice on Cases of Secessionist Movements

### 4.1. Introduction

In recent years, the issues of self-determination and creation of States in international law have always been treated more as political than they are legal questions. Generally, no State created by unilateral secession has been admitted to the UN against the declared will of the government of the Predecessor State. Outside the colonial setting, State practice is extremely reluctant to recognise unilateral secession. Arguably, the legal right of external self-determination is of questionable significance. Even if groups possess it, States may choose not to offer them much, if any, support; if groups lack it, States may nonetheless wish to support their claims even at the expense of obligations owed to the States within which such groups are located.

The right of self-determination and secession are two of the most controversial issues in international affairs. It is true that, the existence of the right of self-determination is highly questionable, due to the international community's continued and consistent support for the principle of territorial integrity. On the other hand, in international law, any attempt at unilateral secession with no agreement with the existing State, is without legal foundation. After examining the crucial legal issues to the contents of the right of self-determination, and the applicable rules of the rights of minorities, the act of recognition, the law of statehood and Secession. It is now important to turn the discussion to study how these elements of international law have manifested themselves on a practical level. Arguing how international practice responds to secession.

This chapter evaluates the role of international law in legitimising secession as an accurate instance 'remedial secession' given the inability of the people to exercise their right to self-determination within the parent State. Recent endorsement of Kosovo, South Sudan and Quebec, have indicated that the premise that the separation of an ethnic group is supposedly legitimate in certain exceptional cases. The Declaration of Kosovo Independence has raised several fundamental questions of international law in terms of the legal status of secessionist entities, as well as whether the independence of Kosovo is unique and cannot establish any

precedent. The chapter will briefly review the background to the Kosovo case, before focusing on the more recent declaration of independence by the Kosovar parliament. Then, the chapter will examine Kosovo's legal right to self-determination and the role of RS in enabling the Kosovar Albanian achievement of independence in 2008.

Accordingly, the focus will be on the ICJ advisory opinion, in which the Court had been asked whether there was a specific right to effect secession under international law, and the present case, in which the Court was asked whether the declaration of independence was 'in accordance with international law'.<sup>1014</sup> In addition, the chapter argues that, despite the Declaration of Independence being considered as successful, the secession of Kosovo remains 'unilateral'. It has however, attracted a huge amount of recognition. So that, does this mean that Kosovo is not a legitimate State? Rather, what lessons can be learned from Kosovo about the contemporary law of statehood and recognition and the role of ES, and RES in legitimising secession. The case may serve as an example to show how some concepts relevant for the law of statehood operate and what shortcomings they face in difficult situations. On the other hand, Kosovo has also evinced a major complication with 'ES' and 'RES' core concepts of granting specific levels of sovereignty. Under these theories, Kosovo may have earned its sovereignty because the UN administered it, and because during this time, it demonstrated to the outside world that it was ready and capable of functioning as an independent State.

The chapter will then turn to scrutinize and critically discuss the case of Quebec from the perspective of international law. How the Canadian Supreme Court distinguished between the right of internal self-determination and the right to external self-determination. When and under what circumstances may the external right of self-determination become an applicable solution? In addition, how the Supreme Court responded to the issue of the legality of secession, and the legal consequences of the *Reference* under Canadian law will be examined. The case of Canada may serve as an example to show where a State refused to treat a group of citizens as citizens, where their internal rights to self-determination were violated, those citizens in turn have the right to consider it no longer to be their State. This means that in democratic States, secessionist demands must not be ignored. In addition, how the exercise of

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<sup>1014</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, ICJ Advisory Opinion of 22 July 2010 [2010] ICJ Rep [hereinafter 'Kosovo Advisory Opinion'] Para 56, 2010 (n 478).

any self-determination right ‘must be sufficiently limited to prevent threats to State’s territorial integrity or the stability of relations between sovereign States’.<sup>1015</sup>

Finally, the chapter will examine the recent successful secession of Southern Sudan. Significantly, it will evaluate the role of international law in legitimising the secession as an accurate instance of ‘remedial secession’ given the inability of the people to exercise their right to self-determination within the parent State. The case of South Sudan shows that where a parent State waives its claims to territorial integrity, the international community undoubtedly accepts the emergence of a new State. This applies alternatively when the mother State rejects every compromise solution in a conflict situation, or when there is no realistic prospect of a conflict being resolved, especially when the methods of peaceful conflict resolution appear to have been exhausted.<sup>1016</sup>

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<sup>1015</sup> The Canadian Supreme Court concluded that ‘exceptional circumstances,’ where a people is being denied its rights to internal self-determination, ‘as a last resort’, could be entitled to exercise its right to self-determination by secession: See, *Reference Re Secession of Quebec*, (n 21) para 135.

<sup>1016</sup> H Krueger, ‘Implications of Kosovo , Abkhazia and South Ossetia For International Law, The Conduct of the Community of States in Current Secession Conflicts’ (2009) 3 *Caucasian Rev Int’l A* 121.



## 4.2. Kosovo

### 4.2.1. Factual background

The debate on the Kosovar Declaration of Independence has proved to be a long, difficult, and complex process from a political, historical, as well as legal perspective. Kosovo was an autonomous region of Serbia dating from when Serbia was a State within the Socialist Federal Republic of Yugoslavia ('SFRY').<sup>1017</sup> The majority of its population are ethnically Albanian, and so distinct from Serbs who today still form about 10% and the vast majority of the population of Serbia as a whole. In the early 1990s, when the SFRY collapsed, Kosovo remained a part of the SFRY's successor. In 2003, when the FRY ceased to exist, Kosovo became a part of Serbia and Montenegro, and when Montenegro seceded from Serbia in 2006, Kosovo remained a part of the sole Serbian State.<sup>1018</sup>

Kosovo's status in the SFRY was that of an autonomous province of Serbia. It was not formally equal in status to the SFRY's constituent republics and had no right to secede according to the 1974 constitution. The 1974 SFRY constitution granted Kosovo the status of an autonomous province within the country's federal structure.<sup>1019</sup> Under the terms of the 1974 constitution, Kosovo had enjoyed some real autonomy from SFRY, including the right to its own constitution and institutions, the right to decide on changes to its territory; and was considered a 'constituent element' of the SFRY.<sup>1020</sup> Most importantly, its predominantly ethnic Albanian population enjoyed multiple rights, for instance, the right to education in the Albanian language, the right to Albanian language media, the right to celebrate cultural holidays and generally preserve its ethnic structure and belonging.<sup>1021</sup> However, in 1989, following the election of nationalist leader Slobodan Milosevic, the nationalist tension that

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<sup>1017</sup> M Vickers, 'The Status of Kosovo in Socialist Yugoslavia', in Christian Tomuschat (ed), *Kosovo and the International Community, A Legal Assessment* (Springer, 2001) 1, 2-6.

<sup>1018</sup> Brown, 'Human Rights, Sovereignty, and the Final Status of Kosovo' (n 190).

<sup>1019</sup> Gruda, 'Some Key Principles for a Lasting Solution of the Status of Kosova: *Uti Possedetis*, The Ethnic Principle, and Self-Determination' (n 189).

<sup>1020</sup> B Reka, *UNMIK as an International Governance in Post-War Kosova: NATO's Intervention, UN Administration and Kosovar Aspirations* (Logos A Skopje, Macedonia 2003) 49.

<sup>1021</sup> Noting that Kosovar Albanians were allowed to open an Albanian-language university in Pristina in 1969, and that the institutional changes under the 1974 SFRY Constitution resulted "in the growing Albanization of educational, political, and legal institutions. See, H H Perritt, 'Final Status for Kosovo' (2005) 80 *Chicago-Kent L Rev* 3.

would subsequently tear the SFRY apart increased, and Kosovo's autonomy was abolished.<sup>1022</sup>

In the early 1990's, the SFRY dissolved, when four of its six republics, including Croatia, Macedonia, Slovenia and Bosnia declared independence, Kosovo remained a part of the rump SFRY, which became the Federal Republic of Yugoslavia (FRY) first. Then it became a part of Serbia and Montenegro, thereafter, when Montenegro broke away from the latter Kosovo remained a part of the state called Serbia. In 1996, guerrilla warfare broke out as Albanians rose in revolt against Serbian rule. The tension between Serbian forces and the Albanian UCK is recognised as a non-international armed conflict. Kosovo's civilian population was driven into exile, and the Serbian carried out acts of violence towards them. As a result, Kosovo's autonomous province status was removed, and the Albanian population was deprived of important civil and political rights.

In 1998, the Serb government engaged in a brutal wave of oppression, which resulted in widespread atrocities. After Serbian and Kosovar leadership failed to persuade Milosevic to withdraw security forces from Kosovo, NATO countries launched an air campaign to force the Serb government to withdraw the police and the military.<sup>1023</sup> In the aftermath of NATO's intervention, the UN Security Council passed Resolution 1244 (1999).<sup>1024</sup> The resolution authorised the UN's administration of Kosovo through the United Nations Mission in Kosovo ('UNMIK'), its safety was to be guarded by a NATO-led military force KFOR. The resolution set out a general framework for resolving the final legal and political status of Kosovo. The UN participated in the administration of Kosovo for the next nine years, while political negotiations over the final status of the territory were entirely inconclusive.

In addition, the Resolution explicitly upheld the existing sovereignty of Serbia over Kosovo, reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region.<sup>1025</sup> In this regard, Belgrade proposed that Kosovo be highly autonomous and remain a part of Serbia; Belgrade officials have repeatedly said that an imposition of Kosovo's independence would be a

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<sup>1022</sup> See, T Jaber, 'A Case for Kosovo? Self-Determination and Secession in the 21st Century' (2011) 15 *The International Journal of Human Rights* 926.

<sup>1023</sup> Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession, and Recognition' (n 244).

<sup>1024</sup> UNSC Rec 1244 (n 749).

<sup>1025</sup> J L Černič, 'Kosovo Declares Independence' (*International Law Observer*, 2008) <<http://www.internationallawobserver.eu/2008/02/18/kosovo-declares-independence/>> accessed June 13, 2013.

violation of Serbia's sovereignty and therefore contrary to international law.<sup>1026</sup> While on the other hand, Kosovo insisted that it deserved independence.

After mediating negotiations between the parties for fifteen months, the UN Special Envoy for Kosovo Martti Ahtisaari submitted in March 2007 the Comprehensive Proposal for the Kosovo Status settlement (the Ahtisaari Plan). The plan envisioned Kosovo becoming independent after a period of international supervision.<sup>1027</sup> The proposal was rejected by Serbia while the Kosovar Albanian leaderships endorsed it. Moreover, in a response to the Secretary-General, the 'Troika' reported in December 2007 that 'the parties however, were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo'.<sup>1028</sup> After the collapse of the negotiations, many countries grappling with some sort of secessionist issue in their own domestic politics such as Serbia and Russia argued that Kosovo's secession would be a breach of international law.<sup>1029</sup> In contrast, the US, UK, France, and most of the other States in EU supported Kosovar independence.

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<sup>1026</sup> *ibid.*

<sup>1027</sup> Borgen, 'Kosovo's Declaration of Independence' (n 244).

<sup>1028</sup> From August to December, in an effort to receive the mediation process, the EU, Russia, and the US the (Troika) oversaw negotiations between the Government of Serbia and the Kosovar Albanian. See, 'UNSC Report of the European Union/United States/Russian Federation Troika on Kosovo (4 December 2007) UN Doc S/2007/723', 2007. Available at <<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kosovo%20S2007%20723.pdf>>accessed> accessed 13 June 2013.

<sup>1029</sup> Borgen, 'Kosovo's Declaration of Independence' (n 244).

#### 4.2.2. The Declaration of Independence

On 17 February 2008, backed by powerful world countries such as the US and UK, the Parliament of Kosovo issued a statement declaring ‘Kosovo to be independent and a sovereign State’.<sup>1030</sup> The Parliament pledged compliance with the Comprehensive Proposal for the Kosovo Status Settlement envisioned in the Ahtisaari Plan. It represents a secession, which is heavily discouraged under traditional international law. However, despite strong Serbian protest, many countries including the US formally recognised Kosovo as a sovereign and independent new State.<sup>1031</sup> However, it has not been recognised by countries such as Russia, China, and Spain, which face their own separatist issues.

Russia and Serbia have argued that Resolution 1244 does not allow the secession of Kosovo without the consent of Serbia. In particular, they refer to the resolution’s preamble language ‘reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia’.<sup>1032</sup> The EU on the other hand, has taken a position that the Resolution is not a bar to Kosovo’s independence, and it did not predetermine the outcome of final status talks.<sup>1033</sup> On balance, one must concede that, the Resolution neither promotes nor prevents Kosovo’s secession. In other words, the substantial language of Resolution 1244 is addressed to the interim status of Kosovo. Moreover, the references to the territorial integrity of Serbia are only in the preamble language and not in the operational language.<sup>1034</sup> Therefore, the document is silent as to what form the final status of Kosovo takes.

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<sup>1030</sup> Full text: Kosovo declaration, *BBC News* (17 February 2008) Available at <<http://news.bbc.co.uk/1/hi/world/europe/7249677.stm>> accessed 14 June 2013.

<sup>1031</sup> For example, as of February 18, 2008, the United States, the United Kingdom, France and Belgium had all expressed support for the “new state of Kosovo” Ibid. Today 108 UN Member States recognised Kosovo as an independent sovereign State. See, (...) ‘Who Recognised Kosovo as an Independent State? Recognised or Announced the Recognition of Republic of Kosova’ <<http://www.kosovothanksyou.com/>> accessed June 23, 2014. Note however, that several States expressed their opposition to the Kosovar independence, including Spain, Russia, China, Indonesia, and Sri Lanka.

<sup>1032</sup> Borgen, ‘Kosovo’s Declaration of Independence’ (n 244).

<sup>1033</sup> *ibid.*

<sup>1034</sup> *ibid.*

### 4.2.3. International law and the secession of Kosovo

In fact, the recognition of Kosovo would seem to extend the right of self-determination beyond the traditional colonial or foreign occupation situation.<sup>1035</sup> Kosovo was never a colony, and the Serbian Army had withdrawn long before the independence issue was determined. However, Harris argued that, the only coherent legal basis for recognising the exercise of self-determination, by the Kosovo people in the form of an independent State is that, prior to that independence, while under Serbian rule; the Kosovar Albanians were subject to alien subjection, domination, and exploitation.<sup>1036</sup> At the same time, a convincing case can be made that under the later years of Milosevic's rule in Serbia, the Kosovars were being persecuted by the Serbian authorities, and 'they were subjected indeed to subjugation, domination and exploitation by people, who although long part of the same country, were culturally different and could in that sense arguably be described as alien'.<sup>1037</sup>

Furthermore, Kosovo's independence must be assessed under the international law of secession. Thomas Frank, regarding a hypothesised secession of Quebec, wrote that:

[It cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits secession. There is a privilege of secession recognised in international law and the law imposes no duty on any people not to secede].<sup>1038</sup>

In this way, while international law does not foreclose the possibility of secession, it does provide a framework within which certain secessions are favoured or disfavoured, depending on the facts.<sup>1039</sup> Hence, the key is to determine whether Kosovo meets the standard for the legal privilege of secession.

As has been canvassed in chapter three, the right of self-determination is comprised of two distinct subsidiary parts. The favoured one is 'internal self-determination', which is the protection of minority rights within a State. The group is said to have internal self-

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<sup>1035</sup> P Harris, 'Is Tibet entitled to self-determination?' (2008) 18 CCPL Occasional Paper <<http://www.law.hku.hk/ccpl/pub/Documents/OccasionalpaperNo.18Eng.pdf>> accessed 14 June 2013.

<sup>1036</sup> *ibid.*

<sup>1037</sup> *ibid.*

<sup>1038</sup> T M Frank (ed), Expert Opinion Obtained Prior to the Reference, reproduced in, Anne Bayefsky, *Self-Determination in International Law, Quebec and Lessons Learned*, Opinion Directed at Question 2 of the Reference in (n 848) 421. See also, Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill-Queen's UP 2003).

<sup>1039</sup> Borgen, 'Kosovo's Declaration of Independence' (n 244).

determination, when a State provides them the ability *inter alia* to speak their language, practice their culture, and effectively participate in the political community. While the disfavoured one on the other hand is ‘external self-determination’, or secession. The Supreme Court of Canada found that ‘a right to external self-determination which in ‘*re secession of Quebec*’ case potentially takes the form of the assertion of a right to unilateral secession, arises only in the most extreme cases and, even then, under carefully defined circumstances’.<sup>1040</sup>

Secession is regarded as one of the most contested controversial issues in international affairs. It rarely receives formal adjudication, court opinion, State practice and other authoritative writings, point the way to classifying what are the ‘carefully defined cases’ and ‘extreme cases’ under which privilege of secession exists. A Special Committee on European Affairs, concerning the secessionist conflict in Moldova found that ‘any attempt to claim legal secession, that is, where secession trumps territorial integrity, must at least show that:

- a. The secessionists are a ‘people’, in the ethnographic sense;
- b. The State from which they are seceding seriously violates their human rights; and
- c. There are no other effective remedies under either domestic law or international law.<sup>1041</sup>

Based on the evidence developed in previous chapters, there are several arguments why Kosovar Albanians should have the right to self-determination, in other words, it remains crucial to analyse the factual and legal arguments that characterize and give a distinct feature to the Kosovo case. The following analysis will highlight whether the Kosovo Albanians are a people, entitled to the right of external self-determination, because of a complete denial of their right to internal self-determination, and the heavy oppression exercised upon them by the central government, and whether secession was the only solution for Kosovo.

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<sup>1040</sup> ‘*Reference re Secession of Quebec*’ (n 21) para 126. ‘Such cases are those of colonial peoples and also ‘where a people is subject to alien subjugation, domination or exploitation’. For the Court these different criteria were ‘irrelevant’ for Quebec case. See, *ibid*, paras 132, 133.

<sup>1041</sup> ‘Special Committee on European Affairs, Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova, 61 REC’, The Association of the Bar of the City of New York 2006 <[http://www2.nycbar.org/Publications/record/vol\\_61\\_2.pdf](http://www2.nycbar.org/Publications/record/vol_61_2.pdf)> accessed 17 June 2013.

#### 4.2.3.1. Are Kosovar Albanians a ‘people’?

It has been understood that, the community, which claims the right to self-determination, has to fulfil certain objective criteria: they have to be perceived by themselves and by the world as the people, the nation; this is fulfilled by the common history, language, and culture.<sup>1042</sup> Moreover, they have to live on the particular territory in an organised way, presumably being a majority of the inhabitants. A subjected people are linked to have effective control over the territory. Likewise, the Supreme Court of Canada in the Quebec case discussed the meaning of ‘peoples’ as ‘somewhat uncertain’.<sup>1043</sup> At different periods in international legal history, the term of ‘people’ has been used to signify citizens of a nation-State, the inhabitants in a specific territory being decolonised by a foreign power, or an ethnic group.<sup>1044</sup> In addition, in 1920, the Commission of Jurists who arbitrated the status of the Aland Islands found that ‘for the purposes of self-determination one cannot treat a small fraction of peoples as one would a nation as a whole’.<sup>1045</sup>

Here one may argue that Kosovars are a ‘people’, having inhabited Kosovo for centuries. However, the Kosovar Albanians are more generally perceived as an Albanian ethnic enclave, rather than a nation unto themselves.<sup>1046</sup> This definition of the term of ‘people’ as a ‘nation’ has been criticised for being too restrictive. In Opinion No 2 (1992), the Arbitration Commission of the European Conference on Yugoslavia with regard to the Serbia population of Bosnia-Herzegovina Higgins comments that, ‘People’ is to be understood in the sense of all the people of a given territory. ‘Of course, all members of distinct minority groups are part of the people of the territory. In that sense, they too as individuals are holders of the right of self-determination. However, minorities as such do not have a right of self-determination. That means in effect that they have no right to secession, to independence or to join with comparable groups in other States’.<sup>1047</sup> In addition, the ICJ in *Western Sahara* case found

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<sup>1042</sup> Černič, 'Kosovo Declares Independence' (n 1025).

<sup>1043</sup> ‘Reference Re Secession of Quebec’ (n 21) para 123.

<sup>1044</sup> Borgen, 'Kosovo’s Declaration of Independence' (n 244).

<sup>1045</sup> ‘Aland Island case’ (n 169).

<sup>1046</sup> Borgen, ‘Kosovo’s Declaration of Independence’ (n 244).

<sup>1047</sup> Quoted in Harris, *Cases and Materials on International Law* (n 390) 120-121. It is rather argued that, ‘a group of minorities can qualify as a ‘people’ if they possess the will to be identified as a ‘people’ or the consciousness of being a ‘people’ and if they have institutions or other means of expressing their common characteristics and will.’ See, C Ijezie, 'Right of Peoples to Self Determination in the Present International Law,' (*Academia.edu*, 2014) 9

that, the lands were inhabited by peoples, which, if nomadic, were socially, and politically organised in tribes and under chiefs competent to represent them.<sup>1048</sup> Accordingly, it is clear that in international law the right to self-determination only attaches to peoples, while minorities groups are protected through their parent State's commitments to the respect of basic human rights. Thus, Vidmar argued that, although Kosovo Albanians might qualify as a people for the purpose of the right of self-determination, the applicability of this right does not *per se* suggest that secession can be justified.<sup>1049</sup> It is however questionable whether widespread support of Kosovo's independence would signal a shift in the definition of 'people', so that, the term no longer represents a complete ethnic nation, but can be used to refer to a homogenous ethnic enclave within another nation.<sup>1050</sup>

#### 4.2.3.2. Whether Kosovar Albanians rights to internal self-determination was respected

The Supreme Court of Canada in the *Quebec* case concluded that a 'people' has a right to so-called external self-determination only if its central government is not fulfilling its rights to internal self-determination.<sup>1051</sup> Without doubt, it was clear that Kosovar Albanians' right to internal self-determination had not been respected by the Milosevic-led Serbia.<sup>1052</sup> While on the other hand, it seems that such rights were considerably respected in the pre-Milosevic era. In other words, the 1974 Constitution of the SFRY specifically granted autonomous status to Kosovo, and in practice Kosovo was a fully functional province operating in the federal

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<[http://www.academia.edu/2967647/RIGHT\\_OF\\_PEOPLES\\_TO\\_SELFDETERMINATION\\_IN\\_THE\\_PRESENCE\\_OF\\_INTERNATIONAL\\_LAW?login=&email\\_was\\_taken=true](http://www.academia.edu/2967647/RIGHT_OF_PEOPLES_TO_SELFDETERMINATION_IN_THE_PRESENCE_OF_INTERNATIONAL_LAW?login=&email_was_taken=true)> accessed June 23, 2014.

<sup>1048</sup> The ICJ held that, 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.' See, '*Western Sahara Case*' (n 103). The Court however, continued: The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances. See, *ibid*.

<sup>1049</sup> J Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (2009) 42 *Vand J Transnat'l L* 779.

<sup>1050</sup> Borgen, 'Kosovo's Declaration of Independence' (n 244).

<sup>1051</sup> '*Reference Re Secession of Quebec*' (n 21) para 135.

<sup>1052</sup> Noting that from 1989 on, the Kosovar Albanians 'were denied the ability to exercise any sovereign authority or functions or even to participate in the federal government,' and that they were subjected to 'a systematic denial of their basic human rights'. See, Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (n 916).



structure of the former Yugoslavia.<sup>1053</sup> Kosovo was granted the status of an autonomous province, with virtually the same rights and responsibilities as the six Yugoslav Republics. The autonomous rights included the right to change and adopt its constitution, identity, territory, and judicial autonomy, the right to ratify treaties that were concluded with foreign States and international bodies; and representation in all organs of the Yugoslav Federation. Accordingly, under the constitution, both Albanians and Kosovars have acquired the right to internal self-determination, parallel to such rights existing for peoples living within other larger federal states.<sup>1054</sup> Thus, while it is certain that the Milosevic regime was not respecting Kosovars' right to internal self-determination, it is true that those rights had been respected in the past by the SFRY, and it was at least plausible that those rights would be respected by Serbia in the future. In other words, if we were to conclude that the Kosovar rights to internal self-determination would be fulfilled in the future, our analysis would stop here because the Kosovars would have no right to external self-determination, like Quebec, and thus no right to secede from Serbia. On the other hand, if we were to conclude that it is not likely that Serbia would respect the Kosovar rights to internal self-determination in the future, then the Kosovars would have the right to external self-determination and thus the right to secede from Serbia.

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<sup>1053</sup> Compare the general content of the right to internal self-determination, which includes the right of people to determine their political and social regime, the right of people to freely dispose of their natural resources and pursue economic development, and the right to solve all matters under domestic jurisdiction. With the rights conferred on the Kosovar Albanians by the 1974 SFRY Constitution, which included, *inter alia*, the right to adopt laws and a constitution, and the right to have judicial autonomy and a Supreme Court. Thus, it is clear that the 1974 SFRY Constitution enabled Kosovo and its citizens to exercise full internal self-determination. See, Gruda, 'Some Key Principles for a Lasting Solution of the Status of Kosova' (n 1019).

<sup>1054</sup> In addition, the 1974 Constitution provided political rights for Kosovar Albanians, such as the right to participate in the Yugoslav federal government and the right to form their own provincial parliament, linguistic rights, such as the right to have Albanian-language schools, university, and media, religious rights to freely exercise their religion, and general rights to preserve their Albanian culture and ethnicity. See, *ibid*.

#### **4.2.3.3. The third argument which is most supported in the international community is the right of self-determination to victimized people, whether there were serious human rights violations in Kosovo.**

The International Committee of Jurists in the *Aland Islands case* found that there was no right to secede absent ‘a manifest and continued abuse of sovereign power to the detriment of a section of population’.<sup>1055</sup> The Serb regime persistently committed atrocities against Albanians, and they were responsible for serious human right violations against the Kosovars, as in 1999 Resolution 1244 noted ‘a grave humanitarian situation’ and a threat to international peace and security.<sup>1056</sup> In particular, Serbian atrocities directed exclusively at Kosovars showed a clear intention to eliminate them from Kosovo. Only the NATO intervention in 1999 stopped Serbian forces from totally achieving their aim.

On the other hand, it should be noted here that Kosovar Albanians themselves have also committed human rights abuses. To the extent, the international community considers it relevant whether human rights abuses are ongoing or historic, the situation in Kosovo is unclear. In this regard, ‘the on-going international presence in Kosovo is legally relevant as it is evidence of the international community’s determination that the situation in Kosovo was and is highly volatile and that it cannot be solved completely via a domestic political structure’.<sup>1057</sup>

#### **4.2.3.4. Was secession the only solution?**

The report of the Commission of Rapporteurs appointed by the League of Nations in 1919 concluded that international law did not legally support the right of secession for the people of the Aaland Islands. It was argued that ‘the separation of a minority from the State of which it forms a part and in this case incorporation to another State, could only be considered as a last resort when the State lacks either the will or the power to enact and apply just and

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<sup>1055</sup> ‘*Aland Island Case*’ (n 169).

<sup>1056</sup> Borgen, ‘Kosovo’s Declaration of Independence’ (n 244).

<sup>1057</sup> *ibid.*

effective guarantees'.<sup>1058</sup> In the same way, the Supreme Court of Canada in *Quebec* noted that international law did not support the right in cases where minorities freely choose their representatives and are given political, language and cultural protection. It did conclude, though, that when a people are blocked from the meaningful exercise of their right to self-determination internally, they are entitled, as a last resort, to exercise it by secession.<sup>1059</sup>

The situation in Kosovo prior to the Declaration of Independence was unlikely to offer any realistic alternative to secession. Since then, the two sides have failed to resolve their differences; it is unlikely that anything short of military intervention could keep Kosovo within Serbia.<sup>1060</sup> As a result, it is clear that most realistic options other than secession had failed. For that reason, the basic framework provided by international law is receptive to arguments for and against secession. On the one hand, in the interest of systemic stability, the international community has a bias against secession. Nevertheless, if it is assumed that secession is not totally prohibited by international law, then the case of Kosovo presents a set of facts that may be persuasive and an ethnic group, (though perhaps not a nation), within a region with historically defined boundaries 'Kosovo as a province', after the intervention of NATO to prevent humanitarian disaster, and after the deadlock of negotiations with the predecessor State, that seeks independence via a declaration that is coordinated and supported by the international community.<sup>1061</sup> Thus, the argument is conversely to stand to another claim of a right to secede, for instance, those of Transnistria, which due to different material facts would fail under the same legal analysis.<sup>1062</sup>

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<sup>1058</sup> After the secession of Finland from Russia Swedish, population of Aaland Island pleaded national self-determination as set forth by Woodrow Wilson, to join their motherland, Sweden. See, 'LN Doc B7 21/68/106 (1921)'.

<sup>1059</sup> 'Reference Re Secession of Quebec' (n 21) para 135.

<sup>1060</sup> Borgen, 'Kosovo's Declaration of Independence' (n 244).

<sup>1061</sup> *ibid.*

<sup>1062</sup> 'Special Committee on European Affairs, Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova', 61 REC.

#### 4.2.4. The legality of secession and recognition (The ICJ Advisory Opinion)

Recognition of States has previously been discussed in chapter two. Crawford states that, ‘in international legal circles the assertion that the formation of a new State is a matter of fact, and not of law, continues to have considerable weight’.<sup>1063</sup> Hence, an act of recognition is not an instrument whose function it is to create a State, but only to demonstrate acceptance of a given claim to statehood based on a neutral assessment of whether or not a given entity meets the criteria that are incumbent on that title.<sup>1064</sup> While the dominant view is that, the act of recognition is not constitutive of a State, but rather declaratory in effect and nature, it merely affirms the fact of statehood. However, a State may exist in spite of negative reactions. In practice, widespread recognition appears to be of particular worth from the standpoint of those institutions claiming to meet the criteria of statehood.<sup>1065</sup> Almqvist argued that recognition appears to be an essential condition for the new entity to be able to exercise the international rights and obligations that correspond to the status of statehood, including entering into international relations with States, and in this way becoming a fully-fledged member of the international community.<sup>1066</sup> In addition, Crawford explained that, despite the non-decisive nature of recognition from an international legal perspective, recognition by other States can be used as evidence for the legal validity of the claims for statehood set forth by secessionist movements.<sup>1067</sup>

The EU Resolution 1244 contends that ‘generally once an entity has emerged as a State in the sense of international law, a political decision can be taken to recognise it.’<sup>1068</sup> This reflects the general understanding that recognition itself is not a formal requirement of statehood; it

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<sup>1063</sup> Crawford, *The Creation of States in International Law* (n 3) 4.

<sup>1064</sup> Almqvist, ‘The Politics of Recognition, Kosovo and International Law’ (n 573).

<sup>1065</sup> See Statehood criteria: Crawford, *The Creation of States In International Law* (n 3) 37.

<sup>1066</sup> Almqvist argued that, it is important to know that in international practice ‘metropolitan recognition’ or recognition from the Parent State (and not simply third State recognition) constitutes an essential condition to become a member of the UN. See, Almqvist, ‘The Politics of Recognition, Kosovo and International Law’ (n 573).

<sup>1067</sup> Crawford stated ‘Recognition is an institution of State practice that can resolve uncertainties as to status and allow new situations to be regularised. That an entity is recognised as a State is evidence of its status; where recognition is general, it may be practically conclusive. States, in the forum of the United Nations or elsewhere, may make declarations as to status or ‘recognise’ entities the status of which is doubtful: depending on the degree of unanimity and other factors, this may be evidence of a compelling kind. Even individual acts of recognition may contribute towards the consolidation of status; in Charpentier’s terms, recognition may render the new situation opposable to the recognising State’. See, Crawford, *The Creation of States In International Law* (n 3) 27.

<sup>1068</sup> Borgen, ‘Kosovo’s Declaration of Independence’ (n 244).

rather merely accepts a factual occurrence.<sup>1069</sup> Thus, as recognition is declaratory, this sort of argument goes, no State is required to recognise an entity claiming statehood? In other words, international law does not confer any obligations on States to participate in the process of recognition or offer a comprehensive recognition or objection statement.

In contrast, it has been argued that, a State should not recognise a new entity if it constitutes intervention in the domestic affairs of a State, or if the State-creation process in any other way would perpetuate a breach of international law (such as in the case of illegal annexation of a territory). ‘Recognition may also be withheld where a new situation originates in an act which is contrary to general international law’.<sup>1070</sup> In this regard, Serbia and Russia argue that, as Serbia did not consent to an alteration of its territory and borders, to recognise Kosovo State would violate its own rights as a State. However, this argument cannot be legally correct, as changing the boundaries of sovereign State (Serbia) in and of itself would not make Kosovar independence illegal because, as argued in the previous chapter that, the international community has come to accept the legality of secession under certain circumstances.<sup>1071</sup>

Furthermore, Borgen argued that, State practice has proven that, absence of a clear indication of illegality, in cases of State recognition there is considerable deference to the political prerogative of outside States to decide whether to recognise an aspirant State.<sup>1072</sup> For example, the Security Council has condemned the establishment of the Turkish Republic of Northern Cyprus. There is however, no such resolution condemning the recognition of Kosovo, but rather, a growing number of States to accept its declaration. Nonetheless, Borgen argued this does not make Kosovo’s secession legal, but it does show that, ‘in cases of secession, law and politics are lightly intertwined’.<sup>1073</sup>

Thus, the effect of recognition will vary according to the situation. Malanczuk argued that ‘where facts surrounding an entity’s satisfaction of the criteria for statehood are clear, the evidentiary value of recognition or non-recognition will not be strong enough to affect the outcome, and in such cases, recognition is declaratory’.<sup>1074</sup> However, in borderline cases where the facts are unclear, the evidentiary value of recognition can have a decisive effect,

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<sup>1069</sup> *ibid.*

<sup>1070</sup> Jennings and Watts (ed), in *Oppenheim’s International Law* (n 362) 183.

<sup>1071</sup> Borgen, ‘Kosovo’s Declaration of Independence’ (n 244).

<sup>1072</sup> *ibid.*

<sup>1073</sup> *ibid.*

<sup>1074</sup> Malanczuk, *Akehurst’s Modern Introduction to International Law* (n 346) 84.

and in such circumstances, recognition is semi-constitutive.<sup>1075</sup> Given Serbia's for instance continued claim to sovereignty over Kosovo, current recognition is having a decisive effect in affirming Kosovo's statehood. Today, 108 States have recognised Kosovo as an independent sovereign State.<sup>1076</sup>

On the other hand, in July 2010, the UN's highest Court (ICJ) ruled that Kosovo's unilateral declaration of independence did not violate international law.<sup>1077</sup> However, Cerone is one who found that the Court's interpretation of the question too narrow,<sup>1078</sup> as it avoided saying whether Kosovo is a State, or whether the State of Kosovo was legal under international law, whether recognition of Kosovo is legal, whether the right of self-determination is applicable to Kosovar Albanian peoples, or perhaps whether Kosovo could be a case of 'remedial secession'. The Court has made it clear that it would not deal with these issues.<sup>1079</sup> All it had to do was decide whether the declaration was prohibited by international law. The Court shows that the interpretation of the question and the identification of the authors of the Declaration had significant implications for the Court's finding that the declaration of independence 'did not violate any applicable rule of international law'.<sup>1080</sup> The Court argued that, the rules, which could possibly prohibit the declaration of independence, apply under: (i) general international law; (ii) Security Council resolution 1244; and (iii) the Constitutional Framework for Kosovo.<sup>1081</sup>

Furthermore, considering The Declaration of independence as a potentially illegal act under international law, the court argued that, 'the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of

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<sup>1075</sup> *ibid.*

<sup>1076</sup> (...), 'Who Recognised Kosovo as an Independent State? Recognized or Announced the Recognition of Republic of Kosova' (n 1031).

<sup>1077</sup> 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo.' ICJ Advisory *Opinion* of 22 July 2010 [2010] ICJ Rep [hereinafter the Kosovo Opinion] para 122.

<sup>1078</sup> J Cerone, 'The World Court's Non-Opinion, *Opinio Juris* (25 July 2010)',

<<http://opiniojuris.org/2010/07/25/the-world-court%E2%80%99s-non-opinion/>> accessed 18 July 2013.

<sup>1079</sup> 'The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States, which have recognized it as an independent State. Accordingly, the Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly.' See, 'The *Kosovo Opinion*', para 51 (n 1077).

<sup>1080</sup> *ibid.*, para 122.

<sup>1081</sup> *ibid.*, para 78.

force or other egregious violations of norms of general international law, in particular those of a peremptory character'.<sup>1082</sup> Accordingly, Vidmar argued that, while the Court held that a unilateral character as such does not render a declaration of independence illegal, it is also implicitly pronounced that a declaration of independence, although not by itself creative of a new State, can violate (general) international law.<sup>1083</sup> Thus, Aspremont argued that, the absence of prohibition did not simultaneously provide any entitlement to the authors of the declaration of Kosovo or to Kosovo as a whole.<sup>1084</sup> In this regard, Judge Bruno Simma demonstrated that, the formulation 'in accordance with international law' should not only be interpreted as a question of whether or not there was a prohibition.<sup>1085</sup> He found that, the question of being in accordance with international law also includes the question whether there was a right to adopt such a declaration of independence.<sup>1086</sup> Simma thought this approach follows from a narrow consensualist approach to international law derived from the *Lotus case*<sup>1087</sup> (what is not prohibited is permitted) and that the Court ought to have addressed whether the declaration was permitted by international law.<sup>1088</sup> Thus, Akande argued that, 'the declaration is not prohibited only gives a partial answer to the question whether the declaration is 'in accordance' with international law'.<sup>1089</sup> If international law actually expressly allowed the declaration (or provided a right to independence) that would be relevant in saying the declaration was 'in accordance with international law'.<sup>1090</sup> Hence, it is possible for international law neither to prohibit nor to permit declarations of independence. Akande argued that, the 'answer given by the Court does not imply that international law permits declarations of independence in these sorts of situations'.<sup>1091</sup>

Moreover, in addressing the issue of legality, the Court obviously adopted the view that the law was neutral on the matter of the unilateral declaration of independence by holding: 'It is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right

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<sup>1082</sup> *ibid*, para 81.

<sup>1083</sup> J Vidmar, 'The Kosovo Advisory Opinion Scrutinized' (2011) 24 *Leiden J Intl L* 355.

<sup>1084</sup> J Aspremont, 'The Creation of States before the International Court of Justice : Which ( II ) Legality ?' The Hague Justice Portal 8.

<sup>1085</sup> 'The Declaration of the Judge Simma appended to the Opinion, ICJ Advisory Opinion (5 December 2011) [2011]', <[http://untreaty.un.org/cod/ICJsummaries/documents/english/190\\_e.pdf](http://untreaty.un.org/cod/ICJsummaries/documents/english/190_e.pdf)> accessed 18 July 2013.

<sup>1086</sup> *ibid*.

<sup>1087</sup> S.S. *Lotus (France v Turkey)* (n 618).

<sup>1088</sup> The Declaration of the Judge Simma Appended to the Opinion (n 1085).

<sup>1089</sup> Akande, 'ICJ finds that Kosovo's Declaration of Independence not in Violation of International Law' (n 591).

<sup>1090</sup> *ibid*.

<sup>1091</sup> *ibid*.

conferred by it'.<sup>1092</sup> However, this reflects, Crawford argued the prevailing doctrinal interpretation that a unilateral declaration of independence is 'a legally neutral act the consequences of which are regulated internationally'.<sup>1093</sup> Nevertheless, the Court made a broader argument that the principle of territorial integrity of States does not operate in situations in which an entity is trying to break away from its parent State. The Court pointed out that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States'.<sup>1094</sup> Accordingly, Vidmar pointed out that, only a State can violate the territorial integrity of another State.<sup>1095</sup> Regardless, this argument is questionable. Because it has been argued that, the right of self-determination applies to peoples and not territories, although the internal boundary arrangement may well be very important for determination of the new international borders.<sup>1096</sup>

Therefore, the Court held that 'a unilateral character as such does not render a declaration of independent illegal'; it also observed that a declaration of independence, would in certain circumstances violate general international law.<sup>1097</sup> Significantly, the Court noted that in the case of Kosovo, the Security Council never proclaimed the illegality of the declaration of independence.<sup>1098</sup> However, this does not mean that there can be no illegality unless the SC says so. The Court made a specific reference, Vidmar argued, to the unlawful use of force; this paragraph was the only one, which suggests that other norms are also capable of rendering a declaration of independence illegal.<sup>1099</sup> Having said that, the UN organs and States practice confirms that the response will be very factual, and while a declaration in itself is not in breach of a specific (rule), that declaration may be accompanied by circumstances rendering the making of the declaration unlawful.

Moreover, following the NATO intervention and UN Security Council Resolution 1244 Kosovo was placed under international administration, removing Serbia's sovereignty over it. With reference to these events, Earned Sovereignty 'ES', was proclaimed, initially as a policy

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<sup>1092</sup> The *Kosovo Opinion*, para 56 (n 1077).

<sup>1093</sup> Crawford, *The Craetion of States in International Law* (n 3) 390.

<sup>1094</sup> The *Kosovo Opinion*, para 8 (n 1077).

<sup>1095</sup> Vidmar, 'The Kosovo Advisory Opinion Scrutinized' (n 1083).

<sup>1096</sup> *ibid.* See also, ICCPR and ICESCR Article 1 (n 19) and (n 20).

<sup>1097</sup> The Court held that [T]he illegality attached to [some other] declarations of independence, stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). See, The *Kosovo Opinion*, para 81 (n 1077).

<sup>1098</sup> *ibid.*

<sup>1099</sup> Vidmar, 'The Kosovo Advisory Opinion Scrutinized' (n 1083).



prescription in 1998, and then reflected in the approach taken by the Rambouillet Accord and Resolution 1244. The elements of ES have provided useful reference points for examining Kosovo's ongoing decade of international administration from 1999. During this time, the international administrator helped Kosovo to develop economy, proper industry, institutions, and infrastructure; so that they can function as a viable State once, the international administration ends. Kosovo, under this theory, may have earned its sovereignty because the UN administered it, and because during this time, it demonstrated to the outside world that it was ready and capable to function as an independent State.

Thus, States that recognised Kosovo's independence argue that it is the only way to promote regional peace and stability and describe Kosovo as a *sui generis* case, and Kosovo's commitment to respect minority rights and accept 'supervised independence'. In other words, they justify their recognition with reference to the elements of ES and RS. In contrast, Bolton and Visoka argued that 'States that withhold recognition support Serbia's sovereignty and territorial integrity and argued that international law does not allow secession outside the colonial context and that 'unilateral secession', in the absence of parent State consent, should not have effect and sets a negative precedent.<sup>1100</sup> Accordingly, as general international law contains no applicable prohibition of declarations of independence, the declaration of independence did not violate general international law. Hence, the declaration did not violate Security Council resolution 1444 (1999).

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<sup>1100</sup> Bolton and Visoka, 'Recognizing Kosovo's Independence: Remedial Secession or Earned Sovereignty?' (n 981).

#### 4.4.5. Is Kosovo an exceptional case?

In fact, the case of Kosovo can be considered as a prominent and most recent example of possible remedial secession. This example is of special interest for academia, because although there is no clear consensus on the law on secession, Kosovo earned a widespread international recognition, including from the United States.<sup>1101</sup> It has been established that after 1989, the internal right of self-determination of ethnic Albanians was denied and gross human rights violations took place, the circumstances that arguably make remedial secession justifiable.<sup>1102</sup> Under the doctrine of remedial secession, secession is a remedy to the denial of internal self-determination by the State of Serbia and Kosovo people were entitled to exercise their right externally. This argument has not only been expressed by many scholars, but also by a number of States in The Kosovo advisory proceeding. Accordingly, secession was *ultima ratio* means a last resort, because there was no alternative, and the status talks had reached the point where further negotiations were meaningless. Tomuschat argued that the 'Kosovo situation falls under purview of remedial secession'.<sup>1103</sup> However, the question of possible remedial secession is at the centre of the international dispute about Kosovo. The Russian government argued that more time was needed for negotiations to achieve a positive outcome.<sup>1104</sup> The Russian Parliament has issued a statement that read in part: 'The right of nations to self-determination cannot justify recognition of Kosovo's independence along with the simultaneous refusal to discuss similar acts by other self-proclaimed states, which have obtained *de facto* independence exclusively by themselves'.<sup>1105</sup>

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<sup>1101</sup> See, (...), 'Who Recognised Kosovo as an Independent State? Recognized or Announced the Recognition of Republic of Kosova' (n 1031). The Kosovo government claims that 98 countries in all have extended diplomatic recognition to it. In addition, President Bush wrote a letter to Kosovo's president, Fatmir Sejdiu that read in part: 'On behalf of the American people, I hereby recognize Kosovo as an independent and sovereign state. I congratulate you and Kosovo's citizens for having taken this important step in your democratic and national development. See, Nicholas Kulish and C J Chivers, 'Kosovo Is Recognized but Rebuked by Others', *The New York Times* (Europe 19 February 2008) 2  
<<http://www.nytimes.com/2008/02/19/world/europe/19kosovo.html?pagewanted=1& r=2>> accessed 21 July 2013.

<sup>1102</sup> Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (n 1049). The violations can be documented by the review of processing, are the ICTY, which has entered conjunctions for crimes against humanity and war crimes.

<sup>1103</sup> C Tomuschat, *Secession and Self-Determination* (CUP 2006) 42.

<sup>1104</sup> B Coppieters, 'The Recognition of Kosovo: Exceptional but not Unique', in Michael Emerson, *Reading in European Security V.5* (CEPS 2009) 96.

<sup>1105</sup> Kulish and Chivers, 'Kosovo Is Recognized but Rebuked by Others' (n 1101).

Furthermore, Vidmar argued that there is ‘a tenable argument that the entitlement of Kosovo Albanians to remedial secession was born in the years of oppression, but was exercised with a delay. However, even with this interpretation the crucial element of the remedial secession the last resort seems to be missing’.<sup>1106</sup> In other words, it can be argued that, there were no on-going human rights violations from the Serbian side at the time of secession. Rather, one can further posit that a new democratic Serbian government could have been willing to accept substantial autonomy of Kosovo and this could be a remedy in the form of internal self-determination.<sup>1107</sup> In addition, the debate on ‘failed talk’ is also a rather factual evaluation if there was indeed a remedy available and would it be effective.<sup>1108</sup> However, who should evaluate the effectiveness and availability of remedies in this particular situation? This links to the question and decides if an entity is or is not a State?

On the other hand, despite these arguments for the recognition of Kosovo, many States continue to insist that Kosovo is a unique case, which in their opinion, does not create a precedent for several reasons:

First: in announcing the recognition of Kosovo, the US Secretary of State Condoleezza Rice has explained that:

1-‘The unusual combination of factors found in the Kosovo situation, including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration, are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today’.<sup>1109</sup>

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<sup>1106</sup> Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (n 1049).

<sup>1107</sup> Within the framework of former Yugoslavia, Kosovo's autonomy had increased over time and its status was upgraded with the 1974 Constitution, the last before the collapse of SFRY. Thence, as a constitutive federal unit, Kosovo's consent was required for all executive, legislative, and judicial decisions at the federal level, hardly the case in other federations in the world, a part of advanced federations such as Canada or Switzerland. See, 'Kosovo: The Unprecedented State', Policy Brief Series/*Prishtina* 14 <[http://www.kipred.org/advCms/documents/73775\\_Kosovo\\_the\\_unprecedented\\_state.pdf](http://www.kipred.org/advCms/documents/73775_Kosovo_the_unprecedented_state.pdf)> accessed 24 June 2014. However, Williams argued, from 1989, the Kosovar Albanians were denied the ability to exercise any sovereign authority or functions or even to participate in the federal government. In addition, they were subjected to a systematic denial of their basic human rights. See, Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (n 916).

<sup>1108</sup> I Vezbergaite, 'Remedial Secession as an Exercise of the Right to Self-Determination' (Master thesis, Central European University 2011).

<sup>1109</sup> 'US Recognizes Kosovo as Independent State,' statement of Secretary of State Condoleezza Rice, Washington DC (18 February 2008) <<http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>> accessed 21 July 2013.

2- The international community has administered Kosovo from 1999-2008. In other words, Borgen argued that the ‘reinintegrating such a territory is different from assessing a claim by a separatist group that, on its own, is seeking to overturn the authority of the pre-existing State and unilaterally secede’.<sup>1110</sup> In the same way, Resolution 1244 has internationalised the problem of Kosovo from being an issue of domestic law, it moved Kosovo from being solely under Serbian sovereignty into the international administration.<sup>1111</sup> However, it would be irrelevant whether Kosovo had been under international administration for the purpose of a special case.<sup>1112</sup> Consequently, Kosovo was administrated by the international community as they considered the situation so violate. In this regard the ICJ concluded that ‘the object and purpose of resolution 1244 (1999) was to that order to establish a temporary, exceptional legal regime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and was which aimed at the stabilisation of Kosovo’.<sup>1113</sup> The Court noted that it was designed to do so on an interim basis.<sup>1114</sup> Moreover, the SC identified the purpose of an interim administration for Kosovo, to ensure conditions for a peaceful and normal life for all inhabitations in Kosovo.<sup>1115</sup>

Finally, it is clear that, the Kosovars Albanians are an ethnicity homogenous enclave physically separate and ethnicity different from the Serbs.<sup>1116</sup> Since 2008, ethnic Albanians and Kosovars had predominantly inhabited Kosovo. They no longer Sterio argued, ‘spoke Serbian and no longer engaged with their Serbian neighbours and even the Serbian government recognised that autonomy was the only viable option’.<sup>1117</sup> On the other hand, the international community was working in Kosovo for years, sharpening the difference between Kosovo proper and the rest of Serbia.<sup>1118</sup> So that, Dion argued that ‘forcing the people of Kosovo to return under Serbian authority would inevitably cause instability in an already fragile region’.<sup>1119</sup> In other words, having conducted ethnic cleansing, and having treated the Kosovars as second-class citizens continuously since annexation, Serb politicians proved unable to rule Kosovo equally with the rest of their territory, they have lost legitimacy

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<sup>1110</sup> Borgen, 'Kosovo's Declaration of Independence' (n 244).

<sup>1111</sup> *ibid.*

<sup>1112</sup> *ibid.*

<sup>1113</sup> Kosovo *Advisory Opinion*, (n 1077) paras 94-100.

<sup>1114</sup> *ibid.*

<sup>1115</sup> UNSC Res 1239, (14 May 1999) para 5.

<sup>1116</sup> Borgen, 'Kosovo's Declaration of Independence' (n 244).

<sup>1117</sup> Sterio, *The Right to Self-Determination under International Law: Selfistans, Secession, and the Rule of the Great Powers* (n 140) 123.

<sup>1118</sup> *ibid.*

<sup>1119</sup> Dion, 'Secession and the virtues of clarity' (n 590).

and a right to govern Kosovo.<sup>1120</sup> The Kosovo Report in 2000 explained that, ‘After what Kosovars suffered in the hands of FRY authorities, they are absolutely unwilling to accept or even symbolic expression of FRY sovereignty on the province’.<sup>1121</sup> At the same time, in light of such circumstances, it is almost impossible to believe that, Serbia would retreat on their promise of autonomy for Kosovo.

Accordingly, it is possible to argue that Kosovo is both exceptional and a source of precedent at the same time. Significantly, the recognition of Kosovo will make the international management of those secessionist conflicts in the world much more fraught, it will rather be at the centre of all discussions on the settlement of secessionist conflicts. Coppieters argued that the question will be raised ‘as to why the EU favours the application of federal models in conflicts such as the one in Abkhazia if it considers these models as inappropriate for Kosovo’.<sup>1122</sup> He added that the fact that Kosovo ‘is an inspiring model for the leaderships of breakaway States does not mean, however, that the external States protecting those secessionist entities will follow the Kosovo example by recognising them’.<sup>1123</sup>

Notably, under the approach of RES, an entity must demonstrate to the outside world that it is capable of functioning as an independent State, that it would be a reliable sovereign partner, and that it is worthy of recognition. The Special Representative of the Secretary-General to Kosovo had proposed a formula called ‘standards before status’, whereby Kosovo would have to fulfil a number of standards as a prerequisite to international recognition.<sup>1124</sup> This bench marks Williams and Pecci argued, identified during conditional sovereignty vary depending on the characteristics of the conflict and generally include conditions, such as protecting human and minority rights, developing democratic institutions, strengthening the rule of law and promoting regional stability.<sup>1125</sup> Once the final status is determined, Williams and Hooper argued, ‘constrained sovereignty’ applies limitations on the sovereign authority and functions of the new entity, such as continued international administration and military presence and limits on the right of the State to undertake territorial association with other

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<sup>1120</sup> See, 'Kosovo: The Unprecedented State' (n 1107).

<sup>1121</sup> 'The *Kosovo Report*' (Oxford 2000) 9.

<sup>1122</sup> Coppieters, 'The Recognition of Kosovo: Exceptional but not Unique' (n 1104) 100-101.

<sup>1123</sup> *ibid.*

<sup>1124</sup> Gruda, 'Some Key Principles for a Lasting Solution of the Status of Kosovo: *Utī Possedetis*, The Ethnic Principle, and Self-Determination' (n 189).

<sup>1125</sup> Williams and Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination' (n 74).

States'.<sup>1126</sup> In other words, according to this proposal, Gruda argued, Kosovo would be governed in a system of political trusteeship in the meantime, in order to advance the local population politically, economically, socially and educationally.<sup>1127</sup> In fact, the intermediary step of international administration has helped Kosovo to develop institutions, proper industry, economy, and infrastructure; so that it can function as a viable State once, the international administration ends. In other words, the elements of ES have provided useful reference points for examining Kosovo's ongoing decade of international administration from 1999. During this time, Bolton and Visoka argued, institutions of self-government were consolidated for Kosovo's 'future status', be that wide autonomy within Serbia, or independent statehood.<sup>1128</sup> In 2008, upon the failure of extensive UN-sponsored negotiations, Kosovo declared its independence.

Thus, despite the declaration and solid arguments for the recognition of Kosovo, just saying that it is exceptional may not be enough. States and academia must ask why one claim of independence is purportedly unique and then consider its downstream political and legal effect.<sup>1129</sup> Serbia and the majority of States on the other hand, will never recognise the independence of Kosovo. This leaves Kosovo's unilateral declaration of independence, with partial, restricted recognition throughout the world, and with an uncertain future.

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<sup>1126</sup> Hooper and Williams, 'Earned Sovereignty: The Political Dimension' (n 914).

<sup>1127</sup> Gruda, 'Some Key Principles for a Lasting Solution of the Status of Kosova: *Uti Possedetis*, The Ethnic Principle, and Self-Determination' (n 189).

<sup>1128</sup> Bolton and Visoka, 'Recognizing Kosovo's independence: Remedial Secession or Earned Sovereignty?' (n 981).

<sup>1129</sup> Borgen, 'Kosovo's Declaration of Independence' (n 244).

### 4.3. Quebec

Quebec was a French colony, which was ceded to Great Britain in 1738.<sup>1130</sup> In 1863, it became one of the four initial provinces of Canada at confederation; however, Crawford argued that, despite a major contribution to Canadian public life, many French-speaking Quebecers were concerned at the risk of being submerged by English Canada.<sup>1131</sup> Shortly, after the enactment of the Constitution Act of 1867, which was marked the birth of the Canadian federation, there was an attempt by Nova Scotia to sever its links with the federation.<sup>1132</sup> The constitution guaranteed the use of French in addition to English in both the federal and Quebec legislature and courts.<sup>1133</sup> This constitutional framework Radan and Pavkovic argued, ‘provided few, if any; legal obstacles to the development of the francophone nationalist movement, which in the late 1960s took up its main political goal the secession of Quebec from Canada’.<sup>1134</sup> In 1976, the *Parti Quebecois* was elected into office in the province of Quebec. For the first time a provincial government advocating secession from the Canadian federation took regional political control in the country.<sup>1135</sup> The *Parti Quebecois* has had full sovereignty from Canada as its main objective, combined with economic association with Canada. The Province conducted referenda in 1980 and 1995.<sup>1136</sup> However, Crawford argued that ‘the defeat of the 1995 referendum by a few thousand votes raised concern in Canada as a whole as to the impact and consequences for the nation of an eventual yes vote’.<sup>1137</sup> In this regard, the federal Government in 1996 asked the Supreme Court for an advisory opinion on three questions relating to the ‘unilateral secession’ of Quebec.

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<sup>1130</sup> Crawford, *The Creation of States in International Law* (n 3) 411.

<sup>1131</sup> *ibid.*

<sup>1132</sup> J D Van Der Vyver, 'Self-Determination of the Peoples of Quebec under International Law' (2000) 10 *J Transnat'l L & Pol'y* 1.

<sup>1133</sup> Pavkovic and Radan, *Creating New States: Theory and Practice of Secession* (n 777) 80.

<sup>1134</sup> *ibid.*

<sup>1135</sup> Van Der Vyver, 'Self-Determination of the Peoples of Quebec under International Law' (n 1132).

<sup>1136</sup> Crawford, *The Creation of States in International Law* (n 3) 411.

<sup>1137</sup> *ibid.*

### 4.3.1. in *Re Secession of Quebec*

The Supreme Court of Canada was asked by the federal government for an advisory opinion on three questions relating to the ‘unilateral secession’<sup>1138</sup> of Quebec. The Court asked to rule on the legality or constitutionality of a unilateral secession of Quebec, thus attempting to specify a legal or constitutional framework for any future attempts of Quebec to secede.<sup>1139</sup>

The three questions of the *Reference* were as follows:

1. Under the Constitution of Canada, can the National Assembly, legislature, or Government of Quebec effect the secession of Quebec from Canada unilaterally?
2. 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?<sup>1140</sup>
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or Government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

The Court first described secession as a ‘legal act as much as a political one’ and defined it as the ‘the effort of a group or section of a State to withdraw itself from the political and constitutional authority of that State, with a view to achieving statehood for a new territorial unit on the international plane’.<sup>1141</sup> In addition, it defines ‘unilateral’ secession as one ‘without prior negotiations with the other provinces and the federal government’.<sup>1142</sup> The first question tackled by the Court was whether Quebec could legally secede unilaterally under the Constitution of Canada. For the Court, ‘the legality of unilateral secession must be evaluated,

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<sup>1138</sup> This term describes a situation in which an entity tries to emerge as an independent State without the consent of its parent State. As identified by the Supreme Court of Canada in the Quebec case, a unilateral declaration of independence can result in a new State creation if it is accepted by the international community of States. It does not by itself change the legal status of a territory but it needs to be regarded as being creative of specific legal and political circumstances in which a new. See, ‘*Reference Re Secession of Quebec*’ (n 21).

<sup>1139</sup> Pavkovic and Radan, *Creating New States: Theory and Practice of Secession* (n 1133) 83.

<sup>1140</sup> ‘*Reference Re Secession of Quebec*’ (n 21).

<sup>1141</sup> *ibid*, para 83.

<sup>1142</sup> *ibid*, para 86.



at least in the first instance, from the perspective of domestic legal order of the State from which the unit seeks to withdraw'.<sup>1143</sup> Later, the Court noted that 'international law leaves the creation of a new State to be determined by the domestic law of the existing State of which the seceding entity presently forms a part'. And that international law is likely to be consistent with the conclusion that a unilateral secession is illegal, only subject to the possibility that such right may be recognised to this entity based on the right of peoples to self-determination'.<sup>1144</sup> The Canadian constitution is silent on this question. In this regard, Dumberry argued that, scholars generally agree that the unilateral secession of Quebec would be unconstitutional under Canadian Law.<sup>1145</sup> On the other hand, it has been argued by some commentators that the constitution of Canada would nevertheless permit secession, even unilaterally, based on a constitutional convention resulting inter alia, from federal acquiescence in the holding of both 1980 and 1995 referenda.<sup>1146</sup> The Court eventually put an end to this argument in concluding that 'although the Constitution neither expressly authorises nor prohibits secession and act of secession 'would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements' and would therefore be illegal'.<sup>1147</sup> It found that secession would require an amendment of the constitution of Canada.<sup>1148</sup> Thus, the Court did not have to venture into such controversy in order to answer Question 1 of the Reference; its silence may also be 'politically motivated'.<sup>1149</sup> In other words, while Quebec had no right to unilateral secession, there was, the Court decided, a constitutional duty on the part of the federal government and the provinces to negotiate the terms of secession should Quebecers democratically and unambiguously express a will to secede.<sup>1150</sup> The Court Lalonde argued

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<sup>1143</sup> *ibid*, para 83.

<sup>1144</sup> *ibid*, para 112.

<sup>1145</sup> P Dumberry, 'Lessons Learned from the Quebec Secession, Reference before the Supreme Court of Canada', in M Kohen (ed) *Secession: International Law Perspectives* (CUP 2006) 425-426. See for example, Patrick J Monahan, 'The Law and Politics of Quebec Secession' (1995) 33 *Osgoode Hall Law Journal* 1. Also, J Webber, 'The Legality of a Unilateral Declaration of Independence under Canadian Law' (1997) 42 *MCGILL LAW JOURNAL* 282.

<sup>1146</sup> This position has been supported by, D Turp, 'Quebec's Democratic Right to Self-Determination', in *Tangled Web: Legal Aspects of Deconfederation* (C.D. Howe Institute, 1992) 103-107. It is also discussed and rejected by, Webber, 'The Legality of a Unilateral Declaration of Independence under Canadian Law' (n 1145).

<sup>1147</sup> 'Reference Re Secession of Quebec' (n 21) para 84.

<sup>1148</sup> *Ibid*. In addition, The Court noted that, 'any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order'. *Ibid*, para 104.

<sup>1149</sup> Dumberry argued that, in the pleading, the Attorney General of Canada emphasised the fact that the Court did not have to determine how secession would be constitutionally achieved. See, *Dumberry, Lessons Learned from the Quebec Secession, Reference before the Supreme Court of Canada* (n 1145) 427 .

<sup>1150</sup> 'Reference Re Secession of Quebec' (n 21) para 265.

proceeded, in effect, to set out the legal framework for such an eventuality.<sup>1151</sup> As Schneiderman concluded, 'the federal government got what it wanted then, but much more than it bargained for'.<sup>1152</sup>

Furthermore, in the absence of explicit provisions in the constitution of the country, The Supreme Court suggested that, 'the seceding process must be constrained by four underlying structural principles: the democratic principle, the principle of federalism, the principle of the primacy of the constitution and of the rule of law, and the principle of protection of minorities'.<sup>1153</sup> Any province could in principle initiate a secession process.<sup>1154</sup> However, there has been a referendum on secession. The question must be clear, concise, and short.<sup>1155</sup> The Court indicated that the referendum result 'must be free of ambiguity both in terms of the question asked and in terms of the support it achieves'.<sup>1156</sup> The democratic principle must be interpreted by the rule of absolute majority. There must be also negotiations after the referendum on various important issues, such as tax and borders.<sup>1157</sup> The Court also Dumberry argued, identified that the other provinces as well as 'other participants' would take part in these negotiations.<sup>1158</sup> Ultimately, the negotiations would have to 'address the interests' of all participants, as well as 'the rights of all Canadians both within and outside Quebec'.<sup>1159</sup>

Accordingly, the Court acknowledged that a referendum 'undoubtedly may provide a democratic method of ascertaining the views of the electorate', but also that 'in itself and

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<sup>1151</sup> Lalonde, 'Quebec's Boundaries in the Event of Secession' (n 674).

<sup>1152</sup> D Schneiderman, 'Introduction', in David Schneiderman (ed), *The Quebec Decision, Perspectives on the Supreme Court Ruling on Secession* (James Lorimer & Company 1999) 8.

<sup>1153</sup> 'Reference Re Secession of Quebec' (n 21) para 87.

<sup>1154</sup> See, Seymour, 'Secession as a Remedial Right' (n 211).

<sup>1155</sup> 'Reference Re Secession of Quebec' (n 21) paras 92-93.

<sup>1156</sup> *ibid*, para 87.

<sup>1157</sup> The Court in its judgment on the legality of secession of Quebec insisted that from the perspective of Canadian constitutional law, secession requires that it be carried within the framework of principles of constitutionalism, federalism, democracy, the rule of law and protection of minorities. These principles, the Court ruled, demand a clear question and a clear majority in a referendum expression support for secession. A successful referendum introduces an obligation on the federal government and the secessionist authorities. These negotiations need to address the interests of Aboriginal peoples and minorities, the issue of borders of the seceding state and other issues that may arise because of the secession. See, Pavkovic and Radan, *Creating New States: Theory and Practice of Secession* (n 777) 84.

<sup>1158</sup> This last reference is probably directed to the Aboriginal peoples, since elsewhere in its opinion the Court acknowledged that 'aboriginal interests would be taken into account' in such negotiations. *ibid*, paras, 96, 139. See also, Dumberry, *Lessons Learned from the Quebec Secession, Reference before the Supreme Court of Canada* (n 1145) 429.

<sup>1159</sup> It would require the 'reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be'. 'Reference Re Secession of Quebec' (n 21) paras 92, 93.

without more, it has no direct legal effect, and could not in itself bring about unilateral secession'.<sup>1160</sup> This democratic process 'would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means'.<sup>1161</sup> Thus, it can be argued that, the refusal of any party to take part in the negotiations, would 'seriously put at risk the legitimacy of the exercise of its rights, and perhaps the negotiation process as a whole'.<sup>1162</sup> Consequently, a breach of this obligation to negotiate 'may have important ramifications at the international level' with respect to the international recognition of the new State.<sup>1163</sup> A unilateral secession of Quebec, following or preceding a referendum, Radan argued, is proclaimed illegal in both domestic and international law.<sup>1164</sup>

On the other hand, regarding the 'legal basis' for the unilateral secession of Quebec under international law, it is widely believed in doctrine that Quebec cannot invoke the right of peoples to self-determination to support any right to secession under international law. Quebec simply does not meet the criteria set by international law; it is neither a colonial nor an oppressed people under Canadian Federation. In this regard, Frank reported that:

[O]ne cannot reasonably maintain that the Quebec people is a colonial people, nor that it is deprived of the right of its own existence within Canada as a whole or to participate in the democratic process... Consequently, the Quebec people effectively exercise its right to self-determination within the whole of Canada and are not legally justified in invoking such right to found a possible independence].<sup>1165</sup>

The Court alluded thus to the possibility that when a peoples' right to self-determination is 'being totally frustrated internally', it may be entitled to exercise it externally by secession. However, the Court found that, the population of Quebec was 'equitably represented in legislative, executive, and judicial institutions, and that the State of Canada fully respected the principle of internal self-determination with respect to Quebec'.<sup>1166</sup> So that, according to the Court, the Quebecois people were not denied their rights to internal self-determination

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<sup>1160</sup> *ibid*, para 87.

<sup>1161</sup> *ibid*, para 87.

<sup>1162</sup> *ibid*, paras 88, 90, 95.

<sup>1163</sup> *ibid*, para 103.

<sup>1164</sup> Pavkovic and Radan, *Creating New States: Theory and Practice of Secession* (n 777) 84.

<sup>1165</sup> T M Franck, 'The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty', (1992) *Tamilnation.org* <<http://tamilnation.co/selfdetermination/countrystudies/quebec/quebec2.htm>> accessed 27 June 2014. The Other Co-Authors of the Report Were, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw, Christian Tomuschat .

<sup>1166</sup> For example, the Quebecois in Canada 'occupy prominent positions within the government,' and they 'freely make political choices and pursue economic, social, and cultural development within Quebec, across Canada, and throughout the world.' 'Reference Re Secession of Quebec' (n 21) para 136.

and, accordingly, it was unnecessary to discuss the possibility of rights to external self-determination.<sup>1167</sup> The Court concluded that, ‘exceptional circumstances’, where a people is being denied its rights to internal self-determination, are not applicable to the people of Quebec’.<sup>1168</sup> In fact, Quebec has a degree of relative autonomy within the Federation, is fully participating and represented in all aspects of Canadian democracy and is not subject to discrimination.<sup>1169</sup> On the other hand, some commentators argued that, under international law Quebec population would not constitute a ‘people’ for the purpose of self-determination,<sup>1170</sup> they have already exercised their right to self-determination,<sup>1171</sup> secession would thus not be accepted by the international community because of its negative results on its stability.<sup>1172</sup> For that reason, The Court unanimously ruled out that Quebec had no right to secede unilaterally in constitutional or international law. Similarly, upon the request from the Federal Government, Crawford reported that ‘the Quebec did not enjoy a right to secede unilaterally from Canada in international law therefore that Question 2 of the Reference should be answered in the negative.’<sup>1173</sup>

Among Quebec supporters of secession, Dumberry argued that ‘the argument of the legality of the process by which secession would be achieved is generally supplanted by reference to its legitimacy if corresponding to the expression of the democratic will of the population’.<sup>1174</sup> Relying on the arguments of legitimacy and popular will, sovereignties’ scholars pointed out that while international law might not confer upon the Quebecois people a positive right to independence, neither did it prohibit secession.<sup>1175</sup> International law, Lalonde argued was ‘natural with respect to secession, and in certain circumstances, it might well adapt to

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<sup>1167</sup> *ibid*, para 138.

<sup>1168</sup> *ibid*, para 138.

<sup>1169</sup> Webber, ‘The Legality of a Unilateral Declaration of Independence under Canadian Law’ (n 1145). Also Dumberry, ‘Lessons Learned from the Quebec Secession, Reference before the Supreme Court of Canada’ (n 1145) 432.

<sup>1170</sup> See for example, Van Der Vyver, ‘Self-Determination of the Peoples of Quebec under International Law’ (n 1132).

<sup>1171</sup> For some commentators such a right was exercised in 1867, at the time of the creation of the Federation, as well in the two referenda of 1980 and 1995. This position is largely rejected in doctrine, which tends to go in the direction that Quebec’s agreeable entry into the Canadian Federation cannot have provided support for the claim of the illegality of secession. See, G Marchildon and E Maxwell, ‘Quebec’s Right to Secession under Canadian and International Law’ (1992) 32 *Va J Int’l L* 583.

<sup>1172</sup> Dumberry, ‘Lessons Learned from the Quebec Secession, Reference before the Supreme Court of Canada’ (n 1145) 432.

<sup>1173</sup> Crawford, ‘State Practice, and International Law in Relation to Unilateral Secession’ (n 586) 2.

<sup>1174</sup> *ibid*, 433.

<sup>1175</sup> Jacques Frémont and François Boudreault, ‘Supraconstitutionnalité Canadienne et Sécession Du Québec’ (1997) 8 *National Journal of Constitutional Law* 163, in Lalonde, ‘Quebec’s Boundaries in the Event of Secession’ (n 674).

recognise effective political realities'.<sup>1176</sup> In a like manner, the federalist commentators<sup>1177</sup> have acknowledged that the consequences of a unilateral declaration of independence, if successful, might eventually be 'regulated internationally'.<sup>1178</sup>

In addition, the Court was required to consider whether there exists a positive right under international law for the secession of Quebec. The position of the Attorney General of Canada, which was not refuted by the *amicus curiae*, was that no such right exists for Quebec.<sup>1179</sup> In this regard, the Court stated that 'international law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination'.<sup>1180</sup> The Court then examined the content of the right of self-determination of people. This right however can be exercised 'within the framework of existing sovereign states'<sup>1181</sup> and consistently with the maintenance of the territorial integrity of those states'.<sup>1182</sup> Accordingly, the right to self-determination of a people 'is normally fulfilled through internal self-determination, people pursuit of its political, social, and cultural development within the framework of an existing State'.<sup>1183</sup> On the other hand, the right to external self-determination only arises in the most extreme of cases and, even then, under carefully defined circumstances'.<sup>1184</sup> It proclaimed that a right to secession only arises under the principles of self-determination of people at international law, 'when a people is subjected to alien subjugation, domination or exploitation, and possibly when a people is denied any meaningful exercise of its right to self-determination internally'.<sup>1185</sup> For the Court, these criteria were, 'irrelevant' for this Reference. In addition, it concluded that it was unclear whether this last possibility 'actually reflects an established international law

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<sup>1176</sup> *ibid.*

<sup>1177</sup> See for example, P W Hogg, *Constitutional Law of Canada* (3<sup>rd</sup> edn, Carswell 1992) 128.

<sup>1178</sup> According to Crawford, 'secession is 'neither legal nor illegal in international law, but a legally neutral act the consequences of which is, or may be, regulated internationally'. See, Crawford, *The Creation of States in International Law* (n 372) 268.

<sup>1179</sup> This was also the position expressed by the international law experts in their reports filed by both the Attorney General of Canada and the *amicus*. See, Bayefsky, *Self-Determination in International Law, Quebec and Lessons Learned* (n 848) 6.

<sup>1180</sup> 'Reference Re Secession of Quebec' (n 21) para 112.

<sup>1181</sup> For the Court, 'A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity'. *ibid.*, para 130.

<sup>1182</sup> *ibid.*, para 122.

<sup>1183</sup> *ibid.*, para 126.

<sup>1184</sup> *ibid.*, para 126.

<sup>1185</sup> *ibid.*, para 135. See also, The Decision of the Supreme Court of Canada. Bayefsky, *Self-Determination in International Law, Quebec and Lessons Learned* (n 848) 19 .

standard'.<sup>1186</sup> Thus, in so deciding, Dumberry argued, the Court disregarded several theories put forward in the doctrine to enlarge the right to secession to non-colonial situations<sup>1187</sup>, such as, the various 'moral theories'<sup>1188</sup>, the 'liberal theories'<sup>1189</sup>, as well as those grounded in the concept of legitimacy.<sup>1190</sup> Accordingly, it can be concluded that, Quebec does not meet the threshold of a 'colonial people' or an 'oppressed people', nor can it be suggested that Quebecers have been denied or 'blocked' meaningful access to government, to pursue their, social, political, economic, and cultural development.<sup>1191</sup> In other words, it can be concluded that, 'even if the Quebecois are considered a people, that in itself does not give them the right to unilaterally secede from Canada' because they are neither oppressed nor under colonial domination.<sup>1192</sup> Therefore, the National Assembly, the legislature or the government of Quebec 'do not enjoy a right at international law to effect the secession from Canada unilaterally'.<sup>1193</sup>

In fact, in answering Question 2, the Court avoided the conversational issue of the existence of the Quebec people under international law. The Court proclaimed that, 'much of the Quebec population certainly shares many of the characters, such as a common language and cultural, that would be considered in determining whether a specific group is a people, as do other groups within Quebec and/or Canada'.<sup>1194</sup> Dumberry argued that, the Court was dismissed to determine whether such people of Quebec would 'encompass the entirety of the provincial population or just a portion thereof'.<sup>1195</sup> It was suggested that there exist not only one people in Quebec, but also a juxtaposition of many. According to this opinion, Turp argued that, 'the French-speaking majority in Quebec is a people because of their common

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<sup>1186</sup> 'Reference Re Secession of Quebec' (n 21) para 135. Van Der Vyver argued that 'blocked from meaningful exercise of its right to self-determination internally' falls in a different category. It must be taken to include two quite distinct groups, namely those who are excluded from political processes that determine their status in society, and those who are deprived of the entitlement to live according to their own customs and traditions. See, Van Der Vyver, 'Self-Determination of the Peoples of Quebec under International Law' (n 1132).

<sup>1187</sup> Dumberry, 'Lessons Learned from the Quebec Secession' (n 1145) 434-435.

<sup>1188</sup> See for example, Copp, 'International Law and Morality in the Theory of Secession' (n 682). Also, Buchanan, *The Morality of Political Divorce From Sumter to Lithuania and Quebec* (n 53). And, Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (n 46).

<sup>1189</sup> See for example, Beran, 'A Liberal Theory of Secession' (n 786). Also, Beran, 'A Democratic Theory of Political Self-Determination: For a New Political Order' (n 792).

<sup>1190</sup> Buchheit, *Secession, The Legitimacy of Self-Determination* (n 29).

<sup>1191</sup> 'Reference Re Secession of Quebec' (n 21) para 137.

<sup>1192</sup> *ibid*, para 135.

<sup>1193</sup> The Decision of the Supreme Court of Canada. See, Bayefsky, *Self-Determination in International Law, Quebec and Lessons Learned* (n 848) 19.

<sup>1194</sup> 'Reference Re Secession of Quebec' (n 21) para 125.

<sup>1195</sup> Dumberry, 'Lessons Learned from the Quebec Secession', Reference before the Supreme Court of Canada (n 1145) 436.

language, culture, history, religion, and their ‘collective desire to live together’.<sup>1196</sup> Similarly, Dumberry argued that, ‘the ten Amerindian nations as well as the Inuit nation living in Quebec are also, without a doubt, peoples under international law’.<sup>1197</sup>

Furthermore, the Court accepted the argument advanced by the *amicus curiae* that, ‘while international law might not confer on Quebec a positive right to secede, international law equally did not prohibit secession’.<sup>1198</sup> It proclaimed that, international recognition could be conferred upon such a political reality if independence emerged *via* effective control of the territory of what was now the province of Quebec.<sup>1199</sup> Later, the Court acknowledged the importance of effectiveness: ‘it is true that international law may well, depending on the circumstances, adapt to recognise a political and/or factual reality, regardless of the legality of the steps leading to its creation’.<sup>1200</sup> In the context of Quebec, ‘legal consequences may flow from political facts’ and its secession ‘if successful in the streets, might well lead to the creation of a new State’.<sup>1201</sup> Webber argued that, although Quebec has no right to secession under international law, a secession may nevertheless occur by *illegal* means, and could ultimately be successful if, for example, an independent Quebec were to establish its effective control over its territory, and international recognition from other States was soon to follow.<sup>1202</sup> Here, the ultimate success of such secession would be dependent on recognition by the international community, ‘which is likely to consider the legality and legitimacy of secession’.<sup>1203</sup> Professor Abi-Saeb, on the other hand, gave another positive answer to Question 2 of the Reference, by adopting a reasoning based on the principle of effectiveness in international law. He does not rely on the theories of self-determination granting rights to unilateral secession; he insisted that, secession is a question of fact rather than law.<sup>1204</sup>

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<sup>1196</sup> Turp, ‘Quebec’s Democratic Right to Self-Determination, A Critical and Legal Reflection’ (n 1146) 99-124. In 2002, Quebec had a population of 7,455,208, with roughly 6 million French speakers and 590,000 English speakers, as well as some 600,000 immigrants. See, Dumberry, ‘Lessons Learned from the Quebec Secession’, Reference before the Supreme Court of Canada (n 1145) 436.

<sup>1197</sup> *ibid.*

<sup>1198</sup> ‘Reference Re Secession of Quebec’ (n 21) para 288.

<sup>1199</sup> *ibid.*

<sup>1200</sup> *ibid.*, para 141.

<sup>1201</sup> *ibid.*, para 142.

<sup>1202</sup> Webber, ‘The Legality of a Unilateral Declaration of Independence under Canadian Law’ (n 1145).

<sup>1203</sup> ‘The Decision of the Supreme Court of Canada’, reproduced in, Bayefsky, *Self-Determination in International Law, Quebec and Lessons Learned* (n 848) 19-20.

<sup>1204</sup> The First expert report for the *Amicus Curiae* on international law and self-determination was prepared by Professor Georges Abi-Saeb. He argued that ‘A secession becomes a legal fact if a state authority is effectively exercised over a population on a specific territory. In a like manner, self-determination does not represent a legal guarantee that statehood will be acquired, but it can constitute a factor, which will facilitate the process leading

However, Lalonde argued that, the Court did warn that; subsequent recognition of a unilateral declaration of independence could be taken to mean that secession had been achieved under colour of 'legal rights'.<sup>1205</sup> For that reason, the Court did not pursue the question of Quebec having effective control of the territory concluding that, 'the principle of effectiveness had no real applicability to the second question submitted'.<sup>1206</sup> Consequently, the Court did not confer upon the Quebec people a legal right to secession; it had satisfactorily answered Question 2.<sup>1207</sup> In other words, 'even if Quebec granted such recognition it would not, however, provide any retroactive justification for the act of secession, either under the constitution of Canada or at international law'.<sup>1208</sup> Thus, the Court adopted the declaratory theory on the question of the recognition of an independent Quebec by third States. According to which recognition is not necessary to achieve statehood, 'the viability of a would-be State in the international community depends, as a practical matter, upon recognition by other States'.<sup>1209</sup> The Court nonetheless concluded that, international recognition occurs only 'after a territorial unit has been politically successful in achieving secession, and that it could not 'serve retroactively as a source of a 'legal' right to secede in the first'.<sup>1210</sup>

It is true that the Court referred to the European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union. However, it does not provide any explanation as to the scope of such Declaration its relevance in the context of *Quebec* secession.<sup>1211</sup> The Court stated one of those 'legal norms' which may be taken into account in the process of granting or withholding recognition of a new State is the 'legitimacy' of the process of secession.<sup>1212</sup> Legitimacy was described, as a 'precondition for recognition by the international community',<sup>1213</sup> would include whether secession was

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ultimately to effectiveness and statehood'. See, 'The Expert Opinions For the Reference', reproduced in, Bayefsky, *Self-Determination in International Law, Quebec and Lessons Learned* (n 848) 15-16.

<sup>1205</sup> The Court stated that 'As a court of law, we are ultimately concerned only with legal claims. If the principle of 'effectively' is no more than that 'successful revolution begets its own legality' it necessarily means that legality follows and does not precede the successful revolution'. See, *ibid*, para 290. Also, Lalonde, 'Quebec's Boundaries in the Event of Secession' (n 674).

<sup>1206</sup> 'Reference Re Secession of Quebec' (n 21) para 288.

<sup>1207</sup> *ibid*, para 288.

<sup>1208</sup> 'The Decision of the Supreme Court of Canada', reproduced in, Bayefsky, *Self-Determination in International Law, Quebec and Lessons Learned* (n 848) 19-20.

<sup>1209</sup> 'Reference Re Secession of Quebec' (n 21) para 142.

<sup>1210</sup> *ibid*, para 142.

<sup>1211</sup> Dumberry, 'Lessons Learned from the Quebec Secession, Reference before the Supreme Court of Canada' (n 1145) 438.

<sup>1212</sup> 'Reference Re Secession of Quebec' (n 21) para 143.

<sup>1213</sup> *ibid*, para 103.



achieved legally in accordance with the law of the State from which the territorial unit secede.<sup>1214</sup> However, Turp argued that, the ‘legitimacy of the process’ of secession, as important as it may be, is not a ‘precondition’ for international recognition and clearly not a ‘legal norm’ as the Court is suggesting.<sup>1215</sup> Although, recognition is becoming increasingly collective, and that it is also more and more made conditional upon certain warranties. Nonetheless, it has always been and remains today essentially a ‘*discretionary political*’ act, which is not conditioned by any ‘preconditioned’ or ‘legal norms’, even in the European context.<sup>1216</sup> Thus, in its application of these different criteria and its relevance in the context of Quebec the Court indicated that:

[Secession an emergent state that has disregarded legitimate obligations arising out of its previous situation’ such as the obligation to negotiate its secession under municipal law ‘can potentially expect to be hindered by that disregard in achieving international recognition’, and that, on the contrary, compliance by Quebec ‘with such legitimate obligations would weigh in favour of international recognition].<sup>1217</sup>

However, Dumberry concluded that, ‘the Court’s suggestion that States are more likely to hesitate to recognise a new State if the latter has failed to fulfil an obligation under ‘*municipal law*’ to negotiate with the parent State is merely an ‘*opinion*’ and certainly not a statement of law’, as no such principle exists under international law.<sup>1218</sup> In addition, recent States practice, has shown that third States have indeed recognised seceding entities prior to their recognition by the parent State, for instance, the unilateral declaration of independence of Slovenia and Croatia in 1991, which were undoubtedly unconditional under ‘Yugoslavia Law’, however; it did not prevent third States from recognising them as an independent States.<sup>1219</sup>

Finally, In view of the answers to *Questions 1 and 2*, there is no conflict between domestic and international law to be addressed in the context of this *Reference*.<sup>1220</sup> Thus, it can be concluded that, secession is neither legal nor illegal in international law, but, a legally neutral

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<sup>1214</sup> *ibid*, para 143.

<sup>1215</sup> D Turp, 'The Issue of International Recognition in the Supreme Court of Canada's Reference on Quebec Sovereignty' (1999) 7 Canada Watch 225.

<sup>1216</sup> See, 'Opinion No.10 of the Badinter Arbitration Commission', [1992] 31 ILM 1488.

<sup>1217</sup> 'Reference Re Secession of Quebec' (n 21) para 143.

<sup>1218</sup> Dumberry, 'Lessons Learned from the Quebec Secession, Reference before the Supreme Court of Canada' (n 1145) 439-440.

<sup>1219</sup> See, P Radan, 'Secession and Constitutional Law in the Former Yugoslavia' (2001) 20 University of Tasmania Law Review 182.

<sup>1220</sup> 'Reference Re Secession of Quebec' (n 21).

act the consequences of which are regulated internationally. International recognition on the other hand can only be occurred after a territorial unit has been politically successful in achieving secession. As a remedial approach, RES, demonstrates that a self-determination seeking group does not merit recognition as a new State immediately after its separation or quest to separate from its mother State, but that much a group needs to earn its sovereignty. Accordingly, where there is no rule or legal framework allowing the self-determination seeking group to secede from its mother State, such group must demonstrate to the outside world that it is capable of functioning as an independent State, that is it would be a reliable sovereign partner, and that it is worthy of recognition. Here, the ultimate success of secession would be dependent on recognition by the international community, as a political act an independent State may play a significant role in justifying a group's secession. In this way, if the right to secede has been conceded in international law, this would imply that the legitimacy of secession could be verified.

### 4.3.2. The Clarity Act

In 2000, the Canadian Parliament sought to take matters further, by adopting ‘an *Act to clarify*’ the meaning of the right to negotiate.<sup>1221</sup> The Act, Lalonde argued ‘purports to clarify the Court’s ruling that for a referendum result to give rise to an obligation to negotiate the secession of a province it would have to be free of ambiguity both in terms of the question asked and the support achieved’.<sup>1222</sup> According to Crawford, it provides that the House of Commons shall consider the text of any future referendum question ‘relating to the proposed secession of a province, in order to determine ‘whether the question is clear’.<sup>1223</sup> In addition, it sets some factors the House of Commons would take into account in considering whether there had been a clear expression of will by a clear majority of the population of a province in favour of secession.<sup>1224</sup> However, Crawford concluded, whether this attempt to make clarity doubly clear was worthwhile remains to be seen.<sup>1225</sup>

Thus, it was held in the *Quebec* Case that secession may possibly be justified ‘where a people is subject to alien subjugation, domination or exploitation outside a colonial context,’ and further ‘when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.’ Hence, Crawford argued that ‘the astute balance achieved by the Court in its unanimous opinion that, no right of unilateral secession either under constitutional or international law, but a constitutional right to negotiate independence in the event of a clear affirmative answer to a clear question about secession, did much to clarify the situation and to reduce the tension’.<sup>1226</sup> He added that ‘the constitutional right to negotiate terms of separation has seemed to reduce the likelihood of separation altogether’.<sup>1227</sup> The present author agrees with Crawford when he says that the question of any future referendum should be clear, and there should be a clear expression of will by a clear majority of the population in favour of secession.

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<sup>1221</sup> Crawford, *The Creation of States in International Law* (n 3) 412.

<sup>1222</sup> Lalonde, ‘Quebec’s Boundaries in the Event of Secession’ (n 674).

<sup>1223</sup> Crawford, *The Creation of States in International Law* (n 3) 412.

<sup>1224</sup> The House of Common shall consider whether: (a) the size of the majority of valid votes cast in favour of the secessionist option; (b) the percentage of eligible voters voting in the referendum; and (c) any other matters or circumstances it considers relevant. See, Lalonde, ‘Quebec’s Boundaries in the Event of Secession’ (n 674).

<sup>1225</sup> Crawford, *The Creation of States in International Law* (n 3) 412.

<sup>1226</sup> *ibid.*

<sup>1227</sup> *ibid.*

Moreover, it is true that, in certain circumstances, the right to self-determination may include the right to secede; however, there is still dispute among the scholars on who should be allowed to exercise that right.<sup>1228</sup> In this regard, the UNHRC has explained that ‘people have a right to self-determination but mere minorities do not have the same right’.<sup>1229</sup> Here, it is significant to mention that the Government of Canada has recognised that the Quebecois have a history that is distinct from the majority of Canada. Further, in 1987 the *Meech Lake Accord* recognised Quebec as a distinct society.<sup>1230</sup> Consequently, in the *Charlottetown Accords* in 1992 reiterated this recognition and sought to give Quebec the authority to preserve and promote that society.<sup>1231</sup> However, neither the *Meech Lake Accord* nor *Charlottetown Accords* have been ratified because of fears about their impact on Quebec’s language minorities and distinct society.<sup>1232</sup> On the other hand, the Supreme Court of Canada has recognised Quebec’s distinctiveness in its discussion of federalism, and secession under international law.<sup>1233</sup> However, the Court concluded that ‘although Quebecois are culturally unique, uniqueness alone does not confer the right to secede. This conclusion is in accordance with the current requirements of international law. This discussion can be found in chapter two.

In addition, for a group claiming the right to self-determination, the central government should have oppressed them. The purpose of this requirement Hanna argued, is to ensure that States who do not violate a group’s rights will not be dismembered unnecessarily.<sup>1234</sup> However, the Quebecois have not suffered oppression under the Canadian government.<sup>1235</sup> In

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<sup>1228</sup> R M Hanna, 'Right to Self-Determination in Re Secession of Quebec' (1999) 23 Md J Int'l L 213 <<http://digitalcommons.law.umaryland.edu/mjil/vol23/iss1/9/>>accessed 22 September 2014.

<sup>1229</sup> B Kingsbury, 'Self-Determination and Indigenous Peoples' (1992) 86 Am Soc'y Int'l L Proc 383 (1992) 86 Am Soc'y Int'l L Proc 383.

<sup>1230</sup> Hanna, 'Right to Self-Determination in Re Secession of Quebec' (n 1228).

<sup>1231</sup> J Makarenko, *Charlottetown Accord: History and Overview* (mapleleafweb, 10 February 2009) <<http://mapleleafweb.com/features/charlottetown-accord-history-and-overview>>accessed 10 October 2013.

<sup>1232</sup> *ibid.*

<sup>1233</sup> Hanna argued that, 'In explaining the principle of federalism, the Court is distinguishing between the right to determine the cultural and political development of a people and the right of those People to claim independence'. The Court proclaimed that 'the degree of autonomy that the provinces have in Canada confers the right to develop culturally and politically, but the right to develop culturally and politically does not confer the right to secede. See, 'Reference re Secession of Quebec' (n 21) para 56. Also, Hanna, 'Right to Self-Determination in Re Secession of Quebec' (n 1228).

<sup>1234</sup> *ibid.*

<sup>1235</sup> *ibid.*

this regard, the Supreme Court states that ‘because the Quebecois are manifestly not an oppressed people, they are not entitled to unilaterally secede under international law’.<sup>1236</sup>

Buchanan on the other hand argued that, ‘there may be a basis for secession on a culture preservation ground if a culture is in genuine danger of being destroyed in the near future’.<sup>1237</sup> Hence, Richardson argued that ‘the Quebecois Party bases their claim that Quebec should secede on the belief that the government of Canada does not protect French culture sufficiently’.<sup>1238</sup> However, Hana argued that ‘secession on the grounds of an immediate and serious threat to the survival of French culture does not seem justified’.<sup>1239</sup> In this regard, the Supreme Court did not consider cultural oppression, or oppression of identity; it is unlikely that Quebec would have the right to secede on this ground.

Thus, Hana argued that ‘for a group in the situation of the Quebecois a balancing test may be applied between the level of oppression and the degree that foreign domination played in creation of the situation’.<sup>1240</sup> Accordingly, it can be concluded that, Quebec is not oppressed. On the other hand, although the Quebecois may, be a distinct people, however, because they have meaningful access to government and they are not oppressed they are not entitled to secede. In other words, for a Quebec to have a right of secession they must show that the Canadian government is highly unrepresentative and oppressive, which at present is not the case?

In sum, it must be accepted that the Court's opinion is important for the assessment of the legality of secession. However, legal arguments are neither completely decisive of the question nor irrelevant. The question is both legal and political. The Court comprehensively evaluated the circumstances in which secession in a non-colonial context may be allowed under international law, and as such is a very important useful reference for future disputes involving questions relating to the legality and legitimacy of secession.

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<sup>1236</sup> *Reference re Secession of Quebec* (n 21) para 132. The Court ultimately concludes that, Quebecois have access to government they do not have the right to secede. *ibid*, para 133. The Court further notes that, Canada as a democracy, guarantees all citizens the right to participate in government. *ibid*, para 59.

<sup>1237</sup> Buchanan, *Secession: The Morality of Political Divorce Fort Sumter to Lithuania and Quebec* (n 53).

<sup>1238</sup> D Richardson, 'The Quebec Independence Vote and Its Implications of English Language Legislation' (1997) 26 GA J Int'l & Comp L 521.

<sup>1239</sup> ‘The law declaring that French and English are the official languages and must both be recognised and utilised demonstrates that the Canadian government is making efforts to promote, if not French culture, at least French language’. See, Hanna, 'Right to Self-Determination in In Re Secession of Quebec' (n 1228).

<sup>1240</sup> *ibid*.

## 4.4. The Case of South Sudan, as an Example of the Emergence of States in International Law between Territorial Integrity and the Will of the People

The case of South Sudan is considered as one of the most devastating self-determination conflicts the world has seen. In January 2011, further to a peace agreement, the majority of the people of South Sudan voted in referendum to separate from Sudan. International recognition followed promptly<sup>1241</sup> and on July 2011, it became a member of the UN.<sup>1242</sup> The secession of South Sudan ‘can be viewed as a delayed exercise of decolonisation, if one were to accept the idea that South Sudan should have become independent when the British withdrew from the colony’.<sup>1243</sup> On the other hand, South Sudan’s statehood can be examined as a true case of secession outside the decolonisation paradigm; it ‘is a generally accepted legal fact and its legal status not subject to controversy’.<sup>1244</sup> This case can be considered as a rare example of a right to self-determination being exercised under domestic constitutional provisions.

### 4.4.1. History of South Sudan

Sudan was a British colony, and, when it won independence, ‘the territory of South Sudan remained incorporated into new State of Sudan, pursuant to the principle of *uti possidetis* and the global acceptance of the idea that decolonisation entitled the creation of new States pursuant to the existing colonial borders’.<sup>1245</sup> South Sudan was a part of the larger State of Sudan until the 2011 independence referendum. Sudan’s colonial borders were drawn in 1884 at the Berlin Conference, at which European powers divided the African continent among themselves.<sup>1246</sup> Thus, Sudan became a part of the British colonial empire. Its borders were drawn randomly by European leaders who had cared little about the culture, ethnicity,

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<sup>1241</sup> See, ‘South Sudan: World leaders welcome new nation’, *BBC News* (9 July 2011)

<<http://www.bbc.co.uk/news/world-africa-14095681>>accessed 3 October 2013.

<sup>1242</sup> ‘UNGA Res 65/308 (14 July 2011) UN Doc A/RES/65/308’.

<sup>1243</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 161.

<sup>1244</sup> See, Vidmar, ‘South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States’ (n 51).

<sup>1245</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 161.

<sup>1246</sup> K Rawls, ‘South Sudan’s Independence, Oil and Economic Self-Determination’ (2011) Global Comment <<http://globalcomment.com/south-sudan-independence-oil-economic-self-determination/>>accessed 4 October 2013.

religion, or language of the inhabitants of such a newly created State.<sup>1247</sup> Under British rule, the North and the South were administrated separately. The North encompasses predominately Arab descendent of colonisers, and different ethnic groups of black African in the South.<sup>1248</sup> The British colonial rule emphasised under the North-South divide, and under the British administration, ‘the North quickly established political and economic domination before beginning a campaign of infrastructure destruction throughout the South’.<sup>1249</sup> Subsequently, an agreement was reached in 1899, establishing Anglo-Egyptian rule in Sudan, until its independence, *de facto* British rule continued to rule over Sudan.<sup>1250</sup>

In 1947, at the Juba Conference, ‘the Great British decided to unite formally the North and the South into a single administrative unit, and the British ensured that South Sudan would not have meaningful representation in the new unified colony of Sudan by hand picking representatives for the South’.<sup>1251</sup> Chand argued that ‘the Conference was a window dressing organised to dictate to South Sudan leaders that the political developments though painful, they must accept as irreversible decision to hand over the South to the new Arab and Muslims masters from the North’.<sup>1252</sup> Sterio further argued that ‘the British should never have handed South Sudan to North Sudan because this unjust decision created an internal colony (the south) within a unified Sudan’.<sup>1253</sup> In 1956, in the wake of the global decolonisation movement, Sudan finally won its independence<sup>1254</sup> from the British<sup>1255</sup> and became an independent State. However, it was no surprise that from the beginning of its independence, ‘Sudan was a country deeply divided between the Muslim North and the Black South’.<sup>1256</sup>

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<sup>1247</sup> *ibid.*

<sup>1248</sup> See, D de Chand, 'South Sudan Claims for Right of Self-Determination' (1995) University of Pennsylvania-African Studies Centre <[http://www.africa.upenn.edu/Articles\\_Gen/de\\_chand.html](http://www.africa.upenn.edu/Articles_Gen/de_chand.html)>accessed 4 October 2013.

<sup>1249</sup> Rawls, 'South Sudan's Independence, Oil and Economic Self-Determination' (n 1246).

<sup>1250</sup> For more details see, 'Sudan' (*Encyclopaedia Britannica*, 2013)

<<http://www.britannica.com/EBchecked/topic/571417/Sudan/24316/The-British-conquest>> accessed July 02, 2014.

<sup>1251</sup> Chand, 'South Sudan Claims for Right of Self-Determination' (n 1248).

<sup>1252</sup> *ibid.*

<sup>1253</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 164.

<sup>1254</sup> See, 'The Background to Sudan's Comprehensive Peace Agreement' (UNMIS)

<<http://unmis.unmissions.org/Default.aspx?tabid=515>>accessed 4 October 2013.

<sup>1255</sup> Some history books may reflect that Sudan was administrated by both Great Britain and Egypt until its independence. For more details see, Sterio, *The Right to Self-Determination under International Law* (n 140) 163.

<sup>1256</sup> See, M Wakengela and S Koko, 'The Referendum for Self-Determination in South Sudan and Its Implication for the Post-Colonial State in Africa' (2010) 3 Conflict Trends 20 <<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=127532>>. <<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=127532>>accessed 4 October 2013.

Because of the unequal development system applied in the country during the colonial period, ‘the end of British colonisation simply gave place to the internal domination of the South by the North’.<sup>1257</sup> In 1962, South Sudan fought its first independence war, this war was one of secession, rebels under the movement of the South Sudan Liberation Movement (SSLM), fought the central government of Sudan.<sup>1258</sup> However, when the rebels failed to win independence, they settled for autonomy within the framework of the 1972 Addis Ababa Agreement.<sup>1259</sup> The agreement resulted in the establishment of the ‘High Executive Council in South Sudan led by a southern president as well as a southern region assembly’.<sup>1260</sup> In addition, English was recognised as the principal language of the South, while both parties recognised Arabic as the official language of the whole State of Sudan.<sup>1261</sup> Thus, the rebels in 1972 settled for a form of internal self-determination, when their claims for external self-determination remained rebuked by the State of Sudan and the international community.<sup>1262</sup> However, it is true that the central government failed to respect the terms of the 1972 Agreement, as a result, in 1983, Islamic politics and policies were forcibly imposed throughout the nation. In this regard, Chand argued that:

[the denial of democratic values, equal justice for all, superimposition of Sharia (Islamic law) to be the law of the land in 1983; the abrogation of the Addis Ababa Agreement of 1972; the annulment of secular democratic institutions and replacing them with sectarian system based on Islamic precepts have immensely attributed to the continuous paranoia and irreversible institutional paralysis in the country and negated any concept of unity in diversity in a united Sudan].<sup>1263</sup>

In sum, the central government of Sudan retreated on its promise to respect the internal self-determination of the South. As a result, a second civil war erupted, which was largely the continuation of the first one<sup>1264</sup>, ‘it did call for secession’.<sup>1265</sup> The second civil war also failed

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<sup>1257</sup> *ibid.*

<sup>1258</sup> *ibid.*

<sup>1259</sup> ‘Addis Ababa Agreement on the Problem of South Sudan’ (27/02/1972) United Nations Peacemaker <<http://peacemaker.un.org/sudan-addisababa-southsudan72>> accessed 2 July 2014.

<sup>1260</sup> Wakengela and Koko, ‘The Referendum for Self-Determination in South Sudan and Its Implication for the Post-Colonial State in Africa’ (n 1256).

<sup>1261</sup> *ibid.*

<sup>1262</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 163.

<sup>1263</sup> Chand, ‘South Sudan Claims for Right of Self-Determination’ (n 1248).

<sup>1264</sup> In both instances, “the marginalisation of communities across Sudan from the locus of elite power [had] been at the heart of the conflict – to the extent of creating fertile playing ground for the manipulation of religion and ethnicity.” See, Mariam Jooma, ‘Feeding the Peace: Challenges Facing Human Security in Post-Garang South Sudan,’ *ISS Situation Report* (2005) <<http://www.issafrica.org/uploads/050823SUDAN.PDF>> accessed 2 July 2014.

<sup>1265</sup> Wakengela and Koko, ‘The Referendum for Self-Determination in South Sudan and Its Implication for the Post-Colonial State in Africa’ (n 1256).



to achieve their objective, however; it resulted in the signing of a Declaration of Principles ('DOP') in 1994. The DOP was neither a ceasefire nor a peace agreement; but rather an expression of the parties 'wish list' of issues on which they desired future negotiations.<sup>1266</sup> During the second civil war, the current Sudan's president Al-Basher seized power through a bloodless coup in 1989.<sup>1267</sup> Sterio argued that, his regime 'aligned itself with radical Islamists and resulted in a prolonged denial of any meaningful autonomy for the South'.<sup>1268</sup> His policy toward the South has not represented a radical change from those of his predecessors. For that reason, Al-Bashir has faced not only resumption of rebellion in the South, but also growing pressure on behalf of the international community to respect South Sudanese rights.<sup>1269</sup> In light of such pressure, in 2005 the Al-Bashir regime opted for substantive negotiations with the South Sudan Liberation Movement ('SSLM'), 'which resulted in the signing of the Comprehensive Peace Agreement (CPA)<sup>1270</sup> and the establishment of the Inter-Governmental Authority on development'.<sup>1271</sup> The CPA is comprised of texts of previously signed agreements and protocols. For instance, the 'Machakos Protocol' (July 20, 2002), the 'Protocol on Power Sharing' (May 26, 2004), the 'Agreement on Wealth Sharing' (January 7, 2004), and the 'Protocol on the Resolution of the Conflict in Abyei Area' (May 26, 2004).<sup>1272</sup> The Machakos Protocol given that 'that the people of South Sudan have the right to self-determination through a referendum to determine their future status'.<sup>1273</sup> It further established a six-year interim period at the conclusion of which the internationally monitored referendum would take place.<sup>1274</sup> In addition, Articles (17.8, 20.1, 20.2, and 21.2.) regulated technical details pertaining to South Sudan's departure from the common State in case of a decision for independence.<sup>1275</sup>

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<sup>1266</sup> *ibid.*

<sup>1267</sup> *ibid.*

<sup>1268</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 164.

<sup>1269</sup> *ibid.*

<sup>1270</sup> 'The Comprehensive Peace Agreement between The Government of The Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army' (2005)

<[https://peaceaccords.nd.edu/site\\_media/media/accords/SudanCPA.pdf](https://peaceaccords.nd.edu/site_media/media/accords/SudanCPA.pdf)>accessed 2 July 2014.

<sup>1271</sup> Wakengela and Koko, 'The Referendum for Self-Determination in South Sudan and Its Implication for the Post-Colonial State in Africa' (n 1256).

<sup>1272</sup> See, Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (n 51).

<sup>1273</sup> 'Machakos Protocol' (20 July 2002) Art 1.3.

<sup>1274</sup> *ibid.*, Art 2.5.

<sup>1275</sup> *ibid.*, Art 17.8, 20.1, 20.2, and 21.2.

The CPA provided ‘autonomy for the South, wealth sharing between the South and the North, and the holding of a referendum for self-determination in the South on 9 January 2011’.<sup>1276</sup> It induced the parties to a ‘negotiate settlement based on a democratic system of governance which’, on the one hand, recognises the right of the people of Southern Sudan to self-determination and seeks to make unity attractive during the Interim Period. While at the same time is founded on the values of justice, democracy, good governance, respect for fundamental rights and freedoms of the individual, mutual understanding and tolerance of diversity within the realities of the Sudan.<sup>1277</sup> Thus, after the adoption of the CPA, Sudan promulgated a new interim constitution, which granted substantive autonomy to Southern Sudan.<sup>1278</sup> The Constitution ‘further specified that a referendum on the future status of Southern Sudan would be held six months before the end of the six-year interim period’.<sup>1279</sup> The referendum question was initially indicated in the Interim Constitution by providing that the people of Southern Sudan would either ‘(a) confirm unity of the Sudan by voting to sustain the system of government established under the CPA and this Constitution, or (b) vote for secession’.<sup>1280</sup> The Southern Sudan Referendum Act subsequently specified the referendum rules on December 31, 2009.

The interim Constitution of Sudan ‘has defined Southern Sudan as a self-determination unit, in principle, created a constitutional right to secession’.<sup>1281</sup> The right was then Vidmar argued that ‘operationalised in the Southern Sudan Referendum Act, promulgated on 31 December 2009’.<sup>1282</sup> Article 41 of the Act specified the referendum rules and made specific provision for the required quorum (60 per cent of all eligible vote) as well as the winning majority (50 per cent plus 1 vote of the total number of votes cast).<sup>1283</sup> While Article 67, *inter alia*, provided that in the event of Southern Sudan’s vote for secession, the government would apply the constitutional provisions, which foresaw Southern Sudan’s withdrawal from the

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<sup>1276</sup> Wakengela and Koko, ‘The Referendum for Self-Determination in South Sudan and Its Implication for the Post-Colonial State in Africa’ (n 1256).

<sup>1277</sup> ‘The Comprehensive Peace Agreement’ (n 1270).

<sup>1278</sup> Interim National Constitution of the Republic of the Sudan 2005, Art (2). It needs to mention that legal instruments prior to independence refer to ‘Southern Sudan’, while the independent state chose the name of ‘South Sudan’.

<sup>1279</sup> *ibid*, Art 222 (1).

<sup>1280</sup> *ibid*, Art 222 (2).

<sup>1281</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 75.

<sup>1282</sup> *ibid*.

<sup>1283</sup> See, ‘Southern Sudan Referendum Act’ (31 December 2009) <<http://direct-democracy-navigator.org/system/documents/34/Southern%20Sudan%20Referendum%20Act%202009.pdf?1320762019>> accessed 5 October 2013.

Sudanese institutional arrangement.<sup>1284</sup> The referendum was held on July 2011. The option for secession was voted for by 98.83 per cent of voters, at a turnout of 97.58 per cent, and Al-Bashir's government announced that it would respect the referendum results.<sup>1285</sup> South Sudan was admitted into the UN on 14 July 2011<sup>1286</sup>, and the central government of Khartoum announced its formal recognition a day after the declaration of independence was issued.<sup>1287</sup> However, Sterio argued that 'despite successful independence, some areas in South Sudan such as the region of Abyei and the Nuba Mountains remain disputed.'<sup>1288</sup> Moreover, since its independence South Sudan plagued by conflict and inter-ethnic war. It has been reported that, the government of South Sudan is currently at war with at least seven armed groups.<sup>1289</sup> Besides, 'tough negotiations remain on how to divide up economic resources between north and south, which has the bulk of oil'.<sup>1290</sup>

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<sup>1284</sup> *ibid.*

<sup>1285</sup> 'President Omar al-Bashir gives South Sudan his blessing', *BBC News* (7 July 2011)

<<http://www.bbc.co.uk/news/world-africa-14060475>>accessed 6 October 2013.

<sup>1286</sup> 14 July 2011, The General Assembly admitted the Republic of South Sudan as the 193rd member of the United Nations, welcoming the newly independent country to the community of nations.' See, 'UN Welcomes South Sudan as 193rd Member State', UN News Centre

<[http://www.un.org/apps/news/story.asp?NewsID=39034#.U7Qbb\\_ldVrM](http://www.un.org/apps/news/story.asp?NewsID=39034#.U7Qbb_ldVrM)> accessed July 03, 2014.

<sup>1287</sup> See, Rawls, 'South Sudan's Independence, Oil and Economic Self-Determination' (n 1246). See also, 'South Sudan counts down to independence', *BBC News* (8 July 2011) <<http://www.bbc.co.uk/news/world-africa-14077511>>accessed 6 October 2013. Also, M Fick, 'Over 99 Pct in Southern Sudan Vote for Secession', *US Today* <[http://usatoday30.usatoday.com/news/topstories/2011-01-30-2052877353\\_x.htm](http://usatoday30.usatoday.com/news/topstories/2011-01-30-2052877353_x.htm)> accessed 3 July 2014.

<sup>1288</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 164.

<sup>1289</sup> See, 'South Sudan army kills fighters in clashes', *Aljazeera News* (24 Apr 2011)

<<http://www.aljazeera.com/news/africa/2011/04/2011424145446998235.html>>accessed 6 October 2013.

<sup>1290</sup> See, 'South Sudan referendum: 99% vote for independence', *BBC News* (30 January 2011)

<<http://www.bbc.co.uk/news/world-africa-12317927>>accessed 6 October 2013.

#### 4.4.2. The legality of the South Sudanese case for self-determination under relevant international law

Many commentators have categorised the case of South Sudan as a case of independence possibly in light of the fact that South Sudanese independence resulted from popular referendum, the most commonly prescribed method of self-determination.<sup>1291</sup> Significantly, South Sudan's way to independence was marked by a prolonged civil war, atrocities, and a grave humanitarian situation.<sup>1292</sup> However, these circumstances did not create a right to independence under international law.<sup>1293</sup> South Sudan did not become an independent State in terms of international law, until Khartoum's Government formally agreed to hold a referendum on independence at which an overwhelming majority supported secession. Thus, unlike the case of Kosovo, South Sudan can be considered as a State created with the approval of the parent State.

While the people of South Sudan have effectively exercised their right to external self-determination, it is important to assess the legality thereof. Accordingly, this section will analyse the legal case for self-determination in South Sudan.

##### 4.4.2.1. Whether South Sudanese constitute a 'people', for the purpose of self-determination

On a legalistic perspective, the peace agreement recognised the South Sudanese as entitled to self-determination as a matter of Sudanese law. Roepstorff argued that, 'Sudan owes its existence to colonial history and is divided by religion, encompassing 70 per cent Muslims, 25 per cent animists, and 5 per cent Christians'.<sup>1294</sup> Some South Sudanese are Christian, 'having been converted into Christianity by missionary present throughout the colonial era,

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<sup>1291</sup> See for example, M Lind, 'Welcome to the second age of decolonisation' (12 July 2011) *SALON.COM*. <[http://www.salon.com/2011/07/12/lind\\_decolonialization/](http://www.salon.com/2011/07/12/lind_decolonialization/)>accessed 7 October 2013.

<sup>1292</sup> See generally, D H Johnson, *The Root Causes of Sudan's Civil Wars* (5<sup>th</sup> edn, James Currey; Rev edn 2011).

<sup>1293</sup> As noted earlier, the right of self-determination has a universal non-colonial scope, yet relevant sources of international law make it clear that this right is not a synonym for the right to independence). see, D Shelton, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon' (2011) 105 *Am J Int'l L* 60.

<sup>1294</sup> Roepstorff, *The Politics of Self-Determination* (n 846) 140.

while others practice a variety of indigenous religions'.<sup>1295</sup> Chand argued that, 'over 62 per cent of its population is of African stock, 34 per cent of mulattoes Arabs, and 4 per cent of conspicuous classification and origin'.<sup>1296</sup> At the time of independence, English has been recognised as the official language.<sup>1297</sup> Thus, objectively, it is argued that, the inhabitants of South Sudan cannot be constituted a single people. In other words, 'the self seems divided into myriad mini-selves and tribal 'selfistans'.' Subjectively, it would also be hard to conclude that the inhabitants of South Sudan share a common sense of belonging to the same unity'.<sup>1298</sup> Thus, under traditional view of what constitutes a people, the South Sudanese would fall short of this assessment.

On the other hand, many have argued that the South Sudanese 'self' may consist of a sentiment of exception from the largest State of Sudan.<sup>1299</sup> It is true that, when the British colonisers annexed the South into the North at the Juba Conference in 1947, they betrayed the interests of the South at the expense of creating a North-dominated entity. Thus, when Sudan became independent in 1956, the principle of '*uti possidetis*' dictated that South Sudan remain a part of Sudan.<sup>1300</sup> In 1964, the OAU at the Cairo Conference recognised the principle of respect for colonial borders, in essence, however; random or unfair colonial borders appeared, such borders would remain the guiding principle throughout decolonisation.<sup>1301</sup> While this position Sterio argued that 'was espoused by African leaders to avoid chaos and territorial warfare during the creation of so many new States'.<sup>1302</sup> Thus, Chand demonstrated that 'since the independence of Sudan in 1965, the inhabitants of the

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<sup>1295</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 165.

<sup>1296</sup> Chand, 'South Sudan Claims for Right of Self-Determination' (n 1248).

<sup>1297</sup> See, Wakengela and Koko, 'The Referendum for Self-Determination in South Sudan and Its Implication for the Post-Colonial State in Africa' (n 1256).

<sup>1298</sup> The largest group in South Sudan is the Dinka, comprising 12 percent of the national population, followed by the Azande and Nuer. The most widely-spoken languages are Dinka, Juba Arabic, Nuer and English. For more details see, The Permanent Court of Arbitration (PCA) Arbitration. "Abyei Final Award" (July 22, 2009) The Hague <file:///C:/Users/tya/Downloads/Abyei Final Award.pdf>accessed 7 July 2014.

<sup>1299</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 165. See also, Chand, 'South Sudan Claims for Right of Self-Determination' (n 1248).

<sup>1300</sup> *ibid.*

<sup>1301</sup> See, 'Border Disputes Among African States', AHG/Res 16(I) 1964, reaffirming the strict respect by all OAU member states of 'the sovereignty and territorial integrity of each State and for its alienable right to independent existence' and declaring that all member states 'pledge themselves to respect the frontiers existing on their achievement of national independence'.

<sup>1302</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 165. The ICJ analysed the principle of *uti possidetis* in the Case Concerning the Frontier Dispute. The court held that 'the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.' The court then noted that the principle of *uti possidetis* "conflict[s] outright with another one, the right of peoples to self-determination." See, Frontier Dispute, Judgment, (*Burkina Faso v Republic of Mali*) ICJ Rep 1986, 554 1986 (n 176) .

South have been internally colonised and subjected by their official leaders.’ He claimed that, the OAU Cairo Resolution on the preservation of the inherited colonial boundaries should be declared to be as legally void and null.<sup>1303</sup> For decades, it has been impossible for the South and the North to coexist as one heterogeneous State because of ‘historical animosities such continue to prevail today such as slavery, genocidal war and the inculcation of religion into the political theatre of a diverse, multi-ethnic, multi-political, multi- religious an multi-political society’.<sup>1304</sup> The sentiment of oppression and injustice has resulted in two wars for independence fought by South Sudan against the Khartoum Government. Since its independence, Sudan has been in constant conflict and largely divided between the North and the South. Thus, the South Sudanese ‘self’ may be defined by this sentiment of oppression, injustice, and non-belonging to the larger State of Sudan.

Further, it can also be argued that the inhabitants of South Sudan are distinct from those of the North in two ways. First, Sterio argued that ‘Northern Sudan is inhabited by non-black Arabs, whereas the South is particularly populated by black Africans. Second, Northern Sudanese are Muslim, and have been attempting to impose Islamist policies and even ‘shari’a’ law on all Sudan.<sup>1305</sup> South Sudanese are Christian or animist, and have since the 1947 annexation been the victim of Islamic fundamentalism and policies. Thus, although South Sudanese are both black African and non-Muslim; these two factors differentiate them from the Muslim Arab inhabitants of North Sudan. Mamdani described ‘unity’ in South Sudan as one brought about by choice and through freedom.<sup>1306</sup> Such unity must be respected and recognised as a legal case for self-determination because of the inherent injustice of the opposite choice.<sup>1307</sup> Thus, it can be argued that as a matter of international law fact, the inhabitants of South Sudan constitute a people that have the right to self-determination.

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<sup>1303</sup> Chand, ‘South Sudan Claims for Right of Self-Determination’ (n 1248).

<sup>1304</sup> *ibid.*

<sup>1305</sup> Sterio, *The Right to Self-Determination under International Law* (n 140 ) 166.

<sup>1306</sup> M Mamdani, South Sudan: Rethinking citizenship, sovereignty and self-determination (4 May 2011) *Pambazuka News* 527 <<http://www.pambazuka.org/en/category/features/72924>>accessed 7 October 2013.

<sup>1307</sup> Sterio, *The Right to Self-Determination under International Law* (n 1117) 166.

#### 4.4.2.2. Whether the South Sudanese right to internal self-determination was respected

As noted earlier, international law has recognised the right to internal self-determination to all people, a form of autonomy within the parent State, whereby a people's rights to political representation, as well as rights to linguistic, social, cultural freedoms are guaranteed and respected by the mother State.<sup>1308</sup> The Canadian Supreme Court, like the League of Nations, held that 'a people has a right to internal self-determination first, and that only if that right is not respected by the mother State, the same people's right to break off may accrue'.<sup>1309</sup> Traditionally, the right to independence involving secession as a mode of self-determination has only applied to people under colonial domination or some kind of foreign occupation.<sup>1310</sup> However, the modern-day international law has come to embrace the right of non-colonial people to secede from an existing State, 'when the group is collectively denied civil and political rights and subject to egregious abuses'.<sup>1311</sup>

In the case of South Sudan, it was clear that the central government did not respect the South Sudanese people's rights to internal self-determination, between the decolonisation in 1956, and the end of the first independence war.<sup>1312</sup> The Addis Ababa Agreement of 1972 considerably established meaningful autonomy for South Sudan and guaranteed the respect of internal self-determination rights for its people.<sup>1313</sup> However, in 1983, Sudan retreated on this promise and from then until 2005; the South Sudanese did not enjoy any form of internal self-determination.<sup>1314</sup> Internal self-determination had failed as an option. Although, South Sudanese settled for a form of internal self-determination in 1972, and their claims for external self-determination remained rebuked by Sudan and the rest of the international community.<sup>1315</sup> However, the central Sudanese government failed to respect the terms of the 1972 Agreement and, Islamic politics and policies were imposed throughout the entire nation, until 2005, when the CPA was negotiated, the South Sudanese did not enjoy any internal self-

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<sup>1308</sup> See, Chapter 2.

<sup>1309</sup> *Reference Re Secession of Quebec* (n 21) para 134.

<sup>1310</sup> Scharf, 'Earned Sovereignty: Juridical Underpinnings' (n 75).

<sup>1311</sup> See Chapter 2.

<sup>1312</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 166.

<sup>1313</sup> Wakengela and Koko, 'The Referendum for Self-Determination in South Sudan and Its Implication for the Post-Colonial State in Africa' (n 1256).

<sup>1314</sup> *ibid.*

<sup>1315</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 166.

determination rights.<sup>1316</sup> In other words, al-Bashir or his successors would never grant meaningful autonomy to the South, and that the South's rights to internal self-determination would never be respected. Thus, it can be concluded that, the people of South Sudan have been entitled to external self-determination, because their rights to internal self-determination had not been respected.

The case of South Sudan's self-determination can be categorised as one occurs within the decolonisation model, or one occurring outside such parameters. In other words, Sterio argued that 'the case South Sudan can be considered as a case of delayed decolonisation, that they should have been granted independence at decolonisation and should not have been incorporated into larger Sudan'.<sup>1317</sup> The ICJ had acknowledged this in the East Timor case, so the case stands for the proposition of delayed decolonisation.<sup>1318</sup> In the case of East Timor, Portugal withdrew from this country as a coloniser but Indonesian forces swept in and forcibly annexed East Timor.<sup>1319</sup> After 25 years of Indonesian occupation, the people of East Timor were ultimately allowed to vote for independence in a popular referendum.<sup>1320</sup> Thus, East Timor was a case of self-determination exercised through delayed decolonisation and independence from Portugal, not a remedial secession case from Indonesia. Accordingly, the right of self-determination continues to exist until it is exercised, and even when it continues to exist in its post-colonial form as internal self-determination, with external self-determination available in the form of secession in the most exceptional circumstances. Similarly, 'the people in South Sudan could claim that they were unjustly and forcefully annexed at decolonisation to the larger State of Sudan, and that, accordingly, their independence now represents a case of delayed decolonisation'.<sup>1321</sup> However, it can also be concluded that South Sudan seceded from Sudan outside the parameters of decolonisation, which may make it more problematic legally, because Sudan has existed as an independent nation since 1956 and the territory of South Sudan separated itself therefrom decades after Great Britain withdrew as the coloniser. Thus, as noted earlier, whether international law recognises the right of self-determination of people outside the colonial context, such

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<sup>1316</sup> Wakengela and Koko, 'The Referendum for Self-Determination in South Sudan and Its Implication for the Post-Colonial State in Africa' (n 1256).

<sup>1317</sup> Sterio, *The Right to Self-Determination under International Law* (n 140) 167.

<sup>1318</sup> Case Concerning East Timor (n 114) para 103.

<sup>1319</sup> See, Sterio, *The Right to Self-Determination under International Law* (n 140) 104-112.

<sup>1320</sup> *ibid.*

<sup>1321</sup> *ibid* 167.



argument is certainly possible but doubts persist as to its absolute legality.<sup>1322</sup> Accordingly, if the case of South Sudan seceded from Sudan, in the same way as Kosovo seceded from Serbia,<sup>1323</sup> and then debates can be raised about the legality of such non-colonial external self-determination.

#### 4.4.2.3. Whether South Sudanese self-determination violated the territorial integrity of Sudan

In the case of South Sudan, we have a concrete illustration of the intersection of the principles of self-determination and territorial integrity. The ICJ in the *Western Sahara* case concluded that the ‘people of Western Sahara were entitled to self-determination,’ however, the Court stopped short of analysing territorial claims to this region laid in Morocco and Mauritania.<sup>1324</sup> It specifically said that, although there were some ties, these ties did not amount to ‘any legal tie of territorial sovereignty’. Thus, in its Advisory Opinion, the Court has not addressed the issue of self-determination and its possible conflict with the principle of territorial integrity.<sup>1325</sup> Similarly, in the case of South Sudan, Sterio argued that ‘the decolonisation process took place under the principle of *uti possedetis*, without taking into consideration any territorial claims that remained present since decolonisation, causing a civil war and eventually resulting in the partition of the State of Sudan’.<sup>1326</sup> While in the case of Western Sahara, no such partition has taken place, but talks on a popular referendum for the people of Western Sahara have been present over the last decade.<sup>1327</sup> Thus, serious legal issues arise concerning these cases about how to reconcile the principle of self-determination

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<sup>1322</sup> For more details see, Chap 1 *ibid.* (Whether international law recognises the right to external self-determination to non-colonialized people).

<sup>1323</sup> See, T Christakis, ‘The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?’ (2011) 24 *Leiden J Intl L* 73. Also, UNSC Rec 1244 (10 June 1999) (n 749).

<sup>1324</sup> ‘*Western Sahara Case*’ (n 103). For more details see, Sterio, *The Right to Self-Determination under International Law* (n 140) Chap 5.

<sup>1325</sup> In his Separate Advisory Opinion Swedish judge, Sture Petren wrote that: ‘The decolonisation of a territory may raise the question of the balance which has to be struck between the right of its population to self-determination and the territorial integrity of one or even of several States. The question may be raised, for example, whether the fact that the territory belonged, at the time of its colonisation, to a State which still exists today justifies that State in claiming it on the basis of its territorial integrity’. See, ‘*Western Sahara Case*’, ICJ Separate Opinion of Judge Petren [1975] ICJ Rep 110 <<http://www.icjci.org/docket/files/53/5605.pdf>> accessed 9 October 2013.

<sup>1326</sup> Sterio, *The Right to Self-Determination under International Law* (n 140)168.

<sup>1327</sup> See, *ibid* Chap 5.

with the territorial integrity of the parent State, 'or of another neighbouring State which has asserted territorial claims to self-determination exercising entity'.<sup>1328</sup>

Overall, the strongest legal argument to self-determination of the people of South Sudan would be the acceptance of several assumptions. First, that the inhabitants of South Sudan constitute a 'people', that their rights to internal self-determination were seriously violated by the 'Khartoum's government' and that their case does not represent here a case of delayed decolonisation, but the emergence of a new State outside the process of decolonisation. This legal argument would be interesting in the near future, if the ICJ were called to rule on South Sudanese independence, or of any similarly acquired independence in another region of the world. Having the ICJ's stamp of approval would effectively develop a normative legal framework of external self-determination in such complicated circumstances.<sup>1329</sup> On the other hand, Remedial Earned sovereignty, 'RES', as a process can be suggested as an indeterminate solution consisting of very limited, narrow normative frameworks under which external self-determination, leading to remedial secession. 'RES' is legally, morally and politically pleasing to assert that those peoples that have demonstrated their capacity to function as an independent sovereign State and to become a good world citizens should become entitled to their sovereignty. This process would eventually avoid self-determination seeking group to engage in violent secession tactics. Without such framework, it would appear that external self-determination remains heavily influenced by the act of recognition and ultimately by the 'Super Powers' rule. In other words, in practice, an entity seems to be treated as a State only if the outside world wishes to recognise it.

Thus, the people of Sudan grounded their claims to the right to self-determination on the massive human rights violation, and the continuing of domination by the Arab north.<sup>1330</sup> As is arguably the case of Kosovo, South Sudanese people realised their right to self-determination by way of secession. South Sudan emerged as a new State through use of force, as well as a political process, which led to approval being given by its parent State.<sup>1331</sup> The mechanism for secession was rooted in the 2005 CPA and the constitutional arrangement that resulted from this agreement. The separation of South Sudan is a rare example of a right to

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<sup>1328</sup> *ibid* 168.

<sup>1329</sup> Although the ICJ does not do this, it can only apply Article 38 (1) of its status, it is a misconception of the function of the ICJ. Perhaps, the PCA through arbitration agreed by the parties.

<sup>1330</sup> Roepstorff, *The Politics of Self-Determination* (n 846) 140.

<sup>1331</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 76.

independence being exercised under domestic constitutional provisions, which would surely make it a non-colonial case. Such ‘constitutional provisions tend to be implemented exceptionally as an interim solution aimed at peaceful settlement of the contested entity’s legal status’.<sup>1332</sup> In other words, Vidmar argued that ‘in terms of international law, South Sudan did not become an independent State before the central government formally agreed to hold a binding referendum on independence, at which secession was supported by majority’.<sup>1333</sup> In the other words, it can be argued that, the consent of parent State is the reason why, unlike the case of Kosovo, the new legal status of South Sudan is undisputed. In addition, it is true that, similar to East Timor,<sup>1334</sup> the legal case for self-determination of the people of South Sudan may stand for an example of coincidence between international law and the great powers rules. As in the case of Kosovo, where the some great powers essentially enabled the Kosovar Albanians to form their own independent State, the Western great powers arguably were a key factor in allowing for the South Sudanese independence.

Thus, it can be concluded that, that the CPA can be considered as legally binding agreement. In this regard, Sheeran argued that, international law must strive to be as coherent or complete system as is possible using the rules and principles available.<sup>1335</sup> The legitimacy and effectiveness of an agreement such as the CPA depends in large part on its legal status. The CPA makes it very difficult for the Khartoum government not to recognise the right of self-determination of the people of South Sudan under customary international law.<sup>1336</sup> It provides a clear foundation that the right was considered to exist for the people of South Sudan, and set the parameters for its exercise consistent with international law.<sup>1337</sup>

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<sup>1332</sup> Vidmar, ‘South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States’ (n 51).

<sup>1333</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 76.

<sup>1334</sup> Sterio argued that ‘In East Timor, the legal rules pointed toward a favourable outcome for the East Timorese. In other words, the people of East Timor most likely had a valid legal case for delayed colonial self-determination (or even a good legal case for remedial secession from Indonesia, in light of Indonesian abuses of the East Timorese people). However, despite the existence of a solid legal case for self-determination, the East Timorese would never have been able to ‘declare’ independence from Indonesia without the involvement of the great powers.’ See, Sterio, *The Right to Self-Determination under International Law* (n 140) 104-113.

<sup>1335</sup> S P Sheeran, ‘International Law, Peace Agreements and Self-Determination: The Case of the Sudan’ (2011) 60 *Int’l & Comp L Q* 423.

<sup>1336</sup> In term of implementation, the detailed processes prescribed by the CPA fulfil that which is required under customary international law. As the ICJ put it in the Western Sahara case, the exercise of the right ‘requires a free and genuine expression of the will of the peoples concerned’. See, ‘*Western Sahara Case*’ (n 103) paras 54-59.

<sup>1337</sup> Sheeran, ‘International Law, Peace Agreements and Self-Determination’ (n 1335).

## 4.5. Conclusion

It can be concluded that, under international law, the people's right to exercise external self-determination accrues if its parent State has not respected its rights to internal self-determination. In other words, international law seems to recognise an exceptional case of remedial self-determination in the non-colonial context only when the parent State engages in such oppressive behaviour that the minority people no longer can coexist within the larger society of the parent State. At that point, the presumption of territorial sovereignty can be overcome.

The chapter addressed that in Kosovo, international law rules were not as clear, and a good argument can be mounted that the Kosovars did not have a solid legal case for self-determination. Its case poses important questions regarding the contemporary understanding of the international legal theories of secession, statehood, and recognition. It challenges scholars to assert new theories as justification for such unilateral act of secession. In addition, the case poses other solutions to the Kosovar people, such as an 'interim settlement' resolves the self-determination conflict by establishing the secessionist unit as a constitutional self-determination entity,<sup>1338</sup> conditional independence, the creation of an international protectorate, and the division along ethnic lines should be conceptualised before full independence for Kosovo. This situation indicates that, international community recognises only a very narrow set of circumstances under which self-determination may be realised by way of independent statehood, namely, in the case of massive human rights violations committed by an oppressive State and in the case when a parent State is consistently violating the internal rights of self-determination. On the other hand, Earned Sovereignty, 'ES', as a conflict resolution theory, has helped Kosovar people to realise statehood. During the interim period, the people in Kosovo have demonstrated to the outside world that it is capable to

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<sup>1338</sup> Weller explained that the '[colonial self-determination conflicts are not covered, as it is clear from the outset that the colonial entity in question is entitled to independence and there is no need for settlement on that issue the secessionist party suspends its claim for independence for a period during that period, autonomy or self-governance is developed and applied in good faith, with a view to demonstrating that this solution sufficiently answers the requirements of the secessionist entity.' Interim settlements of this kind require that continued territorial integrity be 'given a chance'. After a fixed period of the application of autonomy or self-governance, there is a provision for a referendum on independence, often with international involvement. The referendum will be held in the secessionist unit only, and is decisive in it]. For more details, see, Weller and Wolff (ed) 'Autonomy, Self-Governance, Conflict Resolution: Innovative Approaches to Institutional Design in Divided Society' (n 1012) 160.

function as an independent State, that it would be a reliable sovereign partner, and that it worthy of achieving statehood and that it has ‘earned’ its sovereignty.

The case of Kosovo has shown that the issues of self-determination and creation of States in international law have always been much more political than they are legal questions. The great powers have played a major role in securing the realisation of the legal rules in Kosovo.

In Quebec case, the main argument of the *amicus curiae* was that even if Quebec had no legal right to secession under Canadian or international law, this would not rule out the possibility of a *de facto* successful secession based on the principle of effectively, and international recognition from other States was soon to follow. The Court rightly investigated by stating that, ‘international law contains neither a right of unilateral secession *nor* the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination’.<sup>1339</sup>

The Canadian Supreme Court distinguished the right to internal self-determination from the right to external self-determination. While the former refers to a level of provincial autonomy within the existing State (Canada in this instance), including political, civic, cultural, religious and social rights, the latter refers to the right to separate from the existing State in order to form a new, independent State.<sup>1340</sup> It concluded that the right to separate is conditioned on the non-respect of the right to some form of provincial autonomy. The case of Quebec has shown that, if the group’s rights to internal self-determination will be fulfilled and respected in the future, such group would have no right to external self-determination, and thus no right to secede from its mother State. However, if the mother-State fails in significant ways to respect the group’s rights to internal self-determination, then the group would have the right to external self-determination and thus the right to secede from the mother-State.

At the end, the chapter discussed that, the case of South Sudan is a good illustration of the nature of the emergence of new States in modern international law. Arguing that this does not happen automatically based on meeting the statehood criteria, and/or the existence of historic

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<sup>1339</sup> ‘*Reference Re Secession of Quebec*’ (n 21) para 112.

<sup>1340</sup> *ibid*, para 126.

entitlement, rather it is a legal-political process, which leads to a new legal situation.<sup>1341</sup> For decades, it was impossible for the North and the South to co-exist as one heterogeneous State because of historical animosities, political unrest, and cultural position. The people of South Sudan based their claim to the right to self-determination to the forced Arabisation and Islamisation and ethnic cleansing in the South, as well as, to the grave breach of fundamental human rights by the Arab north. Thus, the conflict in Sudan between the North and the South can be described as a self-determination conflict in which the South sought independence from the North. Although, the fact South Sudan has had a solid legal argument to support their people's exercise of self-determination however; it can be concluded that the great powers were instrumental and a key factor in preparing the South Sudanese for independence.

Significantly, all successful secessionist peoples (Kosovo and South Sudan) have enjoyed support from the theory of 'RS'. For Kosovo, 'RS' has been instrumental in ensuring the people's safety, and capacity-building for the emerging State, and in political and institutional assistance culminating in the new State's ability to access international institutions and to engage in international relations. On the contrary, peoples that have not earned their sovereignty, because of willingness to engage in warfare and at times human rights abuses at the expense of the mother State or other regional ethnic groups, such peoples have been left to their own devices in the struggle for secession and statehood. On the other hand, the secession of South Sudan can be considered as a unique case in African history. The high level of international participation in the constructing of the 'CPA', which led to the eventual secession, meant that the international community was willing to recognise South Sudan as soon as it declared independence. Hence, it can be concluded that, the role of 'RS' as a conflict resolution agreement was essential, as to why South Sudan quickly became the world's newest country, and received recognition from the international community. Through the 'interim period', South Sudanese people have engaged in building measures that international community require, such as, democracy and respect of human rights and minority rights. They have proven that they are capable of functioning as an independent State, and that they have earned their sovereignty, because of willingness to respect all conditional mechanisms provided in 'CPA' and respect the will of the international community. So that, it can be concluded that the international community had supported their claims to self-determination and statehood, because, South Sudanese people have

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<sup>1341</sup> For more details see, Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 77.

demonstrated their capacity to become good world citizens, and that they should become entitled to their sovereignty and recognition.

## Chapter Five: The case of Iraqi Kurdistan Region IKR

### 5.1. Iraqi Kurdistan

The Kurdistan region of Iraq, known as ‘southern Kurdistan’, occupies the mountainous north part of modern day Iraq. It has a population of six million and covers an area of 83,000 square kilometres. Religiously, the majority are Muslims Sunni; however, there are also Christians, and Yazidis. Historically, Kurdistan Region KR was a colony of the Ottoman Empire, until the end of WWI, 1918. However, when the Ottoman Empire collapsed in WWI, the victorious Allied Powers, Britain, France and Russia, stripped all Middle Eastern colonies of the Ottoman Empire and divided them among themselves in accordance with ‘Sykes-Picot’ agreement of 1916. Thereafter, Iraq became a mandate of Britain according to the decision of the League of Nations in 1929. The Kurds had no option except seeking local autonomy or even independence under Britain’s auspices.

Since the establishment of the League of Nations, the experts of international law and political scientists have been waging a continuous debate concerning the viability of an independent State of Iraqi Kurdistan. By scrutinizing the historical events that have placed the Iraqi Kurds in their current situation, the aspects of international law that might enable or prevent them from achieving independence, and the effects that Kurdish independence from Iraq or continued statelessness would have on the region and the international community. This chapter aims to show that the controversies are with the Kurds being able to carve out their own independent State in the near future, while respecting the territorial integrity of the State of Iraq.

The chapter will examine a historical development of the Iraqi Kurds, who were first detached by the Allied Powers to the State of Iraq after WWI. It assesses the Iraqi Kurds situation by employing a critical rhetorical perspective. Who are the Kurds, and how does Kurdish nationalism bubble to the surface? How the Kurds and Iraqi government are sharply divided over the most fundamental issues in the Constitution relating to the nature of their future State and to the governmental system that is to role it will be discussed. In particular, whether the Kurdish region will be defined territorially or ethnically and whether it will include Kirkuk. A continuing territorial dispute between the central government in Baghdad



and Kurdistan Region Government over the area in and around the city of Kirkuk may be at the crux of a stable Iraq. The outcome of city's statute after normalising the situations according to the Iraqi constitution could have a large impact on Iraqi unity, an existing strategy of the US, and reaction of neighbouring countries. How long the Iraqi Kurds can be persuaded to remain part of a federal Iraq? While the majority of Kurds would like to break free of Iraq, and create an independent State. If Iraq cannot unite, can a peaceful secession be achieved that will maintain stability in the region? This chapter will be addressing these issues, later the thesis will investigate the application of the relevant theory to the situation of IKR in Chapter VI, while discussing whether the rules of international law and theories of secession will help them create their own independent State, and the challenges facing their quest for independence.

## 5.2. Historical Background

To begin to understand the Kurdish case in Iraq, it is first important to look at the history of the Kurds, their struggle for independence and autonomy, and the region known as Kurdistan.

The roots of the Kurdish problem lie in the events following the ending of WWI were the Kurds under the control of the Ottoman Empire, attempted to establish their own State. The Kurds are native inhabitants of their land and as such, there is no strict beginning for Kurdish history and origins.<sup>1342</sup> They are a mountain dwelling Indo-European people, comprise the fourth largest ethnic group in the Middle East, but they have never obtained statehood.<sup>1343</sup> They are speared into four countries Turkey, Syria, Iran, and Iraq, in an area referred to as Kurdistan.

The term of Kurdistan first appeared in the twelfth century, meaning the land of the 'Kurds'.<sup>1344</sup> The area of northern Iraq where Kurds predominate is a region of about 83,000 square kilometres, this is roughly the same size as Austria, Smaller ethno-linguistic communities of Assyrian-Chaldeans, Turcoman, Arabs, and Armenians are found in Iraqi

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<sup>1342</sup> M A Izady, 'Origin of the Kurds' (*Kurdistanica*, 1991) <<http://www.kurdistanica.com/?q=node/2>> accessed 10 December 2013.

<sup>1343</sup> K Katzman, 'The Kurds in Post-Saddam Iraq', (CRS Report for Congress, 2010) <<http://www.fas.org/spp/crs/mideast/RS22079.pdf>> accessed 10 December 2013.

<sup>1344</sup> D McDowall, *A Modern History of The Kurds* (3<sup>th</sup> rev edn, I.B. Tauris London 2004) XII.

Kurdistan.<sup>1345</sup> The majority of Kurds are Sunni Muslim;<sup>1346</sup> ‘they do not have a single common language but speak a number of different dialects, they have a distinct culture that is not at all like their Persian, Turkish and Arabic neighbours’.<sup>1347</sup> The Iraqi Kurds, numbering about (6 million), constitute between one-fourth and one-fifth of Iraq’s population, despite much repression, they have always been recognised by the State as a separate ethnic group.<sup>1348</sup>

The Kurds have had a long history of conflict with other ethnic groups in the area for autonomy and independence, without its own State, they struggled to maintain its identity. Under the various regional powers, they enjoyed a degree of semi-autonomy, seeking to exercise territorial control over the lands inherited and inhabited by Kurdish tribes. However, the desire for a Kurdish homeland did not begin until the early 1900's, around the time of WWI. In his Fourteen Points, President Woodrow Wilson ‘promised the Kurds’ a sovereign State.<sup>1349</sup> The 12<sup>th</sup> point stated that, ‘the Turkish portions of the Ottoman Empire should be assured a secure sovereignty, but the other nationalities, which are now under Turkish rule, should be assured an undoubted security of life and an unmolested opportunity of an autonomous development’.<sup>1350</sup> ‘The process of re-drawing a new political map for the post-war Middle East seemed to offer the new nationalities, such as the Kurds, Arabs, and Armenians, an unprecedented opportunity to realise their long-held political aspirations’.<sup>1351</sup> This was a first Kurdish opportunity to establish an independent State, which was supposed to have been accomplished through the Treaty of Sèvres in 1920.

The Treaty of Sèvres<sup>1352</sup>, signed by the Allied Powers and Turkish government on 10 August 1920, recognised the political rights of the Kurdish people. For the Kurds, McDowall argued that, Sèvres (Articles 62, 63, and 64) promised the formation of an autonomous region, ‘which would have the right to elect for complete independence one year after the formation

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<sup>1345</sup> C A O’Leary, ‘The Kurds of Iraq: Recent History, Future Prospects’ (2002) 6 MERIA 17.

<sup>1346</sup> McDowall, *A Modern History of The Kurds* (n 1344) 11.

<sup>1347</sup> C Bird, *A Thousand Sighs, a Thousand Revolts: Journeys in Kurdistan* (Random House of Canada Ltd 2004) 10-15.

<sup>1348</sup> *ibid* 9.

<sup>1349</sup> Ed Kashi, *When the Borders Bleed: The Struggle of the Kurds*, in Hitchens Christopher (ed) (Pantheon Books 1994) 32-61.

<sup>1350</sup> ‘President Woodrow Wilson’s Fourteen Points, (8 January, 1918) Lillian Goldman Law Library’, <[http://avalon.law.yale.edu/20th\\_century/wilson14.asp](http://avalon.law.yale.edu/20th_century/wilson14.asp)> accessed 14 December 2013.

<sup>1351</sup> S Eskander, ‘Britain’s Policy in Southern Kurdistan: The Formation and the Termination of the First Kurdish Government, 1918–1919’ (2000) 27 BJMES 139.

<sup>1352</sup> ‘The Peace Treaty of Sèvres, (*HR-Net*, 20 August 1920) Part III (Political Clauses)’ <<http://www.hri.org/docs/sevres/part3.html>> accessed 12 December 2013.

of the autonomous area, if the League of Nations were persuaded of their capacity for such independence'.<sup>1353</sup> In addition, the Treaty allowed for the adhesion of southern Kurdistan (IKR) to such a future Kurdish State.<sup>1354</sup> However, the Treaty was never ratified, and, three years later, with the rise of Turkey's Kemal Ataturk, another Treaty was negotiated.<sup>1355</sup> The 1923 Treaty of Lausanne<sup>1356</sup> recognised a new Turkish republic, and made no mention of the Kurds or of a State of their own, it rather paved the way for the new British Mandate of Iraq to acquire the oil-rich Kurdish province of Mosul.<sup>1357</sup> The Treaty of Lausanne completely ignored the Kurdish claim to any form of independent State and carved up Kurdistan. As a result, the Kurds have found themselves divided between four countries (Turkey, Iraq, Iran, and Syria).<sup>1358</sup>

At the end of WWI, Iraq was still a British protectorate, and the British were no more interested in Kurdish self-determination than the Turks were.<sup>1359</sup> Everest argued that, what the British were interested 'in was making sure that the former Ottoman Province of Mosul, an area populated by Kurds and Turks, was incorporated into the new State of Iraq, and not into Turkey. The reason was oil'.<sup>1360</sup> They believed that the new State of Iraq would not be able to develop and survive a 'self-sufficient economy' unless it maintained possession of the oilfields near the cities of Mosul and Kirkuk.<sup>1361</sup> In other words, 'it became clear that, because of the impeding Treaty of Lausanne, Kurdish districts in Iraq could not be incorporated into an independent or autonomous Kurdistan, the British made some efforts at providing limited autonomy to Kurdish enclave within Iraqi boundaries.'<sup>1362</sup> In 1931, a United Kingdom report to the Council of the League of Nations pointed out that 'any serious attempt to form an independent Kingdom in these districts was impossible for many reasons. It was not an economic proposition; it would have been regarded with neighbouring power-regarded with intense distrust by neighbouring powers who were also having difficulties with subjects; and it would have difficulties with their own subjects; and postulated a degree of

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<sup>1353</sup> McDowall, *A Modern History of The Kurds* (n 1344) 137.

<sup>1354</sup> *ibid.*

<sup>1355</sup> Bird, *A Thousand Sighs, a Thousand Revolts: Journeys in Kurdistan* (n 1347) 13.

<sup>1356</sup> 'The Lausanne Treaty' (*HR-Net*, 24 July 1923) <<http://www.jstor.org/stable/2189174?origin=crossref>> accessed 12 December 2013.

<sup>1357</sup> Bird, *A Thousand Sighs, a Thousand Revolts: Journeys in Kurdistan* (n 1347) 13.

<sup>1358</sup> See, P Sluglett, *Britain in Iraq: Contriving King and Country* (CUP, Columbia 2007) 121.

<sup>1359</sup> L Everest, *Oil, Power, & Empire: Iraq and the U.S. Global Agenda* (CCP 2003) 64.

<sup>1360</sup> *ibid.*

<sup>1361</sup> *ibid.*

<sup>1362</sup> I T Naamani, 'The Kurdish Drive for Self-Determination' (1966) 20 *The Middle East Journal* 279.

cohesion and cooperation among the Iraqi Kurds themselves which, as has been shown, did not exist'.<sup>1363</sup>

Thus, at the end of WWI, Hunt argued that 'the Victorious Allies at the Conference of San Remo drew the borders of the Middle East in April 1920'.<sup>1364</sup> The European allies made borders 'that were essentially straight lines drawn on a map of the Middle East that did not consider the traditional boundaries of the region'.<sup>1365</sup> As a result, the borders divided some tribes and placed rival tribes together. Polk argued that 'the British were given control of Basra, Baghdad, and Mosul provinces, and decide to combine them into one territory that would later become the State of Iraq'.<sup>1366</sup> Thus, Hunt argued that the British 'had no empathy or understanding of the cultural impact of combining the Shiite and Sunni segments of the territory into one country'.<sup>1367</sup> These imposed borders split the Kurds, and left them without a State.<sup>1368</sup>

In 1930, The Anglo-Iraqi Treaty ended the British Mandate and recognised the independence of the Kingdom of Iraq.<sup>1369</sup> The Treaty did not specify Kurdish rights; as a result, the Kurds rose and rebelled under the leadership of Sheikh Mahmoud, furious that neither the Iraqi government nor the British fulfilled the League's 1925 recommendations.<sup>1370</sup> In 1946, Mustafa Barzani founded the Kurdish Democratic Party (KDP). The Party Tripp argued 'adopted a nationalist programme and it as dedicated to the creation of an independent Kurdish State from Iraq'.<sup>1371</sup> Fighting between the KDP and the Iraqi government continued until 1970, when a peace agreement signed between the Kurds and the Iraqi government that called for Kurdish self-determination, a census was supposed to be held in 1974 to determine the borders of the Kurdistan region. Tripp argued that, the government seemed 'to commit itself to a recognition of Kurdish rights that far exceeded anything that had been conceded before; the distinct national identity of the Kurds was recognised, as was their language, and they were promised participation in government and predominance in the local

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<sup>1363</sup> Great Britain, Colonial Office, *Special report by His Majesty's government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League of Nations on the progress of Iraq during the period 1920-1931* (London, H.M. Stationery Off 1931) 255-256.

<sup>1364</sup> C Hunt, *The History of Iraq* (Greenwood Reference C, 2005) 61.

<sup>1365</sup> *ibid.*

<sup>1366</sup> W Polk, *Understanding Iraq* (HarperCollins Publishers 2005) 82.

<sup>1367</sup> Hunt, *The History of Iraq* (n 1364) 62.

<sup>1368</sup> *ibid.*

<sup>1369</sup> Naamani, 'The Kurdish Drive for Self-Determination' (n 1362).

<sup>1370</sup> J J Abdulla, *The Kurds, A Nation on the Way to Statehood* (Author House, 2012) 92.

<sup>1371</sup> C Tripp, *A History of Iraq* (2<sup>nd</sup> edn, CUP 2005) 117.

administration'.<sup>1372</sup> However, in 1974, fighting resumed when the Iraqi government refused to implement the manifesto's elements, and refused to give the Kurds control over their traditional territory including control over oil-rich province of Kirkuk.<sup>1373</sup> The Kurds, however; failed to resist the renewed Iraqi offensive and the revolt collapsed within weeks.<sup>1374</sup>

In 1975, the festering divisions within the KDP led to a major split between its leaders. Jalal Talabani broke with the KDP and formed the Popular Union of Kurdistan (PUK), 'attracting many who had found Brazani's tribal leadership hard to reconcile with their own nationalist and socialist principles'.<sup>1375</sup> Since its foundation, the PUK has been working for human rights, self-determination, and democracy for the Kurdish people.<sup>1376</sup> Although the PUK has tried to be closer to the government in Baghdad, and held out the possibility of a favourable renegotiation with the centre of the term of the autonomy agreement.<sup>1377</sup> However, it was clear that, the Iraqi government was unwilling to accede to the PUK's demands concerning financial autonomy, Kurdish control of the Kirkuk oil fields, or the question of local control of the security forces (*peshmerga* forces). This led to the collapse of the talks.<sup>1378</sup> Especially McDowall argued that 'after the US, the USSR, and France provided substantial assistance to Saddam for fear that, the Islamic Republic would win the war and destabilise the oil producing States in the gulf region.'<sup>1379</sup> Consequently, fighting erupted between the Kurdish liberation movements and Iraqi government. The period from 1987 to 1990 was marked by gradual territorial devastating of Iraqi Kurdistan and massacre of innocent civilian Kurds.

In 1979, when Saddam Hussain took power in Iraq, the relations broke down irretrievably with the Kurds.<sup>1380</sup> In 1980, during the Iraq-Iran war, the Kurds were sent to the frontlines by both Iraq and Iran, and more than two million died there.<sup>1381</sup> Hussain tried to use the war as an opportunity to exterminate the Kurds and systematically redraw the map of Iraqi

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<sup>1372</sup> *ibid* 200.

<sup>1373</sup> *ibid* 212.

<sup>1374</sup> *ibid*.

<sup>1375</sup> *ibid* 213.

<sup>1376</sup> *ibid*.

<sup>1377</sup> *ibid* 243.

<sup>1378</sup> *ibid* 244.

<sup>1379</sup> D McDowall, *Modern History of Kurds* (I.B.Tauris 1997) 350.

<sup>1380</sup> McDowall, *A Modern History of The Kurds* (n 1344) 263.

<sup>1381</sup> Tripp, *A History of Iraq* (n 1371) 214.

Kurdistan, however; the Kurds resisted more heroically than he had bargained for.<sup>1382</sup> In 1986, the main Kurdish political parties the KDP and PUK formed a military coalition against Saddam. This unity threatened the Iraqi government; they therefore hit back with unspeakable brutality and launched the Anfal Operations.<sup>1383</sup> The ‘Anfal campaign’ has been characterised as a major genocide campaign in Kurdistan. The operation included Bengio argued that, ‘the destruction of hundreds of villages situated in strategic areas; the transfer of between 100,000 and 500,000 Kurds from the heart of Kurdistan to remote areas near the Jordanian or Saudi borders or, at best, to Kurdish areas more readily controlled by the regime such as Erbil; and the sporadic gassing of Kurdish villages with chemical weapons’.<sup>1384</sup>

In 1987, Saddam appointed Ali Hassan Al Majid (The Chemical Ali) as military governor of Iraqi Kurdistan, and initiated the violent campaign *Al-anfal (the spoils of war)*.<sup>1385</sup> Chemical weapons were used against Kurdish towns and villages, as much to inspire terror as to achieve any strictly military purpose.<sup>1386</sup> Saddam Hussein adopted a policy of eradicating the Kurds from his country. Over the next fifteen years, the Iraqi army bombed Kurdish villages, and poisoned the Kurds with cyanide and mustard gas, it is estimated that during the 1980's, Iraqis destroyed some 5000 Kurdish villages and nearly 500,000; civilians were taken away and placed in detention camps in the desert areas of south and west Iraq.<sup>1387</sup> In March 1988 attacks by Iraqi forces resulted in the massacre of upward to 5000 Kurdish civilians of the Kurdish town of Halabja, by gassing them with chemical weapons, which is considered under Article (II) and (III) of the 1948 Convention on the prevention and punishment a ‘genocide’ and as one of the most severe ‘crimes against humanity’.<sup>1388</sup> However, the government in

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<sup>1382</sup> ‘Genocide in Iraq: The Anfal Campaign Against the Kurds’, *Middle East Watch Report*, 1993 <<http://www.hrw.org/reports/pdfs/i/iraq/iraq.937/anfalfull.pdf>> accessed 19 December 2013.

<sup>1383</sup> The term meaning (spoils or looting) see, Abdulla, *The Kurds, A Nation on the Way to Statehood* (n 1370) 171.

<sup>1384</sup> O Bengio, *The Kurds of Iraq: Building a State Within a State* (LRP, London 2012) 180-181.

<sup>1385</sup> Tripp, *A History of Iraq* (n 1371) 244.

<sup>1386</sup> Abdulla, *The Kurds, A Nation on the Way to Statehood* (n 1370) 171-172.

<sup>1387</sup> Study World, ‘The Kurds: A Nation without a State’ (*Study World*, 2012)

<[http://www.studyworld.com/newsite/reportessay/History/Asian%5CThe\\_Kurds\\_\\_A\\_Nation\\_Without\\_A\\_State\\_-321957.htm](http://www.studyworld.com/newsite/reportessay/History/Asian%5CThe_Kurds__A_Nation_Without_A_State_-321957.htm)> accessed 15 December 2013.

<sup>1388</sup> ‘Genocide in Iraq: The Anfal Campaign Against the Kurds’ (n 1382). See also, ‘Convention on the Prevention and Punishment of the Crime of Genocide, (9 December 1948) UNTS 78, GA Res 260 A (III), Entry into force: 12 January 1951 <<http://www.refworld.org/docid/3ae6b3ac0.html>> accessed 20 December 2013. Emile Zola’s *J’Accuse*, Joost Hilterman pointed an accusing finger at the United States, arguing that, [Evidence shows that the U.S., fully aware it was Iraq that had gassed Halabja, accused Iran of being at least partly responsible, and then instructed its diplomats to propagate Iran’s partial culpability. This ploy, while successful in getting the Iraqis off the hook, had an important consequence: the Iraqis saw another green light and took immediate advantage. Using gas tactically on the first day of every Anfal stage, they were able to

Baghdad never seriously punished for these attacks and the international community took no significant measures to punish these actions; in fact, countries continued to supply Iraq with weapons. This inaction Clark argued 'stands in stark contrast to the international response to Iraq's invasion of Kuwait a few years later, the international community took no action against Iraq for gassing Kurds because most countries regarded the action as an "internal matter" rather than a violation of international law'.<sup>1389</sup> Thus, failure to take any action against Saddam was singly assuring him he could get away anything, 'the invasion of Kuwait was another sign of this'.<sup>1390</sup>

In 1991, a major Kurdish popular rebellion was launched against Saddam Hussein's regime.<sup>1391</sup> After the Iraqi army was defeated in the first Gulf War in 1991, the US allowed Saddam to crack down on an initially successful Kurdish uprising.<sup>1392</sup> As a result, over 2 million Kurds abandoned their homes and fled to the mountains, thousands of them died of cold and starvation.<sup>1393</sup> After the repression, and the mass exodus of Kurds from Northern Iraq, the US and UK decided to protect them.<sup>1394</sup> On 5 April 1991, the UNSC passed Resolution 688 in order to restrain Baghdad. The Resolution condemned 'the repression of the Iraqi civilian population in many parts of Iraq, including most recently in a Kurdish populated area' and demanded that 'Iraq, as a contribution to removing the threat to international peace and security in the region immediately end this repression, and that Iraq allow immediate access to international humanitarian organisations to all those in need of assistance in all parts of Iraq'.<sup>1395</sup> The resolution McDowall argued was historic and raised a number of important issues in international law. It was the first international document since the League's arbitration of the Mosul province in 1925 to mention the Kurds by name, thus lifting their status internationally. It was also the first time the UN had insisted on the right of

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gather up and methodically kill tens of thousands of Kurds']. See, J R Hilterm, *A Poisonous Affair: America, Iraq, and the Gassing of Halabja* (CUP 2007) 239-240.

<sup>1389</sup> P A Clark, 'Taking Self-determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate?' (2012) 5 *Chicago J Int'l L* 737.

<sup>1390</sup> Abdulla, *The Kurds, A Nation on the Way to Statehood* (n 1370) 178.

<sup>1391</sup> S Zunes, 'The United States, and the Kurds: A Brief History' (*Foreign Policy in Focus*, 2007)

<<http://stephenzunes.org/2007/10/25/the-united-states-and-the-kurds-a-brief-history/>> accessed 20 December 2013.

<sup>1392</sup> McDowall, *A Modern History of The Kurds* (n 1344) 373.

<sup>1393</sup> *ibid.*

<sup>1394</sup> *ibid.*

<sup>1395</sup> 'The Resolution condemned the repression of the Iraqi civilian population in many parts of Iraq, including its Kurdish inhabitants, and found that the consequences of this repression can threaten the international peace and security in the whole region. It warned Iraqi aircrafts from flying north of the 36th Parallel, and Iraqi armed forces not to be sent into the 36-by 63-mile zone created by the operation for the safety of its Kurdish inhabitants.' See, 'UNSC Res, 688' (5 April 1991), UN Doc S/RES/688.

interference in the internal affairs of a member State'.<sup>1396</sup> In addition, an internal act of repression by the 'Iraqi government was included in the resolution's definition of international peace and security, where they had the consequence of generating an outflow of refugees towards and across international borders'.<sup>1397</sup> However, the resolution was not passed under Chapter VII and it did not authorise the use of force.<sup>1398</sup> The enforcement of the unilaterally proclaimed no-fly zones Gray argued has come to be seen as illegitimate, despite UK protestations of humanitarian necessity.<sup>1399</sup> Thus, although the US and UK have offered little by way of legal justification at the time,<sup>1400</sup> however, the creation of 'Operation Provide Comfort' (OPC) which established a 'Safe Haven' protected the Kurds from Saddam's brutality in northern Iraq and without it, many thousands of people would have died in a very short time. Dewhurst argued, it allowed the Kurds to be internationally recognised as a repressed group that deserved to be protected.<sup>1401</sup>

In 1992, the Kurds established their own Parliament and local authorities that ruled the region in complete independence of the central government consequently the Iraqi State's control over northern Iraq has completely disappeared. Meanwhile, the Kurds in Kurdistan of Iraq 'have been in control of their own region, and they have been able 'to institutionalise self-rule in northern Iraq through the Kurdistan Regional Government' (KRG).<sup>1402</sup> As a result Iraqi Kurdistan became a '*de facto*' Kurdish State from 1991-2003. In 1994, the two major Kurdish parties KDP and PUK fought each other, 'underlying tension was clearly exacerbated by the double embargo imposed on the region (The central government economic siege and the UN

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<sup>1396</sup> McDowall, *A Modern History of The Kurds* (n 1344) 375.

<sup>1397</sup> Yildiz, *The Kurds in Iraq, the Past, Present and Future* (n 107) 38.

<sup>1398</sup> For more details see, P Malanczuk, 'The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War' (1991) 2 *EJIL* 114.

<sup>1399</sup> C Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq' (2002) 13 *EJIL* 1. The UK has supported the legitimacy of its actions, it openly acknowledge that: [The legal justification for the patrolling of the non-fly zones does not rest on Security Council Resolution 688. That has not been the government's position. In terms of humanitarian justification, we are entitled to patrol the no-fly zones to prevent a grave humanitarian crisis. That is the legal justification in international law. It does not rest on Resolution 688, although that resolution supports the position that we have adopted]. House of Commons Hansard, Debates (26 February 2001). See, *ibid*.

<sup>1400</sup> *ibid*.

<sup>1401</sup> M Dewhurst, 'Assessing the kurdish question: what is the future of kurdistan?', 2006.

<sup>1402</sup> D Natali, 'Transnational Networks: New Opportunities and Constraints for Kurdish Statehood' (2004) 11 *Middle East Policy*

111<<http://osearch.proquest.com.unicat.bangor.ac.uk/docview/60164038?accountid=14874>>accessed 20 December 2013.



sanctions against Iraq)'.<sup>1403</sup> They were heading down a path toward mutual destruction of the region until they agreed to a cease-fire in 1998.<sup>1404</sup>

In 2003, the Second Gulf War removed Saddam's regime from the power. The Kurds became key allies of the United States in overthrowing Saddam's regime, by joining American forces in capturing the cities of Kirkuk and Mosul, 'and this paved the way for even greater Kurdish autonomy'.<sup>1405</sup> The Kurds generally have participated, as a strong ally in the central government, in two national elections in 2005, Talabani, the PUK leader, became President of Iraq.<sup>1406</sup> In addition, the Kurdistan National Assembly democratically elected Massoud Barzani, the leader of the KDP as the new regional president of Iraqi Kurdistan.<sup>1407</sup> The Kurds 'want to maintain as much autonomy as possible in a federal Iraq,' and they have insisted on the validity of their historic claim to the oil-rich, 'ethnically mixed city of Kirkuk as their regional capital'.<sup>1408</sup>

Historically, Dawoody pointed out that, it is difficult to determine the 'exact ethnic composition of Kirkuk prior to the Iraqi government's Arabization policy in the 1980s and after'.<sup>1409</sup> However, the most reliable census available dates back to 1957. Gunter and Yavuz argued that, the census indicated that Kirkuk city (as distinguished from Kirkuk province or governorate) had a slightly larger Turcoman (39.8 percent) than Kurdish (35.1 percent) population. The Arabs (23.8 percent) constituted only the third-largest group, the 1957 census, however, also showed that Kirkuk province had a Kurdish majority of (55 percent), while the Arabs numbered only (30.8 percent) and the Turkmens (14.2 percent).<sup>1410</sup> Nonetheless, successive Iraqi governments tried with varying degrees of intensity to change the ethnic character of the Kirkuk region. Thus, it is estimated that between the 1970s and 2003, Saddam Hussein uprooted more than 100,000 Kurds in his efforts to Arabize the city of Kirkuk.<sup>1411</sup> By expelling and killing thousands of Kurds, and replacing them with Arab settlers, the percentage of Arabs in Kirkuk rose from 30% of the total population according to

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<sup>1403</sup> Yildiz, *The Kurds in Iraq, the Past, Present and Future* (n 107) 48.

<sup>1404</sup> Tripp, *A History of Iraq* (n 1371) 234.

<sup>1405</sup> McDowall, *A Modern History of The Kurds* (n 1344) 376.

<sup>1406</sup> (...), 'Talabani Predicts U.S. Exit in Two Years' *CNN* (USA, 5 April 2005).

<sup>1407</sup> (...), 'Iraqi Kurdistan leader sworn in,' *BBC* (London, 14 June, 2005).

<sup>1408</sup> *ibid.*

<sup>1409</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1410</sup> M M Gunter and M Hakan Yavuz, 'The Continuing Crisis in Iraqi Kurdistan' (2005) 12 *Middle East Policy* 122.

<sup>1411</sup> L Beehner, 'The Challenge in Iraq's Other Cities: Kirkuk' (*Council on Foreign Relations*, 30 June 2006) <<http://www.cfr.org/iraq/challenge-iraqs-other-cities-kirkuk/p11036>> accessed 25 December 2013.

the 1957 census to 44% according to the census taken in 1977.<sup>1412</sup> In addition, the US Department of State has reported that, between 1991 and 1999, 'In north Iraq, the government continued its campaign of forcibly deporting Kurdish and Turcoman families to southern governorates, as a result of these forced deportations, approximately 900,000 citizens were internally displaced throughout Iraq'.<sup>1413</sup>

Kirkuk is ultimately considered as one of the World's largest oil fields, and one of the most contested disputed areas.<sup>1414</sup> It has been the subject of much conflict and debate, over the control of the oil revenue. While it is unclear whose claim to the land will win out, 'it is evidence that the outcome of the Kirkuk issue, which has been an area of major focus in the Post-War conflict, will have a significant effect on both the long-and short term stability of Iraq'.<sup>1415</sup> The City has been the source of most of the tension between the Iraqi Kurdistan region and Baghdad in recent years. The city of Kirkuk and Kirkuk Governorate status is not resolved in the Traditional Administrative Law (TAL), and will have to be settled in the negotiation of the permanent Constitution.<sup>1416</sup> The City rich in Petroleum has been one of the principle obstacles to finding a peaceful solution to the Kurdish question in north Iraq. Meanwhile, if the Kurds are to secede or gain independence from Iraq, control of Kirkuk is somehow essential, meaning that the city is of immense strategic and economic importance to the Kurds. In 2005, a permanent constitution was approved by the Iraqi Council of Representatives, and provides Article (140).<sup>1417</sup> The completion of the implementation of Article (58) from the (TAL) has been reaffirmed, and the Statue of Kirkuk according to Article (140) will be determined in three stages: First, the demographic situations (the Normalisation) in the region will be brought back to level it was before Saddam's era and by the Arabization campaigns. Then 'a census will be conducted to determine the make-up of the

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<sup>1412</sup> *ibid.*

<sup>1413</sup> US Department of State, 'Iraq, Country Reports on Human Rights Practices', (23 February 2001) <<http://www.state.gov/j/drl/rls/hrrpt/2000/nea/787.htm>> accessed 25 December 2013. See also, Nouri Talabany, *Arabization of the Kirkuk Region* (ED Kurdistan Studies Journal 2001) 20-25.

<sup>1414</sup> B O'Leary, 'Federative Possibilities', in John McGarry, Brendan O'Leary and Khaled Salih (ed), *The Future of Kurdistan in Iraq* (UUP 2005) 83.

<sup>1415</sup> Yildiz, *The Kurds in Iraq, the Past, Present and Future* (n 107) 207.

<sup>1416</sup> O'Leary, 'Federative Possibilities' (n 1414) 83. Article (58) of the (TAL), which is considered as a theoretical victory for the Kurdish position declared that "the Iraqi Transitional Government shall act expeditiously to take measures to remedy the injustice caused by the previous regime's practices in altering the demographic character of certain regions, including Kirkuk, by deporting and expelling individuals from their places of residence, forcing migration in and out of the region, settling individuals alien to the region, depriving the inhabitants of work, and correcting nationality." See, 'Law of Administration for the State of Iraq, For the Transitional Period', 2004 <<http://www.law.case.edu/saddamtrial/documents/TAL.pdf>> accessed 20 December 2013.

<sup>1417</sup> 'Iraqi Constitution' (n 84).

province's population followed by a referendum to decide whether or not to include Kirkuk in the Kurdistan region'.<sup>1418</sup>

The Iraqi constitution envisions a referendum on the status of Kirkuk, but the vote, although planned earlier, has never taken place because pre-referendum requirements, such as a census, could never be carried out. Today, many groups in Kirkuk believe Article (140) supports only Kurdish interests in the region, and they will act properly as an obstacle in the way of implementing the Article.<sup>1419</sup> Turcomans claims that they have historically dominated the city; while an Arab leader claims that they have a right to stay because they were legally settled there. Kurds say that before the start of the Saddam-led ethnic-cleansing policies, Kurds constituted the majority of the population in the city. On the other hand, the Kurds will be opposed to any provincial elections in the city until its status is resolved. Because, Cogan argued that, the 'Kurdish control of Kirkuk would provide the economic foundations for the long-term perspective of Kurdish nationalists a separate Kurdish State'.<sup>1420</sup> At the same times, as tensions increased between Baghdad and the Kurds, Iraqi minorities in northern Iraq are increasingly fearful of their status. Thus, Kirkuk's question cannot be delayed, without some political solution; the result might be more violence in Kirkuk and in the entire region. Seen as a microcosm of Iraq for its mix of several ethnic groups, Salih argued that 'Kirkuk awaits an uncertain future as disagreements about the future of the city increase, a victim of its oil wealth, Kirkuk has for long been a divisive issue in Iraq's politics'.<sup>1421</sup>

Until the summer 2014, the Kurds enjoyed relative stability, compared to the rest of the country; violence in the Kurdish region had drastically disappeared. The relative stability in the Kurdistan region has allowed the Iraqi Kurds to enjoy the country's highest living standard and highest level of foreign investment.<sup>1422</sup> The region is stable enough to allow the Iraqi Kurds to engage in foreign relations with other countries, and even hosts travellers and businessmen from Europe and around the world. Most importantly, the Kurds have succeeded in a achieving a federal form of government within the State of Iraq. As a federal entity of Iraq, the Kurdish language has been recognised as an official national language of Iraq

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<sup>1418</sup> See, Dewhurst, 'Assessing the kurdish question: what is the future of kurdistan?' (n 1401).

<sup>1419</sup> E Ferris and K Stoltz, 'The Future of Kirkuk, the referendum, and its potential impact on displacement', Project on internal displacement (The Brooking Institution, University of Bern 2008).

<sup>1420</sup> J Cogan, 'Iraq: Kurdish leader threatens civil war over Kirkuk' (WSWS, 2007) <<https://www.wsws.org/en/articles/2007/08/kurd-a07.html>> accessed 3 January 2014.

<sup>1421</sup> 'M A Salih, Bloody fight over Kirkuk's future, *Asia Times* (Hon Kong, 7 October 2006).

<sup>1422</sup> M Rubin, 'Is Iraqi Kurdistan a Good Ally' [2008] Middle East Forum <<http://www.meforum.org/1822/is-iraqi-kurdistan-a-good-ally>> accessed 23 December 2013.

alongside Arabic.<sup>1423</sup> Moreover, the Kurdish provinces have united into a single, largely autonomous region capable in maintaining its own internal security, armed forces; impose taxes and overruling federal rules.<sup>1424</sup>

From the 1990s onwards, the international community and specifically Washington appears to have decided that the Kurds have a role to play in preserving regional security and stability, which has always been an objective of its Middle Eastern policy.<sup>1425</sup> In the aftermath of the Iraqi War (2003), the U.S. viewed the Iraqi Kurds as constituting the only factor of stability in the country's domestic affairs.<sup>1426</sup> However, this does not imply that the U.S. no longer has the 'state' as the centrepiece of its policy, still the U.S. deals with the Kurds of Iraq only within an Iraqi federal framework.<sup>1427</sup> Today, Charountaki argued that the Kurds can be defined as a 'non-state' actor in the sense that they constitute a political entity other than the States that interact in the international political system (with big States) and are formally organised, as such they play an important role in international politics.<sup>1428</sup> Carole O'Leary described Iraqi Kurdistan as a 'crucible for democracy' and a model for post-Saddam Iraq.<sup>1429</sup> Meanwhile, the majority of Kurds want to secede from Iraq and form an independent Kurdish State.<sup>1430</sup> On the other hand, the Kurdish leaders would not push for outright independence, instead they have been involved as a pillar force in holding Iraq together, 'helping to write and adopt a national constitution that, although gives great powers to the regions, has kept Iraq intact as a federal State'.<sup>1431</sup> The reasons why the Kurdish leaderships have taken this stance are numerous but are due to a mixture of American pressure in favour of preserving Iraq's territorial integrity, fears of international especially regional countries'

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<sup>1423</sup> See, Art 9, 'Law of Administration for the State of Iraq, For the Transitional Period' (n 1416).

<sup>1424</sup> *ibid* Art 54.

<sup>1425</sup> M Charountaki, *The Kurds and US Foreign Policy: International Relations in the Middle East since 1945* (Routledge 2010) 220-236.

<sup>1426</sup> M M Gunter, United States Foreign Policy Towards The Kurds, in Lokman I Meho (ed), *The Kurdish Question in U.S. Foreign Policy: A Documentary Sourcebook* (Praeger Publishers 2004) 3-13.

<sup>1427</sup> Charountaki, *The Kurds and US Foreign Policy: International Relations in the Middle East since 1945* (n 1425) 220-236.

<sup>1428</sup> *ibid*.

<sup>1429</sup> C G Macdonald and C A O'Leary (ed), *Kurdish Identity: Human Rights and Political Status* (FUP 2007) 336.

<sup>1430</sup> See, 'KRM-International Committee, Kurdistan Referendum Movement: '98 percent of the people of South Kurdistan vote for independence', *Kurdish Media* (8 February 2005)

<<http://www.kurdmedia.com/article.aspx?id=6235>>accessed 25 December 2013.

<sup>1431</sup> A L Butters, 'Kurdistan: Iraq's Next Battleground?' *Time Magazine* (Erbil, 12 April 2007).

reaction to an independent Kurdish State, and the Kurdish parties' lack of a unified strategy for achieving Kurdish national aspirations.<sup>1432</sup>

Nevertheless, in July 2014, the situation has worsened in Iraq, the country has witnessed drastic changes since the Jihadist extremists seized the northern cities of Iraq and declared a caliphate<sup>1433</sup> in the areas they control.<sup>1434</sup> This could have dramatic effects on regional and international stability. After the Islamic State of Iraq and the Levant (ISIS-ISIL) the 'extremist militants' have captured the city of Mosul and the majority of Sunni areas in northern Iraq from the Iraqi army. The Kurdistan regional government (KRG) are seen to have come under the obligation to protect its population from the violence, as the Iraqi government is no longer capable to take the responsibility to protect and secure its citizens and borders. After the sudden collapse of the Iraqi army in the north by ISIS, the Kurds have advanced to take over disputed areas, including the oil rich city of Kirkuk<sup>1435</sup>, as the Kurds feared the city's oil reserves would be captured by the Islamic militants.<sup>1436</sup>

Accordingly, it is important to realise that Iraq is plunging towards civil war, sectarian violence is out of control, security is non-existent, regional and international security is threatened, basic services are found wanting, the majority of the population are being internally displaced, this indicates that Iraq is falling into being a failed State. These events have proven to the international community that the government in Baghdad is no longer capable to protect the existence of Iraq as a federal State. However, despite the turmoil around it, IKR remains an oasis of stability and the only secure region in the area.

In fact, as Iraq descends deeper into chaos, the Kurds have taken advantage of the tumult to expand and tighten their control in the oil-rich Kirkuk province and that could boost the Kurdish dreams for independence. In other words, things are definitely going in the right direction for the Kurds, as they have been in full control of Kirkuk and the other contested areas, the Kurds could not risk leaving the city's Kurdish residents, who comprise the majority in these areas. On the other hand, as Iraq has fallen to an ethnic civil war between

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<sup>1432</sup> A Berwari and T Ambrosio, 'Democratization: The Kurdistan Referendum Movement: Political Opportunity Structures and National Identity' (2008) 15 Routledge Taylor & Francis Group 891.

<sup>1433</sup> C J Carter, 'Iraq developments: ISIS establishes 'caliphate,' changes name', *CNN Middle East* (June 30, 2014).

<sup>1434</sup> F Gardner, 'Jihadistan': Can Isis militants rule seized territory?' *BBC News Middle East* (9 July 2014).

<sup>1435</sup> (...), 'Iraq conflict: ISIS militants seize new towns', *BBC News Middle East* (13 June 2014).

<sup>1436</sup> J Muir, 'Could Iraq conflict boost Kurdish dreams of independence?' *BBC News Middle East* (13 June 2014).

the north Sunni extremists and the south Shia groups, the creation of a Sunni enclave along IKR's borders will have security, social, political, and economic effects on the region. For that reason, KRG must consider itself required and under the obligation to protect its population from violence. This could also justify the Kurdish legitimate breakaway from Iraq and create an independent Kurdish State in north Iraq. These issues will be examined further in the next chapter.

Finally, it is clear that, outside the colonial context the UN is extremely reluctant to accept unilateral secession of part of independent States if the government of that State opposes the secession.<sup>1437</sup> Moreover, in international law, 'self-determination for peoples or a group within an independent State is achieved by participation in the political system of the State, based on respect for its territorial integrity'.<sup>1438</sup> In other words, in the case of non-colonial peoples, 'the right to self-determination does not grant them directly the right to secede, since their identity as a distinct group is recognised within the parent State'.<sup>1439</sup> Meanwhile, Frank argued that, 'international law does not give a right of secession *per se*, but neither does it prevent it'.<sup>1440</sup> Accordingly, Buchheit argued that international law provides a right to secession only for people subject to extreme persecution or unable to realise their right to self-determination internally.<sup>1441</sup>

Nevertheless, despite all the difficulties the main question is what would be possible to develop a strategy or a theory, which will enable the Kurds in Iraq to claim a sustainable solution and prevent any potential any ethnic and territorial conflict in future. Significantly, how long the Kurds can be persuaded to remain part of a united Iraq. Whereas the majority would like to freely separate and create an independent State. In other words, do the peoples of Iraqi Kurdistan, specially the Kurds have a right to external self-determination that would enable them to create their own State in accordance with international law? These issues will be further examined in the next chapter while discussing the application of the theory of Remedial Earned Sovereignty 'RES', on the situation of the IKR.

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<sup>1437</sup> Bayefsky argued that, 'There is no right to unilateral secession possessed by groups within independent states as a matter of international law.' See, Bayefsky (ed), *Self-Determination in International Law, Quebec and Lessons Learned* (n 848) 15-17.

<sup>1438</sup> 'Reference re Secession of Quebec', (n 21) paras 121 and 122.

<sup>1439</sup> Bayefsky, *Self-Determination in International Law, Quebec and Lessons Learned* (n 848) 17.

<sup>1440</sup> Bayefsky further argued that, 'No prohibition exists in international law upon person or groups preventing secessionist attempts.' See, *ibid*. In addition, Professor M Frank in his analysis of Question 2 of the Reference re secession of Quebec has pointed out that, 'the law cannot be invoked to achieve secession, but it cannot be invoked to prevent it either'. See, Frank, Report for the *Amicus Curiae* (n 990).

<sup>1441</sup> Buchheit, *Secession, The Legitimacy of Self-Determination* (n 29) 220-223.

### 5.3. Constitutional arrangements within the state of Iraq: A decentralised form of governance)

In post-Saddam Iraq, the Iraqi Kurds have managed to gain formal limited autonomy in the form of the IKR within the Iraqi State, as stipulated in the constitution. Today, the IKR rules much of the Kurdish areas of Iraq and the Kurdish Parliament exercises significant legislative powers. The region of Kurdistan after Operation Iraqi Freedom (OIF) in 2003 has been recognised as a constitutionally federal region within Iraq and it enjoys broad international diplomatic relations.<sup>1442</sup>

On October 15 2005, Iraqis approved the constitution in a referendum. The Kurds firmly believe that four core principles cannot be omitted: federalism, equal rights for women, freedom of individual conscience, and justice for the victims of Baathism.<sup>1443</sup> The constitution establishes a federal central government and regional governments as a form of self-rule. It approved the IKR and its regional and federal authorities. Kurdish is recognised as an official language alongside Arabic.<sup>1444</sup> Rather, ‘oil and gas revenues belong to all Iraqis and the revenue will be shared equitably by the regions’.<sup>1445</sup> It is also agreed to decide the status of Kirkuk and disputed areas according to Article 140. The constitution, guarantees small minorities such as Turkomen, Chaldeans, Assyrians and all other constituents, ‘the administrative, political, culture, and educational rights’.<sup>1446</sup> Article 35 (4), which states that the ‘State will promote cultural activities and institutions in a way that is appropriate with Iraq’s civilizational history and cultural’.<sup>1447</sup> However, the provision Yildiz argued could be ‘used by the State to sanction the discrimination of funding of activities and organisations of minorities and it is recommended that the provision be amended to include the guarantee of non-discriminatory State support’.<sup>1448</sup> Eventually, the constitution states that Iraq will be an independent federal State with full sovereignty, parliamentary and democracy.<sup>1449</sup>

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<sup>1442</sup> See, Article 117 'Iraqi Constitution' (n 84).

<sup>1443</sup> Q Talabani, 'What the Kurds want', *The Wall Street Journal* (NY, 22 August 2005).

<sup>1444</sup> Article 4 'Iraqi Constitution' (n 84).

<sup>1445</sup> Dewhurst, 'Assessing the kurdish question: what is the future of kurdistan?' (n 1401).

<sup>1446</sup> Article 125 'Iraqi Constitution' (n 84).

<sup>1447</sup> Article 35 (4) 'Iraqi Constitution', *ibid*.

<sup>1448</sup> Yildiz, *The Kurds in Iraq, the Past, Present and Future* (n 107) 138.

<sup>1449</sup> Article 1 'Iraqi Constitution' (n 84). It is true that the Iraq established is re-established based on “administrative federalism” and not geographical, ethnic, or historical regional distinctions. See, Rebwar Fatah,

Significantly, the constitution creates a federation, 'federations incorporate elements of self-rule in the sense that their component units enjoy a certain degree of autonomy *vis-à-vis* the federal government even as they share in the control of that government'.<sup>1450</sup> It concerns IKR relationships with the Iraqi central government, based on freedom and independence. The constitution is built on the concept of voluntary unity and sovereignty and optional partnership between the Kurds and Arabs. The last item of the preamble states that, 'We are the people of Iraq, who in all our forms and groupings undertake to establish our union, 'freely and by choice' and to adhere to this constitution, which shall preserve for Iraq its free union of people, land, and sovereignty, adhering to this constitution will protect the Iraq's free union as people, land, and sovereignty'.<sup>1451</sup> It is true that, the preamble shows that the Kurdish participation in establishing the constitution and volunteering in building the Iraqi State. Hence, it is argued that the Kurds can abandon their participation anytime if the desire is not there. This right to abandon the Union-which means 'Separation', is affirmed by the same constitution through many other clear statements; since the Kurds have the right to abandon the voluntary union and separate at any time they feel that their rights have been violated or broken. Given the attachment of Kurds to Kirkuk and to other disputed territories, any attempt to prevent their union with Kurdistan in the future, would be likely to provoke more violence, rather than peace.<sup>1452</sup> In other words, the Kurdish relationships with the central government McGarry and O'Leary argued that, they are built in congruence with the condition of not breaching the constitutional rights of the Kurds by the central government.<sup>1453</sup> Meanwhile, any violation of Kurdish rights gives them the right to practice the external dimension of the right of self-determination.<sup>1454</sup> Thus, Dawoody argued that, 'by identifying the unity of Iraq as a 'free' act of its people, at least indirectly acknowledges that the Iraqi union is a form of 'union at will' that is subject to change according to the determination of its groups'.<sup>1455</sup> Alongside Article 106 obligates the federal government 'alone' with the responsibility of maintaining the integrity of the Iraqi State by stating that, 'the federal authorities shall preserve the unity, integrity, independence, sovereignty of Iraq,

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'Kurdistan Identity Denied in the Iraqi Constitution' (*UNPO*, 2006) <<http://www.unpo.org/article/3897>> accessed 29 December 2013.

<sup>1450</sup> J McGarry and B O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (2007) 5 *ICON* 670.

<sup>1451</sup> See, the Preamble of 'Iraqi Constitution' (n 84).

<sup>1452</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 1450).

<sup>1453</sup> *ibid.*

<sup>1454</sup> *ibid.*

<sup>1455</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).



and its federal democratic system'.<sup>1456</sup> This Article Dawoody argued, considerably exonerates the region of Kurdistan from such obligation and frees it to secede if it chooses to do so in the future.<sup>1457</sup>

Furthermore, some elements in the Iraqi constitution such as, the constitutional provisions on natural resources are a source of controversy. An instance of this, Baghdad's control over the country's natural resources is a sine qua-non for centralisation.<sup>1458</sup> O'Leary argued that 'the constitution makes clear that natural resources are not an exclusive competence of the federal government'.<sup>1459</sup> Article 111, states that 'oil and gas are owned by all the people of Iraq,' is McGarry argued deliberately not a sub-clause of the preceding Article 110, which specifies precisely the exclusive competences of the federal government.<sup>1460</sup> Article 111 functions as a saving clause, and should be read in conjunction with Article 115, which states that, 'All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organised in a region.'<sup>1461</sup> With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organised in a region in case of dispute'.<sup>1462</sup> Here, Dawoody explained that 'how is it possible for the federal government to share its power in matters as specified as the priority of the regional government?'<sup>1463</sup> In addition, Article 116 (2) states: 'The regional authority has the right to amend the implementation of the federal law in the region in the case of a contradiction between the federal and regional laws in matters that do not pertain to the exclusive powers of the federal authorities.' Rather, Article 111 should also be read in conjunction with Article 121, which gives 'the regions a general power of nullification outside the domain of exclusive federal competences'.<sup>1464</sup> Here, if the constitution is the Supreme law of the land, how is it possible for the region to amend or abolish such a law?<sup>1465</sup> Moreover, Article 116 (5) grants considerable power to the regional governments, stating, 'Offices for the regions and

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<sup>1456</sup> Article 116 'Iraqi Constitution' (n 84).

<sup>1457</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1458</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 1450)

<sup>1459</sup> M E Bouillon, David M Malone and Ben Rowswell, Iraq: Preventing a New Generation of Conflict, in Brendan O'Leary (ed), *Federalizing Natural Resources* (Lynne Rienner 2007) 189.

<sup>1460</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 1479).

<sup>1461</sup> Dewhurst argued that 'the Constitution contradicts itself in Article 13 and Article 116 with respect to the supreme law of the Federal Constitution and the ability of the regional governments to amend Federal Laws.' see Dewhurst, 'Assessing the kurdish question: what is the future of kurdistan?' (n 1401).

<sup>1462</sup> Article 115 'Iraqi Constitution' (n 84).

<sup>1463</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1464</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 1450).

<sup>1465</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs'.<sup>1466</sup> Thus, Dawoody argued that, 'Iraq would be the only country in the world that allows diplomatic representation of its provinces in its embassies'.<sup>1467</sup> Accordingly, the Iraqi constitution's federal system (union system) Fatah argued, is contradictory, and the authorities of the regional governments are very limited and weak, and arguably threatens the disintegration of the State of Iraq.<sup>1468</sup>

In the early drafts of the constitution, Article 114 stated that two Regions can unite to create a larger Region, that two Governorates or more can unite to create a Region, and a Governorate can declare itself as a Region based on a request for a referendum.<sup>1469</sup> However, in the current constitution draft this Article has been removed.<sup>1470</sup> Although, the new constitution approved the region of Kurdistan and its authorities, however; it is true that, the Kurdish areas outside the Kurdish government's control cannot unite with the region of Kurdistan in the future. They also cannot declare themselves, 'in a referendum, a Kurdish Governorates according to Article 114, because Kurds do not make up the majority in these Governorates'.<sup>1471</sup> This means that Kirkuk and other disputed areas cannot legally unite with the Kurdistan region even after their normalisation. Thus, Baker and Hamilton argued that 'the fear is that these provisions will promote an ethnic or communal federation, with associated dangers of ethnocentrism/sectarianism and dissolution'.<sup>1472</sup>

Additionally, Article 112 is the second major constitutional article dealing with oil and gas, which states that, 'The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, and that the federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a

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<sup>1466</sup> Article 121 (4) 'Iraqi Constitution' (n 84).

<sup>1467</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1468</sup> Section 5, Articles 116 to 121, explain authorities of regional governments cannot be compared to the authorities of the dominant central government. In addition, Article 117 states that regional governments cannot interfere with the agendas of the central government. Regional constitutions and laws must not contradict the central constitution as described in article 13. The regional constitutions therefore must shadow the central government's constitution (Articles 13 and 118). See, Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (n 1449).

<sup>1469</sup> 'Text of the Draft Iraqi Constitution', 2005

<[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/24\\_08\\_05\\_constit.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/24_08_05_constit.pdf)> accessed 29 December 2013.

<sup>1470</sup> Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (n 1449).

<sup>1471</sup> (...), 'Kirkuk can't come back to Kurdistan' (*AllIraqi*, 2005)

<<http://www.aliraqi.org/forums/showthread.php?t=56233>> accessed 29 December 2013.

<sup>1472</sup> J A Baker III and L H Hamilton, 'The Iraq Study Group Report', (Vintage Books, New York 2006)

<[http://online.wsj.com/public/resources/documents/WSJ-iraq\\_study\\_group.pdf](http://online.wsj.com/public/resources/documents/WSJ-iraq_study_group.pdf)> accessed 1 January 2014.

way that achieves the highest benefit to the Iraqi people'.<sup>1473</sup> In fact, Article 112 and 114 establish other areas in which the regional governments and the federal government share power.<sup>1474</sup> However, Article 112 should also be read in conjunction with Article 115 and 121, 'which authorise regional supremacy'.<sup>1475</sup> Most importantly, Article 112 Horowitz argued 'restricts the federal government's role to present fields, and claims that this 'seems to tie the distribution of future oil revenue to the location of the resource in one region or another'.<sup>1476</sup> Iraq's oil is in the Shiite south and Kurdish north.<sup>1477</sup> Consequently, this would alarm and leave the Sunni Arab community landlocked and without oil.<sup>1478</sup> In addition, McGarry and O'Leary argued that, the constitution makes clear that, 'the territorial status of the Kirkuk governorate has been decoupled from the oil revenues that flow from its oilfields'.<sup>1479</sup> Meanwhile, as Kirkuk's oil comes from currently exploited fields, its revenues are to be redistributed across the State regardless of whether Kirkuk joins Kurdistan or not. This fact needs to be clearly understood, it is a major constitutional compromise.<sup>1480</sup> Thus, Dewhurst argued that, the constitution explains that oil and gas revenues will be shared equally by the regions but is unclear on the exploration rights of oil.<sup>1481</sup>

Perhaps, the most problematic aspect about the new constitution is its embodiment of articles that threaten the disintegration of Iraq. Dawoody argued that, depending on a 'quota system' in governance is 'an attempt to resolve the country's historic social problems at the expense of a weak central government'.<sup>1482</sup> In other words, the constitution contains articles that are vague, 'and that would leave a large room for misinterpretation and speculation', which properly threatens the disintegration of the State of Iraq, specifically the relationship between the federal government and Kurdistan region.<sup>1483</sup> The following examples are specific concerns that may pose a threat on the federal structure and the national security of Iraq in the future.

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<sup>1473</sup> Article 112 'Iraqi Constitution' (n 84).

<sup>1474</sup> This include for example, the development of oil and gas, customs, water resources, environmental policy, antiquities, enforcement, educational, electric energy distribution and health policy. See Article 112 and 114 of the Iraqi Constitution, *ibid*.

<sup>1475</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 1450).

<sup>1476</sup> D L Horowitz, 'The Sunni Moment', *The Wall Street Journal* (USA, 14 December 2005).

<sup>1477</sup> *ibid*.

<sup>1478</sup> International Crisis Group, 'The Next Iraqi War? Sectarianism and Civil Conflict', 52 Middle East Report (27 February 2006) <<http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/052-the-next-iraqi-war-sectarianism-and-civil-conflict.aspx>>accessed 27 December 2013.

<sup>1479</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 1450).

<sup>1480</sup> *ibid*.

<sup>1481</sup> Dewhurst, 'Assessing the kurdish question: what is the future of kurdistan?' (n 1401).

<sup>1482</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1483</sup> N Brown, 'Q&A: Iraq's Draft Constitution' *New York Times* (New York, 12 May 2005).

- Article 13 and 116 contradict each other, with respect to the supreme law of the Federal constitution and the ability of the regional governments to amend Federal Laws. Accordingly, regional laws and constitutions must not contradict the central constitution; they must therefore shadow the federal government's constitution.<sup>1484</sup> The role of the Kurdish parliament will be similar to the role of a 'Council' for the region, and will not have the power of a regional parliament in a federation.
- Article 1, 107 and the Preamble threatens integration and the free union system in Iraq. Importantly, the constitution does not describe Iraq as a 'voluntary union' between the two peoples the Arabs and the Kurds.
- Articles 113-122 recognises a balance of power between the federal government and the regional governments of Iraq, whereas they leave many details to be determined by the council of representatives. With respect to the distribution of authorities, they grant a considerable power to the regional governments, and limit the powers of the federal government. In particular, the Federal system in Iraq has been highly interpretive and vague. The system is in a very loose arrangement that would support the regions especially the Kurdistan region's maximum autonomy over their own affairs. In other words, Hiltermann argued that the constitution describes the federal system with two exceptional characteristics: 'it guts the powers of the federal State through extreme devolution to federal regions, and it provides scope to governorates to form regions, either standing alone or in conjunction with other governorates, that would replicate the Kurdistan region in their powers'.<sup>1485</sup> Hence, the KR has been the principal, and so far sole beneficiary of this arrangement, being the first through the gate. While the other Iraqi regions will depend on the ability of the territories parties' power, to mobilize enough support in each concerned governorate to win a local referendum, which is key to forming a region.
- Article 9 requires the Iraqi armed security and forces, to keep in consideration their 'balance and representation', whereas it (sec B) bans militias from being formed outside of the framework of armed forces. However, the Kurdish 'Peshmerga' is allowed in the Kurdistan region, and that would permit the current Shiites and Sunni militias to be incorporated into the Iraqi armed forces. In other words, the federal

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<sup>1484</sup> Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (n 1449).

<sup>1485</sup> J Hilterman, 'Iraqi Kurds and Their Future, Middle East Research and Information Project' [MER 247] (2008) <<http://www.merip.org/mer/mer247/protect-or-project>> accessed 3 January 2014.

government will have to come to terms with its militias and Armed forces. With the Kurdish Peshmerga as the most established, each prominent ethnic group has established militias to protect their regions. The Armed forces in Iraq are made up of all ethnic groups, to protect the country from external and internal threats. However, Dewhurst argued that ‘some Iraqi units are composed of a majority or entirely of one sect or group in their ranks, the militia’s loyalty is first to their ethnic group, and region; many Shiite and Kurdish units take their orders from the Shiites and the Kurdish political parties’.<sup>1486</sup> Thus, in order for a federal government to succeed, the role and the use of these forces will have to be clarified, so that, the particular points in the new constitution are considered as enormous challenges toward the new government, may require amendments for clarification to assist in the creation of a successful federal system.

- The *quota* system has extended to the exploration of oil and gas in Articles 110 and 112, with respect to the fair distribution in a manner compatible with the demographic distribution of the country. However, it is unclear on the exploration rights of oil and gas.
- Article 1 and 2, defines Iraq as a ‘Democratic’ and ‘Islamic’ country. However, Fatah argued that ‘there are no universal agreements on the meaning of these two totally different, even contradicting, concepts’.<sup>1487</sup> Accordingly, based on such concepts, no law can be legislated or enacted that contradicts the immutable standards of Islam; similarly, no law may contradict democratic standards.<sup>1488</sup> Consequently, such illusive language will restrict the democratic, civil, and human rights of the entire Iraqi populations.
- Article 23 (2), states that ‘ownership with the purpose of demographic change is forbidden.’ Does this mean that one ethnic group could not own property in another ethnic group region? If this is correct, then the constitution is indefensible and does not represent all Iraqi equally.
- Article 140 is the most contested and the major reason behind the rising tension between the federal government and the region of Kurdistan. It represents 30 to 40

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<sup>1486</sup> Dewhurst, ‘Assessing the kurdish question: what is the future of kurdistan?’ (n 1401).

<sup>1487</sup> Fatah, ‘Kurdistan Identity Denied in the Iraqi Constitution’ (n 1449).

<sup>1488</sup> B Roggio, ‘Democracy and Iraq’s Constitution,’ (*The Long War Journal*, 2005)

<[http://www.longwarjournal.org/archives/2005/08/islam\\_democracy.php](http://www.longwarjournal.org/archives/2005/08/islam_democracy.php)> accessed 3 January 2014.

territories in dispute in Iraq.<sup>1489</sup> Its status has not been resolved in the Traditional Administrative Law (TAL), and was supposed to have been completed in the negotiation of the permanent constitution in accordance with Article 140. However, its implementation dead line of December 2007 was not met by the federal government, which has frustrated the Kurds.<sup>1490</sup> So that, after the Kurdish Peshmerga forces claimed to have taken control of Kirkuk on 12 June 2014<sup>1491</sup>, Kurdish President Masoud Barzani announced that 'Article 140' of the Iraqi constitution, on the disputed areas, has been implemented in Kirkuk province, stressing that 'no return shall be for this decision'.<sup>1492</sup>

Thus, perhaps it was a historical milestone by the Kurdish political leadership when the Kurds voted for the Iraqi constitution in 2005. However, many argue that, the Iraqi constitution marks a new era in the history of Kurdish oppression. On the one hand, the idea of federalism is not helpful to the Kurds; especially as it has been diluted to a very simple form of federation.<sup>1493</sup> The federation does not recognise the ethnic, historic, and geographical reality of a Kurdish homeland.<sup>1494</sup> Most importantly, it will not lead to the right to self-determination in the future, unlike the case in Sudan. In Sudan, it has been illustrated earlier that, the constitution allowed the South to attain independence, if their people are not satisfied with the central government after 4 years of the accord.<sup>1495</sup> On the other hand, the constitution Fatah argued does not clearly mention that Kurds are one of the two main people in Iraq, it also deprives Kurdish religious groups of their rights, for example: it does not identify some a half million Kurdish religious group Kakeyies, who have their own customs and rules, while it gives Arab Hussiyniye tribes freedom.<sup>1496</sup> In addition, it fails to recognise crimes against humanity committed against the Kurds in the past few decades, such as, the Operation of Anfal, Arabization campaigns, murdering and burying people alive, destroying

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<sup>1489</sup> R Mardini, 'Rising Arab-Kurdish Tensions over Kirkuk Will Complicate U.S. Withdrawal from Iraq', (*Kurdish Aspect*, 2009) <<http://www.kurdishaspect.com/doc022509RM.html>> accessed 3 January 2014.

<sup>1490</sup> 'Neither a census nor a referendum has been completed because of unresolved disputes between Iraq's Arabs and Kurds. Further, the UN and the federal government are attempting to find a solution outside the Article 140 framework.' See, B Katulis and P Juul, 'The Kirkuk Impasse' (*Centre for American progress*, 2008) <<http://www.americanprogress.org/issues/military/news/2008/07/28/4713/the-kirkuk-impasse/>> accessed 3 January 2014.

<sup>1491</sup> T Goudsouzian and L Fatah, 'Analysis: The Kurds take Kirkuk, now what?' *Aljazeera News* (16 Jun 2014).

<sup>1492</sup> (...), 'Article 140 implemented in Kirkuk, Barzani', *Aswat al-Iraq* (27 June 2014).

<sup>1493</sup> Katzman, 'The Kurds in Post-Saddam Iraq' (n 1343).

<sup>1494</sup> Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (n 1449).

<sup>1495</sup> Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (n 51).

<sup>1496</sup> Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (n 1449).

thousands of Kurdish villages, and the genocide of the Kurds in Halabja. Thus, dismissing such terms in the constitution as a vital parts of Kurdish identity is a step 'towards dissolving the Kurdish identity, it is cultural genocide, and the Kurds must never compromise on their historical identity'.<sup>1497</sup>

Generally, federalism as an organising structure for governance. O'Leary argued 'can promote stability in multi-ethnic or multi-religious States through the establishment of political units whose relationship to the centre is defined in a constitution that provides written principles concerning structures and rules for governance and appropriation of federal funds'.<sup>1498</sup> Federal arrangements are often used as a way of keeping deeply divided societies together. In particular, Steytler and Mettler argued that, where divisions, be they ethnic, linguistic, or religious, could develop into violent conflicts or the threat of a civil war, constitutional arrangements for self-rule and shared rule have been put forward as a key to peace.<sup>1499</sup> The federal distribution of power is then used to satisfy sectorial demands for self-determination.<sup>1500</sup> Yet a federation involves as self-rule as well as shared rule, 'and how Iraq's different communities and regions share power within institutions at the federal level will determine, arguably, whether loyalty to the federation can be developed and if the State will survive intact'.<sup>1501</sup> Dewhurst pointed out that, ensuring successful federalism however to a country lacking in a democratic tradition with strong religion and ethnic division, is a massive challenge.<sup>1502</sup> Specifically, Gunter and Yavuz argued, 'federalism as a sophisticated division and sharing of power between a central government and its constituent parts would probably require a democratic ethos for its successful operation'.<sup>1503</sup> However, it is true that the Iraqi form of federalism is based on ethnic and sectarian considerations.<sup>1504</sup> It originated Morgan discussed 'among formerly, exiled Shiite politicians and clerics and has never been an 'Iraqi solution', a demand arising from among all sections of the peoples and corresponding to their common needs and aspirations'.<sup>1505</sup> It has been strongly rejected by the

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<sup>1497</sup> *ibid.*

<sup>1498</sup> O'Leary, *Federative Possibilities* (n 1414) 79.

<sup>1499</sup> N Steytler and J Mettler, 'Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy' (2001) 31 *The Journal of Federalism* 93.

<sup>1500</sup> *ibid.*

<sup>1501</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005' (n 1450).

<sup>1502</sup> Dewhurst, 'Assessing the kurdish question: what is the future of kurdistan?' (n 1401).

<sup>1503</sup> Gunter and Yavuz, 'The continuing Crisis in Iraqi Kurdistan' (n 1410).

<sup>1504</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1505</sup> S J Morgan, 'The Right of Iraq to Self-Determination' (*The Cheers*, 2007)

<[http://www.thecheers.org/Politics/article\\_2150\\_The-Right-of-Iraq-to-Self-Determination.html](http://www.thecheers.org/Politics/article_2150_The-Right-of-Iraq-to-Self-Determination.html)> accessed 5 January 2014.

Iraqi Sunnis,<sup>1506</sup> who see it favouring the economic and politic interests of Shiites, and supported by Iraqi Kurds, who see it considerably favourable to keep their autonomy.<sup>1507</sup> Rather, Dawoody argued that ‘basing federalism on sectarianism and ethnicity undermines the right of those in minority and transforms the country into warring factions’.<sup>1508</sup>

Alternatively, to create a successful system of federalism, it will ultimately depend on the people of Iraq to make it work. A successful Iraqi federation must be democratic and voluntary, based on mutual trust and recognition among all ethnic groups,<sup>1509</sup> with the full panoply of liberal democratic rights. Most importantly, Dawoody argued, is ensuring responsibility in governance, ‘balance in the distributions of missions among regional and federal authority, ethical standards of public officials, and maintenance of unity among the different components of the federated system’.<sup>1510</sup> Hence, without these standards, a federal system is not going to work, and ‘ultimately will lead to internal disturbance and the partition of the State’.<sup>1511</sup> However, the federal system in Iraq appears to be on a different path to other successful ones, on the one hand, it has failed to gain a national acceptance, on the other hand, it has been criticised for its proportional representation and promoting a national fragmentation.<sup>1512</sup> This irregularity paved the way for Iraqi political groups to be interested in catering to their own political interests than to support the common interest of all Iraqis.<sup>1513</sup> Similarly, after the collapse of Saddam's regime, it is thought that, Iraq may provide a legal mechanism for keeping the territorial integrity of the country and imminent Kurdish secession. In this regard, Mukhlis stated that:

[The constitution was written with the interest of only one group in mind: the Kurds. The Shiites seem to think they can shape the country to their wishes if only they can appease the Kurds and gain their cooperation. However, the Kurds have their own plan: their ultimate goal is to form an independent State of Kurdistan, with or without Iraq's help. Even now, a "greater Kurdistan," which would absorb Kurdish areas of neighbouring countries, is in the cooking].<sup>1514</sup>

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<sup>1506</sup> Adnan al-Dulaimi, head of an umbrella group called the National Conference for the Sunni People of Iraq, told reporters that, "We reject federalism in the central and southern regions. We reject it because it has no basis other than sectarianism." See, (...) 'Iraqi factions firm against constitution', *Aljazeera.Net* (24 August 2005).

<sup>1507</sup> Morgan, 'The Right of Iraq to Self-Determination' (n 1505)

<sup>1508</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1509</sup> Dewhurst, 'Assessing the kurdish question: what is the future of kurdistan?' (n 1401).

<sup>1510</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1511</sup> *ibid.*

<sup>1512</sup> (...) 'Iraqi factions firm against Constitution', *Aljazeera* (Qatar, 24 August 2005).

<sup>1513</sup> *ibid.*

<sup>1514</sup> H Mukhlis, 'Voting 'Yes' to Chaos', *The New York Times* (New York, 18 October 2005).



Thus, since the constitution exonerates the regional governments from preserving the integrity of the country, the IKR is not therefore required to remain within this union. In addition, since the constitution in Article 115, permits the regions to include any number of provinces in a referendum, Dawoody argued that ‘the inclusion of Kirkuk and other disputed areas into the region of Kurdistan is legally permissible by insuring their Kurdish identity’.<sup>1515</sup>

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<sup>1515</sup> Dawoody, ‘The Kurdish Quest for Autonomy and Iraq’s Statehood’ (n 79).

## 5.4. Conclusion

The case of IKR towards independence from Iraq is quite compelling. The chapter has argued the role of Iraqi Kurds in the history of Iraq, their treatment and the rights granted or denied to them as Iraqi citizens and inhabitants of a distinct Kurdish region. The Kurds are native inhabitants of their land and as such, there is no strict beginning for Kurdish history and origins. Based on their common background, cultural, history, language, the Kurds of Iraq are a distinct group of people, inhabited in the area of north Iraq. They have had a long history of conflict with other ethnic groups in the area for autonomy and independence, without its own State, they struggled to maintain its identity. At the end of WWI, the formation of a Kurdish State was suggested, to have been accomplished through the Treaty of Sevres. However, the Treaty was scrapped and substituted by the Treaty of Lausanne in 1923, where no mention of the Kurds was made. Since being left without a State, the Kurds of Iraq have suffered tremendously and faced enduring hardship, including human rights violations, military attacks, economic embargoes, and the destruction of their native region. Most importantly, they were the victim of a systematic extermination, and poisoned gas by Saddam's regime during the Anfal Campaigns. With Saddam's removal in 2003, the Kurds have an incredible opportunity for greater autonomy or even independence from Iraq.

Today, the Iraqi constitution cannot guarantee peace; the Kurds have constantly renewed their warning against violations of the Iraqi constitution over the status of Kirkuk and oil resources and the other major problems. The Kurds insist that the problem of the ethnically divided city of Kirkuk is a constitutional issue and that it must be solved according to the constitution. Until its status is resolved, the Kurds are firmly opposed to any provincial elections in Kirkuk. However, the situations have changed drastically after the insurgents of the Islamic State of Iraq and Sham took control over the major key cities of northern Iraq including Mosul and Tikrit. Consequently, after the long-standing dispute over an oil-rich Iraqi city, the Kurdish Peshmerga forces claim to have taken control of Kirkuk, long the object of their dreams and aspirations, considering Article 140 to have been implemented. In this regard, President Barzani has said that the 'dispute is finished', meaning Kurdish control of the area would continue.<sup>1516</sup>

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<sup>1516</sup> (...), 'Iraq: Kurdish president proposes independence referendum', *The Guardian* (3 July 2014).

Moreover, most compelling evidences have proven that the Iraqi constitution contains articles that threaten the disintegration of the state of Iraq. The linguistic structure of the constitution text is complex and contradictory, which ultimately leaves a large room for speculation and misinterpretation. In addition, it is argued that, the federal system in Iraq is a major controversial political problem. Ultimately, it will depend on the people's reliance and support to make it work. To ensure a successful federation, it is indeed an enormous challenge to a country lacking a democratic tradition and-with strong ethnic and religious divisions. After the fall of Saddam's regime, the Kurds generally have participated as a strong ally in the central government. However, for the Kurds, the future federal government remain ill-defined. Today, the Kurdish leaders consider independence is a natural right of the people of Kurdistan.<sup>1517</sup> The recent situations have proven that Iraq is effectively partitioned. The Kurds are pushing themselves further towards independence after president Barzani asked the MPs to form a committee to organise an independence referendum.<sup>1518</sup> Barzani said: 'The Kurdish people will not relinquish their right to a referendum and they will make their decision'.<sup>1519</sup> He said 'if Maliki insists on a third term, then Iraq will be driven towards a precipice and no one can predict what will happen,' 'And no decision will bring the country back to its previous state'.<sup>1520</sup> In his words, the constitution has been violated in many ways and on many occasions by Iraqi premier. Barzani said, all these years, 'we have only been asking for the implementation of the constitution'.<sup>1521</sup> Thus, Kurdish leaders have long accused the central government of ignoring the constitution, particularly articles on disputed areas and on an oil and gas law, that are now under Kurdish control and Erbil's share of the national budget.

To sum up, it is true that there are many contested issues between the IKR and the central government, which may threaten a breakdown of constitutional order.<sup>1522</sup> As a consequence,

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<sup>1517</sup> *ibid.*

<sup>1518</sup> *ibid.*

<sup>1519</sup> (...), 'President Barzani Blasts Accusations by Baghdad against Kurds', *Rudaw* (Erbil, 9 July 2014).

<sup>1520</sup> *ibid.*

<sup>1521</sup> *ibid.*

<sup>1522</sup> In the 2008 Iraqi budget deliberations (adopted February 13, 2008); Iraq's Arab leaders tried but did not succeed in efforts to cut the revenue share for the Kurds from 17% of total government revenue to 13%, the Kurds did agree to abide by a revenue share determined by a census that is to be held. The Kurds further require the *Peshmerga*'s salaries to be paid out of national revenues. It is also not clear whether the Constitution allows the IKR to buy weapons from foreign resources. See, Katzman, 'The Kurds in Post-Saddam Iraq' (n 1343). In addition, 'Tensions between the Iraqi central government and the IKR have risen recently over oil revenue disputes and Exxon's controversial decision to sign a contract with IKR to develop oil fields partly within the DIBs.' See, D A Ollivant, 'Renewed Violence in Iraq,' (*Council on Foreign Relations*, 2012) <<http://www.cfr.org/iraq/renewed-violence-iraq/p28808>> accessed 7 January 2014.

a deepening constitutional crisis could be taken as an advantage ‘to try to break up the Iraqi State (such as through a declaration of Kurdish independence and/or a concerted push for Sunni ‘federalism’ an attempt to set up a separate Sunni region analogous to the KRG)’.<sup>1523</sup> These developments have signalled that ‘the Kurds could be hedging their bets and preparing for independence if a united Iraq does not come to fruition’.<sup>1524</sup>

The next chapter will examine the adaption of the theory of ‘Remedial Earned Sovereignty’ to the situation of the IKR. Whether such a theory can be used as an effective remedy to end sovereignty based conflict, in a country which has had a long history of violence and ethnic struggle. A successful implementation of ‘RES’ could potentially provide peace and prosperity for Iraqi Kurds and ultimately respect the territorial integrity of the State of Iraq.

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<sup>1523</sup> *ibid.*

<sup>1524</sup> Dewhurst, ‘Assessing the Kurdish question: what is the future of Kurdistan?’ (n 1401).

## Chapter Six: The Application of the Reconceptualised Theory of ‘Remedial Earned Sovereignty’ RES to the Situation of Iraqi Kurdistan Region IKR

### 6.1. Introduction

Self-determination is a fundamental principle of the international system. Though widely applied in the decolonisation era as a right of colonial people to independence, however; the applicability of self-determination outside this paradigm has been subject to continuing debate. Over the past decades, courts and scholars have struggled to delineate parameters to the question, under which people would be entitled to such a drastic form of self-determination. The first limiting factor in this thesis is the purposeful distinction between people and minority groups. Under international law, any right of self-determination, whether external or internal, is granted to the former, but not the latter.<sup>1525</sup> The second factor in the application of the self-determination theory lies in the distinction between internal and external self-determination and the controversy over the applicability of the external self-determination to non-occupied and non-colonial people. Most scholars have simply concluded that, the right to external self-determination can only occur for colonised peoples and peoples subject to foreign domination and occupation. According to this view, non-occupied and non-colonised peoples have only rights to internal self-determination under international law (rights within the existing mother State). On the other hand, many scholars and some courts have suggested the possibility of external self-determination for people outside the decolonisation context. According to this argument, a right to external self-determination may exist for peoples in some exceptional circumstances, leading to remedial secession and the disruption of the territorial integrity for their existing mother State.

For most scholars and courts Sterio argued, ‘such a right to external self-determination may only be occurred in extreme circumstances where no possibility exists for the peaceful cohabitation of the mother State and the struggling people’.<sup>1526</sup> Hence, most debate exists over the application of self-determination and the accurate contours of this theory.

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<sup>1525</sup> Minority groups are entitled to the protection of some rights under international law, but those rights do not entail the right to political autonomy or self-governance. Rather, minority group rights entail the respect of the group’s culture, heritage, language, or religion. See further, Sterio, *The Right to Self-Determination under International Law: Self-Determination, Secession, and the Rule of the Great Powers* (n 140) 2-4.

<sup>1526</sup> *ibid.*

Unfortunate results of self-determination struggles have demonstrated the difficulty of applying this theory to real-life situations. While the people in Kosovo, Southern Sudan, and Crimea have been successful in exercising rights to external self-determination, peoples in South Ossetia, Chechenia, Abkhazia, Western Sahara, Tibet, Biafra, and Iraqi Kurdistan have been denied for decades to exercise such rights, and their claims to self-determination have never been formally accepted.

An examination of the recent State practice as a source of the right of self-determination has shown that new States emerged as a result of consensual and non-consensual dissolution; as a result of consensual secession from their mother States, and in certain cases perhaps as a result of successful unilateral secession. Most of these new States have been recognised instantly, but some were not and were nevertheless considered a State. The new States Vidmar argued, 'have emerged upon the exercise of the right of self-determination and some of them possibly even under the doctrine of remedial secession'.<sup>1527</sup> Likewise, most States existed with the overwhelming support of the will of the people, expressed at independent referenda. Besides, many States have been created after the post-Cold War as a result of international involvement, which included the creation of democratic institutions.<sup>1528</sup>

This chapter argues that self-determination seeking groups need to meet certain criteria in order to have their requests legitimated by the international community. In other words, for an entity to become a State, it has firstly to fulfil the requirements of statehood and secondly, to have been created lawfully and view its struggle as legitimate to the international community.

Today, the Kurdistan region of Iraq can be seen as one of the Middle East's great recent success stories. The area occupies much of what is now Northern and North-Eastern Iraq. The Kurds have a distinguished and eventful history; their capital, Erbil, claims to be the oldest continuously inhabited city. Occupying strategically important lands and formidable mineral reserves, the region has from ancient times been a magnet for invaders. Since the fall of Saddam Hussain in 2003, the Kurds of Iraq have experienced the best-protected autonomous governance; they have made significant achievements in securing their rights, perhaps

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<sup>1527</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 2-3.

<sup>1528</sup> For more details see, J D'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 *European Journal of International Law* 549 <<http://ejil.oxfordjournals.org/cgi/doi/10.1093/ejil/chr024>> accessed May 31, 2014.

signalling a milestone towards a new culture of human rights in the Middle East. However, an independent Kurdish State has long been the dream of Kurds. Nevertheless, despite atrocities Iraqi Kurds have never given up their struggle for achieving their rights.

This chapter examines the Kurdish drive for self-determination based on the theory of 'Remedial Earned Sovereignty' as a settlement short of secession and alternative to changing established international boundaries. What is thus so unique and special about Iraqi Kurds that can explain its success at achieving full independence so quickly and so relatively easily? Is the IKR justified in unilaterally seceding from Iraq, because its people have a right to self-determination? Does the IKR fulfil the relevant criteria of statehood? What does recognition by other States imply? Are there other legal theories that can justify and legitimate the IKR's separation from Iraq? Are there other viable options for the IKR, short of full independence, that could have presented a better solution legally and politically? This chapter answers these questions and explores a new normative theory of secession 'RES', as a way of assessing post-colonial breakaway movements in their different manifestations.

## 6.2. The application of relevant international law theories to the situation of IKR

Over the past few years, the facts underlying the issues surrounding the Kurdish struggle for self-determination in Iraq, as well as, the applicable norms of international law have determined that a solution to the conflict could be possible based on the respect of such norms becomes rather simple. To do this, a number of relevant international law theories will be reconceptualised to the situation of IKR including theories of secession, statehood, recognition, and remedial sovereignty. In other words, does IKR have an international legal right to secede from Iraq; if so, does it satisfy the relevant criteria's of statehood; finally, does recognition by IKR as a new State (or its absence) impact the place of IKR on the global scene?

### 6.2.1. Iraqi Kurds and the elements of Self-determination

It was noted in Chapter 2 that the right of self-determination is included in many international documents; it has never been explicitly defined. The lack of a clear and universally accepted definition is one of the primary reasons the international community is unable to respond coherently to the increasing number of claims to self-determination and demands for secession. Despite the fact that most of the material analysed earlier refers to all peoples having the right of self-determination, in reality a factual consensus on self-determination seems to have developed in the colonial context only.<sup>1529</sup> In other non-colonial cases, it is not as yet as well established, but generally the case for it is strong whenever an ethnic group is, in the words of the Supreme Court of Canada in Quebec case, subject to 'extreme and unremitting persecution'.<sup>1530</sup>

Iraqi Kurds can be considered as one of the peoples that lie outside of the obvious colonial context. They are in a unique position considering that the in 1920 the Treaty of Sevres initially promised them the right to determine their political future, but that they were only to be denied that right by the Treaty of Lausanne of 1923 without any regard for their wishes.

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<sup>1529</sup> For instance, Crawford, Harris, and Dixon, agree that in the colonial context the right of self-determination is an established right.

<sup>1530</sup> *Reference Re Secession of Quebec* (n 21) para 126.



Since then the land of Kurdistan has been divided between the State of Iraq, Turkey, Iran, and Syria, by the demarcations of the borders set out in the Treaty of Lausanne of 1923.<sup>1531</sup>

For a group to be entitled to a right to collectively determine its political destiny, it must possess a focus of identity sufficient for it to attain distinctiveness as a 'people'.<sup>1532</sup> The criteria for establishing what group of people are sufficiently 'distinct' can be split into objective elements and subjective elements.<sup>1533</sup> Objective elements include 'common racial background, ethnicity, language, religion, history and cultural heritage and the territorial integrity of the area which the group is claiming'.<sup>1534</sup> On the other hand, to satisfy the subjective element, the group has to perceive itself collectively as a distinct 'people'<sup>1535</sup> and 'the degree to which the group can form a viable political entity'.<sup>1536</sup>

The Iraqi Kurds satisfy both sets of criteria. First, they share a belief of unity and separateness from the rest of the peoples in Iraq. They expressed such feelings of ethnic difference throughout various political and military protesters since the establishment of the Iraqi State in 1920.<sup>1537</sup> In January 2004, Kurdish non-governmental organisations 'NGO's' collected 1,700,000 signatures on petitions demanding a vote on whether Kurdistan should remain part of Iraq. In just one month, the people of Kurdistan almost unanimously preferred independence to being part of Iraq.<sup>1538</sup> In addition, after the fall of Saddam's regime, the Kurds submitted a proposed constitution to the Iraqi Governing Council that would make Kirkuk the Kurdish capital and give the Kurds the constitutional right to secede from Iraq at any time.<sup>1539</sup> Although Sunni and Shiites have rejected the proposal, it demonstrated however the Kurdish desire for independence.<sup>1540</sup> The common Kurdish identity has been particularly evident since the first Gulf War. Since 1992, the Kurds have enjoyed the longest period of self-rule in a century, allowing them to freely express their regional identity in substantive

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<sup>1531</sup> McDowall, *A Modern History of The Kurds* (n 1344) 115-261. For more details see chapter 5.

<sup>1532</sup> For more details see, Christian Tomuschat, *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993) 102-124.

<sup>1533</sup> See, Chapter 2.

<sup>1534</sup> 'The Nagorno-Karabagh Crisis: A Blueprint for Resolution, A Memorandum Prepared by the Public International Law & Policy Group and the New England Center for International Law & Policy <[http://www.nesl.edu/userfiles/file/center for international law and policy/nagorno.pdf](http://www.nesl.edu/userfiles/file/center%20for%20international%20law%20and%20policy/nagorno.pdf)> accessed 14 July 2014.

<sup>1535</sup> V P Nanda, 'Self-Determination Under International Law: Validity of Claims to Secede' (1981) 13 Case W. RES. J. INT'L L. 257.

<sup>1536</sup> See, Crawford, 'State Practice, and International Law in Relation to Unilateral Secession' (n 586) 115.

<sup>1537</sup> See Chapter 5.

<sup>1538</sup> See, P W Galbraith, 'Kurdistan in Federal Iraq', in Brendan O'Leary, John McGarry and Khaled Salih (ed) *The Future of Kurdistan in Iraq* (UPP 2005) 243.

<sup>1539</sup> B Park, 'Iraq's Kurds and Turkey: Challenges for US Policy' (2004) 34 Parameters 18.

<sup>1540</sup> *ibid.*

and symbolic form.<sup>1541</sup> The Kurdish language has been developed and deployed in the public sphere. Most importantly, there has been widespread development and display of national symbols such as a Kurdish flag, hymns and the erection of statues and portraits of Kurdish national leaders, and a new Kurdish calendar.<sup>1542</sup> These symbols are significant because they are tangible indications of a Kurdish sense of common identity. Given the Kurds to see themselves collectively as Kurds and have been fighting for self-rule and independence. Thus, the Kurds in Iraq can be considered as a 'people' because they satisfy the subjective element of self-determination.

Second, Iraqi Kurds share a common language, culture, religion, and mode of life and thus qualifies objectively as a 'people' for the purpose of self-determination. The Kurds share a common language of Kurdish, but with four distinctive dialects.<sup>1543</sup> All dialects are however commonly referred to as simply 'Kurdish'. Kurdish has become a common language throughout the area. Schools and universities teach Kurdish and both broadcast and print media.<sup>1544</sup> According to Stansfield in their unambiguous efforts to break 'linguistically' from the rest of Iraq, 'English is now being promoted as the second language in Kurdish schools and colleges'.<sup>1545</sup> The younger generation does not speak Arabic, few under twenty-five even understand Arabic,<sup>1546</sup> the older generation cautiously observes the new Iraq, and looks optimistically toward possible independence.

The Kurds are not homogeneous religiously. The vast majority of Kurds share a common religion, approximately, 75 per cent follow Sunni Islam. However, McDowall argued that, the religious particularism of the remaining Kurds may point to longstanding difference of origin.<sup>1547</sup> Nevertheless, in the region of Kurdistan, all religious groups and sects have been allowed to freely follow their religious practices and methods.<sup>1548</sup> Furthermore, Freen argued

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<sup>1541</sup> O Bengio, 'Autonomy in Kurdistan in Historical Perspective', in Brendan O'Leary, John McGarry and Khaled Salih (ed) *The Future of Kurdistan in Iraq* (UPP 2005) 176.

<sup>1542</sup> *ibid.*

<sup>1543</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1544</sup> Bengio, 'Autonomy in Kurdistan in Historical Perspective' (n 1541) 176.

<sup>1545</sup> G Stansfield, 'Divide and Heal' (*Prospect Magazine*, 2006)

<<http://www.ekurd.net/mismas/articles/misc2006/4/independentstate685.htm>> accessed July 16, 2014.

<sup>1546</sup> (...), 'Iraqi Kurdistan: Does Independence Beckon?' (*Economist.com*, 2007)

<<http://www.economist.com/node/9769132>> accessed July 16, 2007.

<sup>1547</sup> Other religious communities exist in Kurdistan such as, Jews, Christian, Armenians, and Yazidis. For more details see, McDowall, *A Modern History of The Kurds* (n 1344) 10-13.

<sup>1548</sup> Hadji, 'The Case of Kurdish Statehood in Iraq' (n 949).

that, the primary form of social organisation in rural Kurdistan continues to be the tribe.<sup>1549</sup> Likewise, Kurdistan, while possessing a Kurdish majority, also encompasses Turkoman, Arab, Armenian, and Assyrian populations.<sup>1550</sup>

In addition, the Kurds are a distinctive ethnicity with a common history. Dawoody argued that, 'the earliest evidence of a distinct ethnicity dates back to 2000 BC when the first vanguard of 'Indo-European-Speaking' people arrived and settled in the area known as Kurdistan'.<sup>1551</sup> The settlers established the first State called the 'Medean Empire', 'which disintegrated later into smaller kingdoms and city-states that gradually fell under the domination of the Roman Empires'.<sup>1552</sup> No significant Kurdish State emerged until 1750, when a large Kurdish kingdom of the 'Zand' was born and continued for 117 Years.<sup>1553</sup> In 1867, however, it collapsed at the hand of the Ottoman Turks.<sup>1554</sup> Thereafter, no other Kurdish entity was established until 1945, when the former Soviet Union aided in the creation of the Kurdish Republic of Mahabad in western Iran.<sup>1555</sup> However, within a year this republic collapsed once the Soviets withdrew their support.<sup>1556</sup> Thus, over the centuries, despite turmoil and upheaval in the region, the Kurds have struggled with other ethnic groups to preserve their identity; they are bonded more by their heritage and common history than by any territorial line. Today, Iraqi Kurds can be considered as a national group, and as a distinct 'people' from the State, who are struggling to create their own independent State.

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<sup>1549</sup> M Freen, 'Iraqi Kurdistan' (*ATLIS*, 2005) <<http://atlismta.org/online-journals/0607-journal-development-challenges/iraqi-kurdistan/>> accessed July 17, 2014.

<sup>1550</sup> *ibid.*

<sup>1551</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).

<sup>1552</sup> *ibid.*

<sup>1553</sup> *ibid.*

<sup>1554</sup> *ibid.*

<sup>1555</sup> *ibid.*

<sup>1556</sup> On 27 November, the Iranian army attacked the Republic. Mahabad surrendered on December 16 on 31 March 1947, Qazi Mohamad the President of the Republic was hanged in a public place. The same place where he had proclaimed fourteen months before the birth of the Republic of Mahabad. For more details see, A KILIC, 'The State of the Republic of Kurdistan' (2009) *Pen-Kurd.org* <<http://www.pen-kurd.org/englizi/ali-kilic/The-State-of-the-Republic-of-Kurdistan.pdf>> accessed 17 July 2014.

### 6.3. Statehood criteria and the region of Kurdistan

Statehood is a legal theory that seeks to justify the attribution of statehood on objective criteria, which are at least in theory independent from the political reality underlying many attempts at secession or separation.<sup>1557</sup> Accordingly, if IKR decide to break away from Iraq, it has to prove that it satisfies the legal criteria of statehood: that it is has a defined territory, a permanent population, a government, and the capacity to enter into international relations.<sup>1558</sup> Harris argued that these provisions have acquired the status of statehood criteria under customary international law.<sup>1559</sup> However, it is suggested that these requirements have recently been supplemented by others requiring that a State is not created as a result of the illegal use of force<sup>1560</sup>, in violation of the right of self-determination<sup>1561</sup> or in pursuance of racist policies<sup>1562</sup> and of a political or moral character.<sup>1563</sup>

First, it has been argued that there is no limit to the size of a State's population and territory.<sup>1564</sup> Today, it can be argued that, the region of Kurdistan satisfies the permanent population and defined territory elements, because, Iraqi Kurds are clearly a permanent population of about 6 million living in the Kurdistan Region.<sup>1565</sup> This is enough people to qualify as a State, since countries such as, Nauru with less than 9,000 inhabitants and is only eight square miles in area is recognised by the United Nations.<sup>1566</sup> On the other hand, the

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<sup>1557</sup> Article 3 of the of the Montevideo Convention states that [t]he political existence of the state is independent of recognition by the other states]. See, The Montevideo Convention on Rights and Duties of States (n 342).

<sup>1558</sup> The Montevideo Convention on Rights and Duties of States, in its Article 1, provides: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory, (c) government; and (d) capacity to enter into relations with other states.' See, *ibid.* For more details, see Chapter 2.

<sup>1559</sup> D Harris, *Cases and Materials on International Law* (7<sup>th</sup> edn, Sweet & Maxwell 2010) 92.

<sup>1560</sup> Crawford suggested that independence obtained by the use of force contrary to art 2(4) of the UN Charter may in some cases not give rise to statehood. See Crawford, *The Creation of States in International Law* (n 3) 118.

<sup>1561</sup> It is argued that, secession of Southern Rhodesia has violated the self-determination principle, because the secessionist government did not represent the majority population and did not express their will for external self-determination (colonial self-determination). For more details see, Chapter 2.

<sup>1562</sup> See, McCorquodale, 'The Creation and Recognition of States' (n 662) 192.

<sup>1563</sup> Crawford, *The Creation of States in International Law* (n 3) 106 and 226.

<sup>1564</sup> Harris, *Cases and Materials on International Law* (n 1559) 92. Raič argued that, the criteria of a permanent population and a defined territory do not prescribe any minimum population figure or a minimum requirement of the surface area. See, Raič, *Statehood and the Law of Self-Determination* (n 254) 60. For more details, see Chapter 2.

<sup>1565</sup> (...), 'The People of the Kurdistan Region' (*Kurdistan Regional Government KRG*, 2014) <<http://www.krg.org/p/p.aspx?l=12&p=214>> accessed July 17, 2014.

<sup>1566</sup> Harris, *Cases and Materials on International Law* (n 1559) 92.

territory of Kurdistan has formally been recognised by the Iraqi constitution.<sup>1567</sup> The Kurdistan region has 40,643 square kilometres in area.<sup>1568</sup> Although, the boundaries of the region have not been settled, more than half of southern Iraqi Kurdistan is so-called disputed areas. Much of these areas were under the Iraqi army control until the Islamic State of Iraq and Syria (ISIS) attacked Mosul and Kirkuk, and the Iraqi army shockingly retreated without defending the land or their people. As a result, the Kurds have advanced to take over disputed areas, including the oil rich city Kirkuk. Based on the recent turmoil in the area, Kurdish President Masoud Barzani announced that Article 140<sup>1569</sup> of the Iraqi constitution, on the disputed areas, has been implemented in Kirkuk province.<sup>1570</sup> At the same time, many argued that article 140 has not been implemented yet for the safety of Kirkuk<sup>1571</sup>, it has been claimed that from 1,050 km about only 15 km of the Iraqi-Kurdish border is currently under the control of the Iraqi army.<sup>1572</sup> A militant group known as ISIS, has defeated Iraqi armies and gained control of the completely remaining border area. In fact, unsettled boundaries do not disqualify the Kurdistan region from being considered a State as Vidmar argued, international law does not require that all borders of a State to be undisputed, but rather demands ‘sufficient consistency’ of the territory.<sup>1573</sup> Thus, in practice, Dunoff argued, many entities that we routinely consider States have a disputed and often undefined territory.<sup>1574</sup> For example, Israel boundary disputes with Arab neighbours; the two Koreas have battled over their border for decades; and Sudan’s territories are disputed with the South by potent rebel movements.

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<sup>1567</sup> See, Article 4 'Iraqi Constitution 2005' (n 1417).

<sup>1568</sup> (...), 'Kurdistan’s Geography and Climate' (*Kurdistan Regional Government KRG*, 2014) <<http://www.krg.org/p/p.aspx?l=12&s=020000&r=303&p=213>> accessed July 17, 2014.

<sup>1569</sup> Article 140 of the Iraqi Constitution concerns the holding of a referendum in Kurdish disputed regions, including Kirkuk. See chapter 5.

<sup>1570</sup> (...), 'Kurdistan’s Barzani: Article 140 of Iraqi Constitution Completed for Us and Will Not Talk about It Anymore' (*E Kurd.net*, 2014) <<http://www.ekurd.net/mismas/articles/misc2014/6/kirkuk829.htm>> accessed July 17, 2014.

<sup>1571</sup> (...), 'A Murad: Article 140 Has Not Been Implemented' (*Kirkuknow*, 2014) <<http://kirkuknow.com/english/index.php/2014/06/adil-murad-article-140-has-not-been-implemented/>> accessed July 17, 2014.

<sup>1572</sup> Kurdistan originally shared 1,050 km of their border with the Iraqi government. Since early July when ISIS militants began their attack against the Iraqi army, much of the border control has been lost. Now the Peshmerga only have control of about 15 km of their border with Iraq. See, B Kakayi, 'Peshmerga: Most of Iraqi Border with Kurdistan under ISIS Control' (*BasNews*, 2014) <<http://basnews.com/en/News/Details/Peshmerga--Most-of-Iraqi-border-with-Kurdistan-under-ISIS-control-/25406>> accessed July 17, 2014.

<sup>1573</sup> Vidmar explained that, ‘a group of and nor can a people without a territory cannot establish a State’ territory alone become a state without a group of people intending to inhabit it permanently. See, Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 40. See also, Harris, *Cases and Materials on International Law* (n 1559) 93. For more details, see Chapter 2.

<sup>1574</sup> Dunoff, Ratner, and Wippman, *International Law Norms Actors Process* (n 533) 115-116.

The criteria of government Crawford argued, has been described as ‘the most important single criterion of statehood, since all the others depend upon it’.<sup>1575</sup> Vidmar argued that, ‘a government of a State needs not only to exist as an authority but also to exercise effective control in the territory of a State’, as well as to operate independently from the authority of governments of other States.<sup>1576</sup> It is also argued that traditionally the type of government is not required; there must be some authority exercising governmental functions.<sup>1577</sup> The Kurdistan Regional Government (KRG) was formed in 1992, ‘by the first democratically elected parliament in Kurdistan (and in Iraq) following the no-fly zone designed to protect the Kurdistan Region from the violence of Iraq’s former Ba’ath regime’.<sup>1578</sup> The Iraqi constitution recognises the Kurdish region and gives the KRG a considerable control of it.<sup>1579</sup> Article 117 gives the KRG the power to amend the application of national laws; to maintain internal security forces; and to establish embassies abroad.<sup>1580</sup> In addition, the KRG has the right to cancel federal laws, determine the tax rates of people living in the Kurdish region, and control the oil and water in the region.<sup>1581</sup> Ironically, the KRG is responsible for security in the Kurdish region and its population from the violence and threats. Since 1992, The KRG is working independently from the government in Baghdad.<sup>1582</sup> The KRG is a parliamentary system of government similarly structured to democratic countries such as the government in the UK. The Kurdish Parliament has been elected five times since 1992,<sup>1583</sup> the KRG developed experience and expertise throughout successive cabinets, especially after the fall of the former regime in 2003.<sup>1584</sup> Accordingly, it can be argued that the Kurdistan region satisfies the government criteria because it has an independent effective government. Nonetheless, in practice, it is seen that entities with collapsed governments have remained ‘States’ in the past. For example, Afghanistan throughout the 1990’s did not have a stable

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<sup>1575</sup> Crawford, *The Creation of States in International Law* (n 3) 56.

<sup>1576</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 40. Also, Raič, *Statehood and the Law of Self-Determination* (n 254) 75. For more details, see Chapter 2.

<sup>1577</sup> See, Chapter 2.

<sup>1578</sup> (...), ‘About the Kurdistan Regional Government’ (*Kurdistan Regional Government KRG*, 2014)

<<http://www.krg.org/p/p.aspx?l=12&s=030000&r=314&p=224>> accessed July 18, 2014.

<sup>1579</sup> ‘Iraqi Constitution 2005’ (n 1407) Articles 4, 116, 117, 118, 119, 120 and 121.

<sup>1580</sup> *ibid*, Article 114. See also, Katzman, ‘The Kurds in Post-Saddam Iraq’ (n 1343). For more details, see Chapter 5.

<sup>1581</sup> Hadji, ‘The Case of Kurdish Statehood in Iraq’ (n 949).

<sup>1582</sup> The government in Baghdad has almost not control in Kurdistan region. See, (...), ‘About the Kurdistan Regional Government’ (n 1578).

<sup>1583</sup> (...), ‘Iraqi Kurdistan: Does Independence Beckon?’ (n 1546).

<sup>1584</sup> (...), ‘About the Kurdistan Regional Government’ (n 1578).

government, and yet it remained treated as a State and retained its seat in all major international organisations.<sup>1585</sup>

Finally, Raič argued that ‘the capacity to enter into international relations with other States needs to be distinguished from the actual existence of relations, which is a matter of policy for States’.<sup>1586</sup> In other words, Vidmar argued that ‘the international law of statehood does not impose an obligation upon States to enter into relations with other states if they do not wish to do so’.<sup>1587</sup> Most importantly, it is claimed that an entity claiming statehood must show that it effectively exists on the international plane as a State. However, in practice, many entities routinely considered States do not have the capacity to enter into international relations.<sup>1588</sup> For example, Liechtenstein and Monaco depend on Switzerland and France respectively for their national defence. In addition, several Pacific island nations, likewise, depend on the United States and New Zealand for their defence and have been dubbed ‘freely associated States’.<sup>1589</sup> Other small nations depend on the United States, and/or other economically powerful nations, for trade and commercial relations.<sup>1590</sup>

The KRG established the Department of Foreign Relations (DFR) in September 2006 to conduct relations with the international community.<sup>1591</sup> Today, ‘the KRG coordinates activities outside of the Kurdistan Region through its 13 representative offices worldwide’.<sup>1592</sup> Erbil is now host to a number of diplomatic representations.<sup>1593</sup> The Iraqi constitution guarantees the right of the Kurdistan Region to continue its practice of maintaining representative offices abroad in order to promote its economic, cultural, and educational interests.<sup>1594</sup> The KRG receives members of foreign governments and conducts both foreign policy and public relations independent of Baghdad.<sup>1595</sup> The KRG aspires to maintain

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<sup>1585</sup> Dunoff, Ratner and Wippman, *International Law Norms Actors Process* (n 533) 116.

<sup>1586</sup> Raič, *Statehood and the Law of Self-Determination* (n 254) 73. Also, Harris, *Cases and Materials on International Law* (n 1559) 98. For more details, see Chapter 2.

<sup>1587</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 41.

<sup>1588</sup> See, Chapter 2.

<sup>1589</sup> Dunoff, Ratner and Wippman, *International Law Norms Actors Process* (n 533) 116.

<sup>1590</sup> *ibid.*

<sup>1591</sup> (...), ‘Foreign Relations’ (*Kurdistan Regional Government KRG*, 2014)

<<http://www.krg.org/p/page.aspx?l=12&s=030000&r=318&p=230&h=1>> accessed July 17, 2014.

<sup>1592</sup> (...), ‘KRG Offices Abroad’ (*Kurdistan Regional Government KRG*, 2014)

<<http://dfr.krg.org/p/p.aspx?p=40&l=12&s=020100&r=364>> accessed July 17, 2014.

<sup>1593</sup> (...), ‘Current International Offices in the Kurdistan Region’ (*Kurdistan Regional Government KRG*, 2014)

<<http://dfr.krg.org/p/p.aspx?p=37&l=12&s=020100&r=363>> accessed July 17, 2014.

<sup>1594</sup> ‘Iraqi Constitution 2005’ (n 84) Article 121 (4).

<sup>1595</sup> Hadji, ‘The Case of Kurdish Statehood in Iraq’ (n 949).

international relationships based on mutual understanding and respect. It promotes cultural, educational, business, investment, and trade relations with all of its friends abroad.<sup>1596</sup> Most recently, the KRG hosted the US Secretary of State<sup>1597</sup> and with the UK Foreign Secretary.<sup>1598</sup> They held talks with Kurdish leaders about international efforts to confront the Islamic State threatening to overrun parts of Iraq, and the role of Kurdish *peshmerga* troops in the battle against ISIS. After each of these official meetings, there was a press conference with the UK or US leader and KRG President and Prime Minister.<sup>1599</sup> The press conferences looked exactly like those held in other recognised sovereign countries that these foreign secretaries have visited. On the other hand, a high-level KRG delegation has recently met United States government officials in Washington, including the Vice President and Secretary of State, as well as foreign policy experts, think tanks, business leaders, non-governmental organisations, and the media to discuss the crisis sweeping Iraq and future options for Kurdistan.<sup>1600</sup> Thus, in recent years, the KRG as an effective government has conducted and supported activities that enhance the image of the Kurdistan region and liaised successfully with the diplomatic community in the Kurdistan region. For years, the KRG was operating and conducting independently with foreign countries, it was essentially conducting its own foreign policy. This is notable, given that conducting foreign policy is something reserved for sovereign States, not provinces of countries.<sup>1601</sup> Accordingly, it can be admitted that the KRG is able to enter into relations with other States, in many respect, it appears as if it already is conducting its own foreign policy.

Eventually, it is argued that, a State must have the legal competence to engage in international relations that means it must be both sovereign and independent. In this regard, Crawford argued that, ‘depends partly on the power of internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of such relations so that no other entity carries out

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<sup>1596</sup> (...), 'KRG Policies' (*Kurdistan Regional Government KRG*, 2014)

<<http://dfr.krg.org/p/p.aspx?p=29&l=12&s=010000&r=336>> accessed July 17, 2014.

<sup>1597</sup> (...), 'Iraq Crisis: Kerry Urges Unity to Expel Isis Rebels', *BBC News Middle East* (24 June 2014).

<sup>1598</sup> (...), 'Hague Holds Talks with Kurdish Leaders in Northern Iraq', *BBC News Politics* (27 June 2014).

<sup>1599</sup> (...), 'UK Foreign Secretary Meets Prime Minister Barzani in First Visit to Kurdistan' (*Kurdistan Regional Government KRG*, 2014) <<http://www.krg.org/a/d.aspx?s=040000&l=12&a=51796>> accessed July 17, 2014.

Also, (...), 'President Barzani Welcomes US Secretary of State John Kerry in Erbil' (*Kurdistan Regional Government KRG*, 2014) <<http://www.krg.org/a/d.aspx?s=040000&l=12&a=51767>> accessed July 18, 2014.

<sup>1600</sup> (...), 'High-Level Delegation Discusses with Washington Crisis Sweeping Iraq and Future Options for Kurdistan' (*Kurdistan Regional Government KRG*, 2014)

<<http://www.krg.org/a/d.aspx?s=040000&l=12&a=51819>> accessed July 17, 2014.

<sup>1601</sup> Hadji, 'The Case of Kurdish Statehood in Iraq' (n 949).



and accepts responsibility for them'.<sup>1602</sup> Accordingly, it is that independence that provides a capacity to enter into international relations with other States, as a State. According to this view, independence can be defined through factual and legal aspects.<sup>1603</sup> Factual independence means the physical capability to govern a territory independently, whereas legal independence means that there are no other legitimate claims by other States to govern that territory. So that, it is argued that, combining both factual and legal independence coincides with the path to statehood and is easy. However, it remains problematic where there is a factual independence but claims of legal dependence. That means that the independence criterion is not fulfilled by factual independence alone. Accordingly, it can be concluded that for 'non-recognised states', a *de facto* authority may engage in foreign relations and could be held legally responsible, for example, in cases involving foreign investment, entry into diplomatic relations (in some levels), making of a bilateral treaty and so on. In other words, unrecognised entities such as IKR, could demonstrate their capacity to engage in foreign relations, especially through economic engagement to consolidate itself as a State, and acquire *de facto* status existence in the international community.

Accordingly, it can be concluded that arguments regarding IKR fulfilment of statehood criteria can be made on the other side and that many States exist which are fully recognised and treated as States, but which do not satisfy all statehood criteria. However, most of these entities seem to have been able to fulfil the criteria of statehood at the time of their independence such as, Southern Sudan and Kosovo, and seem to have been thwarted by civil war and instability, which in turn have played a role on those states' attributes of sovereignty. IKR, on the other hand, seems to have satisfied the criteria of statehood, however, the question about the legal validity of its possible rise into the realm of statehood remain uncertain.

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<sup>1602</sup>Crawford, *The Creation of States in International Law* (n 372) 51-52.

<sup>1603</sup> See, Chapter 2.

## 6.4. The role of recognition

The legal statutes of unrecognised entities such as IKR have been discussed in the ‘greater debate’ between constitutive and declaratory theory. Under constitutive theory, an international personality cannot be created automatically. Crawford argued that, ‘in every legal system, some organ must be competent to determine, with certainty, the subjects of system;’ the school of constitutive theory concludes that such an act can only be accomplished by the States through recognition.<sup>1604</sup> Kelsen argued that, without recognition, the unrecognised State does not exist *vis-à-vis* the other States.<sup>1605</sup> Thus, according to this theory, recognition is a precondition for an entity to be brought into legal existence in relations with recognising States.<sup>1606</sup> On the other hand, under the declaratory theory, recognition is a political act independent of the existence of the new State.<sup>1607</sup> Crawford indicated that ‘subjects other than the State may also possess a bundle of rights and duties at international level;’ thus, he considers the meaning of statehood to derive from standing on the international level that is to say, to possess a range of powers and responsibilities at the international level.<sup>1608</sup> According to this theory, Brownlie argued that the ‘personality of an existing State is conferred by the operation of international law, rather than other existing States’.<sup>1609</sup> Thus, most modern writers have adopted this theory.<sup>1610</sup> This means that, Vidmar argued ‘State may exist without being recognised, and if it does exist, in fact, then whether or not it has been formally recognised by other States, it has a right to be treated by them as a State’.<sup>1611</sup> Accordingly, recognition whether it is considered as a legal or political act, has a direct impact on the pragmatic determination of statehood: whether an entity will be able to truly act as a State on the international scene.<sup>1612</sup>

Furthermore, Crawford argued that in international legal circles the assertion that the formation of a new State is a matter of fact, and not of law, continues to have considerable

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<sup>1604</sup> Crawford, *The Creation of States in International Law* (n 3) 20.

<sup>1605</sup> H Kelsen, ‘Recognition in International Law :Theoretical Observations’ (1941) 35 Am J Int’l L 605. For more details, see Chapter 2.

<sup>1606</sup> *ibid.*

<sup>1607</sup> Crawford, *The Creation of States in International Law* (n 3) 22.

<sup>1608</sup> *ibid.*

<sup>1609</sup> Brownlie, *Principles of Public International Law* (n 359) 87.

<sup>1610</sup> Harris, *Cases and Materials on International Law* (n 1559) 131.

<sup>1611</sup> Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (n 365) 43. For more details, see chapter 2.

<sup>1612</sup> See, Chapter 2.

weight.<sup>1613</sup> Accordingly, an act of recognition is not an instrument whose function it is to create a State, but only to demonstrate acceptance of a given claim to statehood based on a neutral assessment of whether or not a given entity meets the criteria that are incumbent on that title.<sup>1614</sup> In other words, an act of recognition is not constitutive of a State, but rather declaratory in nature and effect: it is not capable of revising, but merely of affirming the facts of statehood. However, Crawford demonstrated that a State may exist in spite of negative reactions, including radical condemnations from third States, in practice; a widespread recognition appears to be of particular worth from the standpoint of those institutions claiming to meet the criteria of statehood.<sup>1615</sup> Particularly, recognition appears to be an essential condition for the new State to be able to exercise in an effective manner, the international rights and obligations that correspond to the status of statehood, including entering into international relations with other States, and in this way becoming a full member of the international community.<sup>1616</sup> Furthermore, it is true that, the concept and relevance of recognition in international law is controversial. Recognition applies to the variety of subjects of status, rights, and privileges of legal persons in the international legal system. On the other hand, it can be argued that, recognition merely follows the lawful establishment of statehood. It is not a criterion of statehood and does not affect whether or not the relevant entity is actually entitled to it. In this regard, Crawford's reasoning clarifies the non-conclusive nature of recognition,

[If State recognition is definitive then it is difficult to conceive of an illegal recognition and impossible to conceive of one which is invalid or void. Yet the nullity of certain acts of recognition has been accepted in practice, and rightly, so; otherwise recognition would constitute an alternative form of intervention, potentially always available and apparently unchallengeable].<sup>1617</sup>

This also entails that, 'the test for statehood must be extrinsic to the act of recognition'. As Crawford suggested, individual State pronouncements on statehood are not constitutive of the legality of that statehood.<sup>1618</sup>

Accordingly, under the declaratory view of recognition, outside actors would be free to recognise or deny recognition to the IKR, but such political decisions would not affect the

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<sup>1613</sup> Crawford, *The Creation of States in International Law* (n 3) 4.

<sup>1614</sup> Almqvist, 'The Politics of Recognition, Kosovo and International Law' (n 573).

<sup>1615</sup> Crawford, *The Creation of States in International Law* (n 3) 17-27.

<sup>1616</sup> Almqvist, 'The Politics of Recognition, Kosovo and International Law' (n 573).

<sup>1617</sup> Crawford, *The Creation of States in International Law* (n 3) 21.

<sup>1618</sup> *ibid.*

IKR's legal status as a State in the future.<sup>1619</sup> Thus, the fact would be that most countries that will recognise the IKR as a State would have no bearing on the legal question of whether the IKR has achieved statehood. However, under the constitutive view, recognition of the IKR by outside actors is one of the elements of its statehood.<sup>1620</sup> Under this view, countries that have chosen to recognise the IKR would indicate that at least one of the criteria of the IKR's statehood has been fulfilled. Nonetheless, the IKR would still need to prove that it satisfies the four other criteria of statehood. Likewise, under the intermediary view<sup>1621</sup>, it is argued that outside actors would have a duty to recognise the IKR as a new State if it fulfilled the four objective criteria of statehood.

In practice, within the context of the former Yugoslavia, many outside actors quickly recognised Croatia after it declared independence, although its fulfilment of statehood criteria was dubious at best, and although its fulfilment of the Badinter Commission requirement of respect of minority rights was more than questionable.<sup>1622</sup> On the other hand, EU member States refused to recognise Macedonia after it declared independence, despite the fact that Macedonia satisfied the four criteria of statehood and that the Badinter Commission recommended that Macedonia be recognised as a new State.<sup>1623</sup> In addition, the international community may sometimes require additional criteria of recognition. With respect to Macedonia, the Badinter Commission recommended that 'Macedonia not be recognised as a new State unless it agreed to insert a clause in its constitution promising not to claim additional territory against neighbouring States'.<sup>1624</sup> Dunoff argued that, after Macedonia agreed to follow the Badinter Commission recommendations, the EU foreign ministers decided to impose an additional requirement on Macedonia by indicating that this new State

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<sup>1619</sup> See Chapter 2.

<sup>1620</sup> *ibid.*

<sup>1621</sup> The intermediary view asserts that recognition is a political act independent of statehood, but that outside states have a duty to recognise a new state if that state objectively satisfies the four criteria of statehood. See, Dunoff, Ratner, and Wippman, *International Law Norms Actors Process* (n 533) 138. See also, M Sterio, 'The Kosovar Declaration of Independence: 'Botching the Balkans' or Respecting International Law?' (2009) 37 *Georgia Journal of International & Comparative Law* 267. For more details, see Chapter 2.

<sup>1622</sup> Conference on Yugoslavia Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, (*Opinion* No 5), 11 January, & July 4, 1992, 31 I.L.M. 1488, 1505. Despite this Badinter Commission opinion, Germany chose to recognise Croatia as soon as Croatia declared independence. However, Hodge (argued that 'Germany's unilateral recognition in 1991 of the secessionist states of Slovenia and Croatia was an act of irresponsible diplomacy'). See, C C Hodge, 'Botching the Balkans: Germany's Recognition of Slovenia and Croatia' (1998) 12 *Ethics & International Affairs* 1.

<sup>1623</sup> Conference on Yugoslavia Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, (*Opinion* No 6) (n 1622).

<sup>1624</sup> *ibid.*

would be recognised only if it used a name, which did not include the term Macedonia.<sup>1625</sup> Thus, Sterio argued that, 'these examples indicate that recognition truly is a political act, and that the geo-political reality of a given region dictates whether an entity will be recognised as a new State'.<sup>1626</sup> Accordingly, it can be concluded that, the recognition of the IKR will be potentially political rather than legal: that politically, outside actors determined that it would be best to accept the IKR as a new independent sovereign partner, in this case, the actors will ignore the legality of Kurdish independence.

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<sup>1625</sup> Dunoff, Ratner and Wippman, *International Law Norms Actors Process* (n 533) 143. For more details, see Chapter 2.

<sup>1626</sup> Sterio, 'The Kosovar Declaration of Independence' (n 1621).

## 6.5. Theories to justify IKR independence

Numbers of legal and political issues plague the IKR's attempt to secede from Iraq. Namely, what theories can be offered to justify such attempt in the first place, and what kinds of problems does this troubled region face in its near future if the Kurds succeed to breakaway off from Iraq?

### 6.5.1. The application of Territorial claim theory

It has been claimed that secessionist claims to independence are only convincing if the secessionist group can prove that their territory was illegally annexed into the parent State, and they have a legitimate and historical claim over the territory.<sup>1627</sup> In fact, when the Iraqi State was established, the British rewarded the Kurdish territory to the Iraqis.<sup>1628</sup> The British did not own Kurdistan and the Kurds were not consulted on the transaction, therefore the British gave away territory to which they never had any legitimate ownership.<sup>1629</sup> Thus, the process was invalid from the beginning. The Iraqi State was itself a pure invention of the British. Brilmayer argued that, 'the State of Iraq is a mockery because it incorporates territory to which in never had any legitimate right'.<sup>1630</sup> In this regard, Atarodi explained that:

[This was a marriage forced upon the Kurdish population of Mosul [vilayet] by the British and confirmed by the League of Nations, absolutely without the consent of the Kurdish people, who have fought against it, and tried to get out of it, for the last seventy-two years].<sup>1631</sup>

Rather, from the historic grievance perspective, it can be argued that the Kurds in Iraq do possess a legitimate case to break away from Iraq. After WWI, the Kurdish territory was

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<sup>1627</sup> Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (n 46). See also, Brilmayer, 'Why the Crimean Referendum Is Illegal,' (n 817). For more details, see Chapter 3.

<sup>1628</sup> After a long brutal and suppressive occupation, the British were successful in absorbing Kurdish territories into Iraq; brushing aside the demands and suffering of the Kurds who aspired to form their own independent state. For more details, see Chapter 5. See also, Cojer, 'Denial of Rights and Self-Determination: The Case of the Kurds of Iraq' (n 215).

<sup>1629</sup> For more details, see, McDowall, *A Modern History of The Kurds* (n 1344) 151-184.

<sup>1630</sup> In her thesis, Brilmayer discusses illegitimate ownership of minority territory by the State. She argued that illegitimate ownership by the state results in a valid argument for secessionist groups. See, Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (n 46). See further Chapter 3.

<sup>1631</sup> H Atarodi, 'The Kurds: A Nation of 30 Million Denied Its Freedom' (1991) 16 JSPES 277.

forced to become part of the newly created Iraq.<sup>1632</sup> The unnatural boundaries of Iraq were drawn to include Kurdistan within a predominately-Arab State.<sup>1633</sup> Iraqi Kurds, who preserved their identity and cultural for centuries, were expected to assimilate into the newly established State regardless of ethnic, culture and linguistic difference and the legitimacy of their own territorial aspiration. In other words, for centuries, the Kurds have never willingly acquiesced their territory to any outside group. They have struggled to keep their claim for land and independence alive. Thus, since the Kurds have occupied the same territorial region for thousands of years, managing to stay on their homeland and retain their distinct identity and culture despite both efforts by other countries to take over their land, assimilate them, and general regional upheaval they possess a legitimate claim to the territory.<sup>1634</sup> Iraqi Kurds lay their claim only to Kurdistan, not to other territory. Their historical grievance is based on a legitimate claim to territory, since this territory has been considered Kurdistan from a time beyond recorded history, it has only considered as Iraqi Kurdistan since 1925. Thus, since the Treaty of Lausanne failed to include an independent Kurdish State, the Kurds subsequently struggled to obtain independent or autonomous homeland.<sup>1635</sup> Accordingly, based on historical facts, it can be concluded that the Iraqi Kurds have a legitimate claim to the territory. However, as it has been canvassed earlier that, over the past few decades, the validity of a historical claim alone cannot explain the results of secessionist struggles. In addition, this approach tends to ignore internal self-determination and focuses on the exercise of external self-determination. In many situations, secession or total independence from a parent State is not the only or even necessary means of exercising the right of self-determination, and there is a strong presumption against secession in non-colonial situations.<sup>1636</sup> According to this view, Iraqi Kurds cannot base their claim on the territorial claim theory since the Iraqi constitution considers the IKR as largely autonomous from federal Iraq.

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<sup>1632</sup> See chapter 5.

<sup>1633</sup> McDowall, *A Modern History of The Kurds* (n 1344) 115-151.

<sup>1634</sup> Hadji, 'The Case of Kurdish Statehood in Iraq' (n 949). For more details, see Chapter 5.

<sup>1635</sup> See chapter 5.

<sup>1636</sup> See chapter 3.

## 6.5.2. The application of Buchanan's remedial theory of secession

Under this theory, international law provides a right to secession for people subject to extreme persecution or unable to realise their right to self-determination internally.<sup>1637</sup> Buchanan holds that secession must be 'a remedy of last resort for persistent and grave injustices, understood as violations of basic human rights'.<sup>1638</sup> Accordingly, it has been argued that remedial secession comes into existence when certain conditions are met. First, secessionists must qualify as a 'people', for the purpose of self-determination, there must be serious human rights violations or a denial of self-determination, and finally, secession must be the only solution to remedy the injustice.

In practice, several examples have been evaluated in the light of remedial secession doctrine. These secessionist groups were seceded from existing State due to human right abuses, and the violation of internal self-determination, but not connected to decolonisation, occupational regimes, or dissolutions of the States such as the case of Southern Sudan and Kosovo.<sup>1639</sup> Significantly, it has been argued that lawfulness and legitimacy of secession can be verified in international law.<sup>1640</sup> However, the successfulness rather depends on the recognition and international community support for secession.<sup>1641</sup>

It has been illustrated that the Kurds have a distinct identity, and represent a clear majority within a given territory. Accordingly, the Kurds qualify as a 'people' for the purpose of self-determination.<sup>1642</sup> On the other hand, autonomy for Iraqi Kurds as a part of Iraq's constitutional and political equation dates back to March 1970, when Iraqi Kurds and the Iraqi government signed a manifesto that called for Kurdish self-determination, a census was supposed to be held in 1974 to determine the borders of the Kurdistan region.<sup>1643</sup> It purported to establish Kurdistan as a self-governing region that had considerable autonomy over its own social and economic affairs and recognised the Kurds as people.<sup>1644</sup> However, the autonomy agreement fell far short of Kurdish demands. It does not cede Kirkuk, and more critically, it

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<sup>1637</sup> Seymour, 'Secession as a Remedial Right' (n 211). See also, '*Reference Re Secession of Quebec*' (n 21) para 126. For more details, see Chapter 3.

<sup>1638</sup> Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 685) 83.

<sup>1639</sup> See chapter 4.

<sup>1640</sup> '*Reference Re Secession of Quebec*' (n 21) paras, 141, 142, 143.

<sup>1641</sup> *ibid.*

<sup>1642</sup> See chapter 5.

<sup>1643</sup> Bengio, 'Autonomy in Kurdistan in Historical Perspective' (n 1384) 174. For more details, see chapter 5.

<sup>1644</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 79).



imposed a vastly more central government control over the region than was envisaged by the agreement.<sup>1645</sup> As a result fighting erupted between the Kurdish liberation movements and Iraqi government. Consequently, the Iraqi army bombed Kurdish villages, and poisoned the Kurds with cyanide and mustard gas, it is estimated that during the 1980's, Iraqis destroyed some 5000 Kurdish villages and more than 100,000 Kurdish civilians disappeared and were executed.<sup>1646</sup>

The autonomy accorded by 1974 agreement lasted until 1991, when Iraqi authorities withdrew from north Iraq in accordance with SC Resolution 688.<sup>1647</sup> In 1991 upon the Iraqi occupation of Kuwait, the Kurds created a self-rule local province. In 1992, the Kurdistan region was consolidated in the first 'free and fair' democratic elections, to fill the political vacuum created by withdrawal of the Iraqi administrations and services in the region. The Kurds established their own Parliament and local authorities that ruled the region in complete independence of the central government. As a result Iraqi Kurdistan became a '*de facto*' Kurdish state from 1991-2003.<sup>1648</sup> In 2005, as a form of shared rule and self-rule, Iraqi constitution established a Federal central government and regional governments. The new Iraq's constitution McGarry argued creates a federation, 'Federations incorporate elements of self-rule in the sense that their component units enjoy a certain degree of autonomy '*vis-à-vis*' the federal government even as they share in the control of that government'.<sup>1649</sup> Today Iraqi Kurds enjoy the country's highest living standard, international isolation has ended, and notably the level of security and foreign investment has increased. The situation was far different, just years ago, while Iraqi Kurds have enjoyed *de facto* autonomy since 1991, and uncertainty overshadowed their daily life.

In fact, successive Iraqi governments have clearly violated the social cultural and economic rights of the Kurds.<sup>1650</sup> Between 1974 and 1991, there was clear denial of self-determination

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<sup>1645</sup> Yildiz, *The Kurds in Iraq, the Past, Present and Future* (n 107) 20-24.

<sup>1646</sup> Study World, 'The Kurds: A Nation without a State' (n 1387). (*Study World*, 2012) For more details, see chapter 5.

<sup>1647</sup> Under the United Nation Resolution (688) in 1991, the United States and its allies created a Safe Haven for the Iraqi Kurds, the Resolution adopted after the mass exodus of Kurds from North Iraq. Its main consequence was the creation of 'Operation Provide Comfort' (OPC) which established a 'Safe Haven' for the protection of Kurds in this area and without it, many thousands of people would have died in a very short time. See, UNSC Res 688 (n 1395). For more details, see chapter 5.

<sup>1648</sup> See chapter 5.

<sup>1649</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal Consociation as Political Prescription' (n 1450). For more details, see chapter 5.

<sup>1650</sup> See, Abdulah, *The Kurds, A Nation on the Way to Statehood* (n 1370) Also, McDowall, *A Modern History of The Kurds*(n 1344).

and Iraqi governments committed gross human rights violations against the Kurds. Brilmayer argued that, 'the strongest rationale for declaring a self-determination claim superior to territorial integrity claims is very simple: democratic self-government is more righteous than the feudal, undemocratic, and oppressive values associated with preserving territorial boundaries'.<sup>1651</sup> She added, there is no stronger case for applying this rationale than in the case of genocide.<sup>1652</sup> In this regard, Hannum considered that if the remedial secession doctrine would be accepted in the international legal system, 'international law should recognise a right to secession only in the rare circumstance when the physical existence of a territorially concentrated group is threatened by violations of fundamental rights'.<sup>1653</sup> He argued that, 'Genocide is illegal under customary international law; gross violations of human rights are also prohibited'.<sup>1654</sup> In February 1988, Saddam Hussain launched the Al-Anfal operation, which now can be categorised as a major genocide campaign in Kurdistan to end the Kurdish aspiration for independence.<sup>1655</sup> In March 1988, attacks by Iraqi forces resulted in the massacre of upward to 5000 Kurdish civilians of the Kurdish town of Halabja, by gassing them with chemical weapons, which is considered under Article (II) and (III) of the 1948 Convention on the prevention and punishment a genocide and as one of the most severe crimes against humanity.<sup>1656</sup> Thus, justifying secession by the Kurds in response to anything less than the most serious human rights violations assumes a principle to which there has never been agreement.

Logically, this position cannot be applied to the current situation in the IKR, as there are no gross human rights violations and the Iraqi government cannot be considered as oppressive. In addition, remedial secession requires that there have to be real options to redress the denial of self-determination, and the remedy must effectively end the violations, abuses of human rights, and guarantee the genuine exercise of self-determination of peoples. In other words, if the other remedies are not available or effective, the right to secession can be exercised as a last resort remedy. Nonetheless, if secessionists secede from the existing State while having alternative remedies, such as autonomy, or any sort of power sharing, such secession does not have legitimacy under remedial secession theory.<sup>1657</sup> The Iraqi constitution has given a

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<sup>1651</sup> Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (n 46 ).

<sup>1652</sup> *ibid.*

<sup>1653</sup> Hannum, 'Rethinking Self-Determination' (n 151).

<sup>1654</sup> *ibid.*

<sup>1655</sup> For more details, see chapter 5.

<sup>1656</sup> *ibid.*

<sup>1657</sup> For more details, see chapter 3.

considerable power to the IKR.<sup>1658</sup> The constitution however, concerns the Kurdistan regional government's relationships with the Iraqi central government, based on freedom and independence. The Kurdish relationships with the central government have been built in congruence with the condition of not breaching the constitutional rights of the Kurds by the central government. Meanwhile, any violation of Kurdish rights gives them the right to practice the external dimension of the right in self-determination. Thus, Cassese argued that, 'any licence to secede must be interpreted very strictly'.<sup>1659</sup> In other words, the right to secession must be conferred to peoples only in exceptional situations.<sup>1660</sup> Accordingly, as the Kurds have been given a chance to exercise internal self-determination, be it autonomy or other forms of self-determination within the existing State, the element of last resort cannot be applied under remedial secession theory. However, if the Kurdish rights have been violated by, the central government and the other remedies were not available or effective; the right to secession can be exercised as a last resort remedy.

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<sup>1658</sup> Iraqi Constitution (n 84), Articles 116, 117, 118, 119, 120, 121.

<sup>1659</sup> Cassese, *Self-Determination of People, A Legal Reappraisal* (n 25). 112.

<sup>1660</sup> Murswiek, 'The Issue of a Right to Secession-Reconsidered' (n 161) 27.

## 6.6. The application of remedial earned sovereignty approach to the situation of IKR and whether the IKR can peacefully secede from Iraq through the approach of RES

It has been illustrated that an entity that fulfils the criteria of statehood does not automatically become a State (Taiwan and IKR, for instance), and an entity that does not fulfil the criteria is not prevented from becoming a State (Kosovo and Bosnia/Herzegovina, for example).<sup>1661</sup> Therefore, for forming a new independent sovereign State, the Kurds must first secede from Iraq. A unilateral secession or any poorly planned secession could jeopardize their chances of international recognition, which depends considerably on the legality and legitimacy of secession. In order to maximize their chances of achieving international recognition, the Kurds must pay close attention to the concern of the legality and legitimacy leading to secession from Iraq. In this regard, the Supreme Court of Canada states that ‘One of the legal norms which may be recognised by states in granting or withholding recognition of emergent states is the [legitimacy] by which the *de facto* secession is, or was, being pursued’.<sup>1662</sup>

Under international law, Iraqi Kurds may be entitled to the right of self-determination, including the right to form an independent State. Specifically, after the collapse of the Iraqi army in the north by the Islamic extremist the radical Islamic State (IS), the Kurds have advanced to take over disputed areas, including the oil rich city of Kirkuk, the region’s large oil reserves it considers as immense strategic and economic importance to the IKR. At the same time, the Kurdish Regional Government KRG has been required to come under the obligation to secure and protect their population from violence. This could justify the Kurdish legitimate breakaway from Iraq and create an independent Kurdish State in north Iraq. On the other hand, it has been argued that, any immediate unplanned secession could not be the best way to ensure stability in the region and achieve enough support in the international community to merit recognition. The most useful viable mechanism, based on the long-term success and minimization of short-term violence, is the approach of ‘Remedial Earned Sovereignty’. Today, the need of this approach is required, in part, to the irrelevance and inadequacy of existing international principles and legal norms, including the right of self-

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<sup>1661</sup> For more details, see chapter 2.

<sup>1662</sup> ‘*Reference Re Secession of Quebec*’ (n 21) para 143.

determination of peoples.<sup>1663</sup> As a way to facilitate status determination, 'RES' can promote and ensure human rights, minority rights, and the creation of valid democratic structures.

The approach has been described as entailing 'the conditional and progressive devolution of sovereign powers and authority from a State to a sub-state entity'.<sup>1664</sup> In other words, as a conflict resolution process it creates an opportunity for the parties to agree on basic requirements that sub-state entity must meet during an intermediate phase in order to attain or discuss final status.<sup>1665</sup> In the light of recent State practice, the emerging conflict resolution approach of 'RES' may be characterised as encompassing six elements, three core elements and three optional elements.<sup>1666</sup> It demonstrates that a new player on the international scene needs to show to the outside world that it is worthy of achieving statehood and that it has earned its sovereignty. Accordingly, those peoples that have struggled for independence through legitimate means, and that have proved to the international community that they would be a reliable new sovereign partner, will eventually become sovereign legitimate States.<sup>1667</sup> In other words, the breakaway entity does not merit recognition as a new State immediately after its separation or quest to separate from its mother State, but that such an entity needs to earn its sovereignty.<sup>1668</sup> The relative peace and prosperity in Kosovo, East Timor, and Southern Sudan explains that 'RES' can be used effectively to end sovereignty-based conflict in countries that have been plagued by violence and war. Accordingly, applying an 'RES' approach in the case of IKR could potentially insure lasting peace and prosperity for the Kurds. In other words, the realisation of IKR's right to self-determination may be achieved through 'RES' approach.

It has been noted earlier that, 'RES' consists of two phases, intermediate sovereignty (or conditional sovereignty), and earned recognition.<sup>1669</sup>

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<sup>1663</sup> See chapter 3.

<sup>1664</sup> Williams and Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination' (n 74). For more details, see chapter 3.

<sup>1665</sup> Williams and Heymann, 'Earned Sovereignty: An Emerging Conflict Resolution Approach' (n 893).

<sup>1666</sup> Scharf argued that, ES is defined as comprising three core elements, shared sovereignty, institution building, and a determination of final status. It may also encompass three optional elements: phased sovereignty, conditional sovereignty, and constrained sovereignty. Scharf, 'Earned Sovereignty: Juridical Underpinnings' (n 75). For more details, see chapter 3.

<sup>1667</sup> Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (n 916). For more details, see chapter 3.

<sup>1668</sup> Scharf, Hooper, and Williams, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach Of Earned Sovereignty' (n 935). For more details, see chapter 3.

<sup>1669</sup> See chapter 3.

The first core element is shared sovereignty. In this case, of earned sovereignty the State and sub-state entity may both exercise sovereign authority and function over a defined territory.<sup>1670</sup> International institutions may occasionally exercise sovereign authority and functions rather to or in lieu of the parent State. Similarly, the international community may exercise shared sovereignty with international recognised State in rare situations.<sup>1671</sup> Hence, an international institution will be responsible for monitoring the parties' exercise of their authority and functions.

It can be argued that, the relationship between the IKR and Iraq can be described now as shared sovereignty. The element prescribed by a period where the sub-state entity is given substantial elements of self-government. Since 1992, the IKR has been autonomous and the Kurds have been forced to govern themselves. The Kurds could establish their own parliament and local authorities that ruled the IKR in complete independence of the Iraqi government, it can be farther considered as relative success that can be improved substantially, as a compare to other areas of Iraq and Middle East areas.<sup>1672</sup> Today, the Iraqi federal constitution creates a federation, 'Federations incorporate elements of self-rule; in the sense that their component units enjoy a certain degree of autonomy *vis-à-vis* the federal government even as they share in the control of that government'.<sup>1673</sup>

The second core element is conditional sovereignty or conditional independence. This element is applied during the period of shared sovereignty prior to the determination of final status. In other words, this approach renders the exercise of self-determination conditional on the self-determination unit meeting certain designed benchmarks<sup>1674</sup> such as, democratic institutions, the rule of law, freedom of movements, protecting human and minority rights,

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<sup>1670</sup> Hooper and Williams, 'Earned Sovereignty: The Political Dimension' (n 914).

<sup>1671</sup> As a non-colonial territory, for an initial period, Kosovo has been represented and supervised by the international community. The 2007 Comprehensive Proposal for Kosovo Status recommended that 'Kosovo's status should be independence; it sets forth a basic framework for governing a post-independence Kosovo, the implementation of which is to be monitored by 'international civilian and military presences.' See, Drew, 'The Meaning of Self-Determination: The Stealing of the Sahara Redux?' (n 960) 97. For more details, see chapter 4.

<sup>1672</sup> For more details, see chapter 5.

<sup>1673</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 1450).

<sup>1674</sup> The Roadmap for example requires comprehensive institution building prior to any further discussions of Palestinian provisional statehood. In addition, Michael Steiner, the Special Representative of the Secretary-General to Kosovo, had proposed a formula called 'standards before status', whereby Kosovo would have to fulfil a number of standards as a prerequisite to international recognition. According to this proposal, Kosovo would be governed in a system of political trusteeship in the meantime, in order to advance the local population politically, economically, socially and educationally. see, Drew, 'The Meaning of Self-Determination: The Stealing of the Sahara Redux?' (n 960) 98. Also, Sterio, 'The Kosovar Declaration of Independence: 'Botching the Balkans' or Respecting International Law?' (n 1621).

halting terrorism, constitutional reform, and promoting regional stability.<sup>1675</sup> In this way, the sub-state entity undertakes to build institutions for self-government and to construct institutions capable of exercising increasing sovereign authority and functions.

In fact, compared to Kosovo and Southern Sudan, the IKR is more advanced at the inception of its pursuits of statehood in terms of the institutions that are necessary to have a fully-functions democratic government.<sup>1676</sup> The IKR already administers local government services.<sup>1677</sup> The Kurds are governing themselves through their own democratic Parliament. The Parliament is the Region's democratically elected legislature.<sup>1678</sup> The Kurdistan parliament has considerable power to debate and legislate on policy in a wide range of areas.<sup>1679</sup> It rather shares legislative power with the federal authorities. Under Article 121 of the Iraqi constitution, the Kurdistan Parliament has the right to amend the application of Iraq-wide legislation that falls outside of the federal authorities' exclusive powers.<sup>1680</sup> In addition, IKR's institutions exercise legislative and executive authority in many areas, including allocating the regional budget, police and security, education and health policies, natural resource management and infrastructural development.<sup>1681</sup>

The KRG makes no distinction between the various religious and ethnic groups in the Region.<sup>1682</sup> The KRG protects people's freedom to practice their religion and promotes inter-faith tolerance.<sup>1683</sup> Today, enough freedom has been given to all religions in IKR. This culture of tolerance is promoted by the KRG and the Region's other institutions, which

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<sup>1675</sup> Hooper and Williams, 'Earned Sovereignty: The Political Dimention' (n 914). For more details, see chapter 3.

<sup>1676</sup> Hadji, 'The Case of Kurdish Statehood in Iraq' (n 949). For more details, see chapter 4.

<sup>1677</sup> (...), 'Iraqi Kurdistan: Does Independence Beckon?' (n 1546).

<sup>1678</sup> (...), 'The Kurdistan Parliament' (*Department of Foreign Relations KRG*, 2014) <<http://www.krg.org/p/page.aspx?l=12&s=030000&r=317&p=229&h=1>> accessed July 29, 2014.

<sup>1679</sup> As provided in Iraqi constitution, The Kurdish Parliament has considerable power in areas: 'health services, education and training, policing and security, the environment, natural resources, agriculture, housing, trade, industry and investment, social services and social affairs, transport and roads, culture and tourism, sport and leisure, and ancient monuments and historic buildings'. See, *ibid.* Also, Iraqi Constitution (n 1417) Articles, 114, 115, 117, 120, 121, 126 and 141. For more details, see chapter 5.

<sup>1680</sup> *ibid.*, Article 121.

<sup>1681</sup> (...), 'Kurdistan Regional Government' (*Department of Foreign Relations KRG*, 2014) <<http://dfr.krg.org/p/p.aspx?p=88&l=12&s=030400&r=403>> accessed July 29, 2014.

<sup>1682</sup> (...), 'KRG and UN Announce Regional Human Rights Regional Action Plan' (*Kurdistan Regional Government KRG*, 2012) <<http://www.krg.org/a/d.aspx?a=42884&l=12&r=223&s=010000>> accessed July 29, 2014.

<sup>1683</sup> (...), 'Religious Freedom and Tolerance' (*Kurdistan Regional Government KRG*, 2014) <<http://www.krg.org/p/p.aspx?l=12&s=020000&r=310&p=220>> accessed August 08, 2014. For more details about tolerance and religion in IKR see, François-Xavier Lovat, *Kurdistan: Land of God* (London: GID; Arbil (Kurdistan-Iraq): Silver Star H Corp 2007). This book of photographs tries to present all these religious facets, which make Kurdistan a unique Land of God.

protect the religious, linguistic, and cultural rights of all groups.<sup>1684</sup> The KRG committed itself to the creation of a federal, democratic, pluralistic Iraq.<sup>1685</sup> KRG officials believe that ‘citizens are all responsible for respecting the rights of ethnic minorities throughout the nation.’<sup>1686</sup> In the Region, ‘the reality on the ground demonstrates respect for diversity and commitment to human rights’.<sup>1687</sup> In the meantime, President Obama talks about recent turmoil in Iraq, he stated that ‘the Kurdish region is functional that way we would like to see, it is tolerant of other sects and other religion in a way that we would like to see elsewhere’.<sup>1688</sup>

Most recently, the IKR with the Office of the High Commission of Human Rights (OHCHR) under the United Nations Assistance Mission for Iraq (UNAMI) launched the Regional action plan for human rights.<sup>1689</sup> The plan emphasises the critical role that all civil society organisations, and human rights activists throughout the Region had in working together with members of parliament, legislators, and relevant KRG ministries in drafting the action plan for promoting human and minority rights and democratic civilized society.<sup>1690</sup> Thus, The KRG has taken the initial step of recognising the importance of protecting human rights by creating a Ministry of Human Rights and Justice.<sup>1691</sup> By building the Ministry of Justice, the KRG is now working properly to make sure that the legal system is effective. Failure to convince the international community of its ability to protect human and minority rights would be a fatal blow to international recognition in accordance to the modern day criteria of statehood.

Economically, in recent years, the KRG has adopted a clearer economic vision.<sup>1692</sup> More than 90 per cent of the KRG’s revenues come from oil.<sup>1693</sup> In addition, the IKR has enormous

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<sup>1684</sup> (...), 'Welcome to the Kurdistan Region of Iraq' [2014] *skchamber.ch*  
<<http://www.skchamber.ch/sites/default/files/download/Kurdistan.pdf>> accessed 8 August 2014.

<sup>1685</sup> *ibid.*

<sup>1686</sup> *ibid.* See also, (...), 'Religious Freedom and Tolerance' (n 1683).

<sup>1687</sup> (...), 'Welcome to the Kurdistan Region of Iraq' (n 1684).

<sup>1688</sup> T L Friedman, 'Obama on the World', *The New York Times* (8 August 2014).

<sup>1689</sup> (...), 'KRG and UN Announce Regional Human Rights Regional Action Plan.'

<sup>1690</sup> *ibid.*

<sup>1691</sup> (...), 'Ministries and Departments' (*Kurdistan Regional Government KRG*, 2014)

<<http://www.krg.org/p/page.aspx?l=12&s=030000&r=315&p=228&h=1>> accessed August 01, 2014.

<sup>1692</sup> (...), 'Kurdistan Regional Government Ministry of Finance and Economy' (*Kurdistan Regional Government KRG*, 2014) <<http://mof-kr.gov/?page=categoryn&c=yasa>> accessed July 29, 2014.

<sup>1693</sup> The Iraqi constitution gave the Kurdistan Regional Government at least 17% of the federal budget for the Kurdish government; however, Baghdad government never gave more than 10%. See, (...), 'Kurdistan Regional Government: What Are the Kurds Main Sources of Income?' (*Kurdistan Regional Government KRG*, 2014) <<http://www.quora.com/Kurdistan-Regional-Government/What-are-the-Kurds-main-sources-of-income>> accessed July 29, 2014.



alternative resources such as trade, agriculture, tourism, and industry.<sup>1694</sup> Lastly, the KRG established the Department of Foreign Relations (DFR) and leaderships that have already begun to conduct relations with the international community.<sup>1695</sup> Accordingly, to manage the relationship between IKR and Baghdad during the interim period it will be necessary to establish mechanism for cooperation and interaction between them. To prepare IKR for the full exercise of its right of self-determination and the possibility of international recognition, it would rather be important to allow the IKR to enter into formal relationships with neighbouring countries and international organisations.

A final way in which the 'RES' approach can be applied to the situation of the IKR is the eventual determination of the final status of the IKR and its relationship to the State of Iraq. In many instances, the parties may agree upon final status during the initial stages of the process, such as in East Timor, whereas in others such as Kosovo it may be determined after a period of shared sovereignty and institutional building.<sup>1696</sup> In other words, Williams and Pecci argued that, 'The options for final status range from substantial autonomy to full independence. This decision is generally made through either some sort of referendum or instructed negotiations, but invariably involves the consent of the international community'.<sup>1697</sup> Significantly, the nature of final status will be determined by a referendum, it may also be determined through a negotiated settlement between the State and sub-state entity, often with international mediation.<sup>1698</sup> At the same time, the consent of the international community is important to the determination of the final status for the IKR in the form of international recognition. For successful implementation of the third stage, it is suggested that the role of international community may sometimes be essential in monitoring and implementing the interim arrangement and assisting with preparation for eventual independence.<sup>1699</sup>

At the end of the interim phase earned recognition would occur. The determination of the international mechanism would be based on IKR's compliance with the commitments and all

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<sup>1694</sup> (...), 'Kurdistan Regional Government: Ministry of Trade and Industry' (*Kurdistan Regional Government KRG*, 2014) <<http://mtikrg.org/Default.aspx?l=1>> accessed July 29, 2014.

<sup>1695</sup> (...), 'Foreign Relations' (n 1681).

<sup>1696</sup> Chapter 3.

<sup>1697</sup> Williams and Pecci, 'Earned Sovereignty : Bridging the Gap Between Sovereignty and Self-Determination' (n 74).

<sup>1698</sup> Scharf, Hooper, and Williams, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach Of Earned Sovereignty' (n 935).

<sup>1699</sup> For more details, see chapter 3.

conditional mechanisms undertaken during the interim period, taken into consideration Iraqi government's compliance with its commitments, and the results of referendum held in the IKR.

Thus, for the successful implementation of 'RES' the collaboration between the IKR and the State of Iraq is required. In other words, for legitimate independence, the Kurds must first earn their internal sovereignty, understood as the efforts of people within the IKR to comply with all conditional mechanisms to achieve the statehood capacities and to engage in good faith with final status negotiations (status determination).<sup>1700</sup> Eventually, this can be facilitated externally by independent sovereign States by the act of recognition. Externally, designed sovereignty relates to the set of norms and actions imposed during the interim period in order to create the political, social, and economic infrastructure whereby the IKR consolidates its statehood abilities with the capacity to make law, functioning democratic institution, a self-reliant market economy and contribute to regional stability.<sup>1701</sup>

Nonetheless, it has been suggested earlier that, for constructing a long-term resolution of the IKR and the Iraqi government dispute several considerations can be made. First, either domestic law or the federal constitution would need to make some provision for secession, whether through adoption of legislation specifically allowing it or some other methods. Secondly, it is necessary that there be a creation of mechanisms for joint co-operation between the IKR and the government in Baghdad. Third, the making of specific commitments on the part of the IKR and the Iraqi State is required, in the area of human rights and minority rights, and engaging in a series of defined confidence building measures. The final requirement is the preparation for status determination with possible assistance of the international community. Most importantly, the determination of the international mechanism would be based on the IKR's compliance with the commitments undertaken during the interim period, take into consideration Baghdad's compliance with its commitments, and the results of referendum held in the IKR. Accordingly, under the theory of 'RES' the Kurds must demonstrate to the outside world that it is capable of functioning as an independent State, that it would be a desirable new sovereign partner, and that it is worthy of recognition. Most importantly, they must demonstrate to the international community that they have struggled for independence through legitimate means, and that it is worthy of

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<sup>1700</sup> See chapter 3.

<sup>1701</sup> For more details, see, *ibid.*

achieving statehood and that they have earned their sovereignty.<sup>1702</sup> In addition, the primary aim of this theory is the cooperation between the IKR and the government in Baghdad. Thus, it can be demonstrated that, RES has two requirements. First, Iraqi Federal constitution and domestic law would need to make some provision for secession whether through adoption of legislation specifically allowing it or some other method. Second, the IKR would need to engage in 'principled negotiations' with the Iraqi government on the issue of independence. Such sort of discussion within the State of Iraq would need to take to successfully gain independence, including a national referendum, addressing the rights of minorities and the interests of the IKR and the Federal government. Means, the issue of independence within the State of Iraq, cannot be accomplished without the principled negotiations with other participants in the state.

Thus, for the Kurds to obtain international legitimisation, the thesis suggested several guidelines that the Kurds must fulfil in order to be able to legitimately gain some degree of self-determination.<sup>1703</sup> However, it should be observed that the principled guidance is not necessary when the parent State has consented to the secession.

1. A 'people': it has been proven that under the principles of international law, the Kurds in question are indeed a 'people' entitled to the right to self-determination.<sup>1704</sup> Rather, it is important for the group to have a homeland or being linked to a specific territory. For groups to qualify as a people they must clearly geographically situated.<sup>1705</sup>
2. An exceptional situation: It has been argued that, historically, Iraqi successive governments have violated the Kurdish rights of self-determination. Besides, most of the Iraqi governments systematically consistently and flagrantly violated human rights of the Kurdish people. In addition, the Kurds have been blocked from the meaningful exercise of its right to self-determination internally. Rather, other effective remedies were not available, and secession was a last resort to remedy the harm. Under this view, a remedial doctrine would be accepted under international legal system.

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<sup>1702</sup> According to Sterio, The theory of earned sovereignty deny statehood to those peoples that have been labelled as violent and that have arguably used illegal means to assert their independence, such as Republika Srpska, Chechnya, or Northern Cyprus. See, Sterio, *The Right to Self-Determination under International Law: Selfistans, Secession, and the Rule of the Great Powers* (n 140) 175. For more details, see chapter 3.

<sup>1703</sup> See chapter 3.

<sup>1704</sup> See chapter 5.

<sup>1705</sup> See chapter 2.

However, today, it cannot be argued that the Kurds have no alternative remedies under the current constitutional framework. Despite having some difficulties, the Kurdish right to internal self-determination, political representation, and power, sharing has been somehow respected by the central government. However, after the recent turmoil, a discussion regarding the possibility or inevitability of a power sharing arrangement is not complete without a critical assessment of Kurdish position. Because of their conflicting interests in both remaining a part of Iraq, which would provide them with oil revenue and bargaining power with their neighbours, and in seeking independence, which has been pursued for decades.<sup>1706</sup> So that, in light of the recent and rapid changes on the ground in Iraq, it is uncertain whether the power sharing is possible and whether or not Iraq will remain united or dissolve.<sup>1707</sup>

3. Activity to be a State: an entity claiming statehood must show that it effectively exists on the international plane as a State. In this regard, it is important for the entity to function as an independent State and work separately from the parent State, is the level of independence such that there is a '*de facto*' state within a State—it is on a separate path—political, cultural, economic, linguistic, social, etc... [From the parent State]. It has been demonstrated that, from 1992 to 2003, the IKR has been a '*de facto*' state in north Iraq that was acting as an independent State and separately from Baghdad.<sup>1708</sup> From 2003, the IKR has become a part of decentralised federal Iraq. Today, the Kurdish parliament has considerable power.<sup>1709</sup> The KRG exercise executive power according to the Kurdistan Region's laws, as enacted by the democratically elected Kurdistan Parliament.<sup>1710</sup> Through the KRG, the IKR is now acting effectively as a separate and an independent State from Iraq.<sup>1711</sup>
4. Responsible behaviour: The would-be the Kurds have behaved responsibility within the existing framework of the State, including in consideration of the rights and entitlements of other groups within the larger unit, and have not themselves violated any fundamental rights in the course of the dispute. For successful legitimate

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<sup>1706</sup> For more details, see, 'POWER-SHARING IN IRAQ: IMPOSSIBLE OR INEVITABLE?' Roundtable Series Report, PILPG (2014).

<sup>1707</sup> *ibid.*

<sup>1708</sup> See, chapter 5.

<sup>1709</sup> (...), 'The Kurdistan Parliament' (n 1678).

<sup>1710</sup> (...), 'Welcome to the Kurdistan Region of Iraq' (n 1684).

<sup>1711</sup> (...), 'Kurdistan Regional Government' (n 1711).

secession, it has been argued that the Kurds must show the legality of its declaration of independence.<sup>1712</sup>

5. Choice: it has been illustrated that, secession should be the choice of the majority of the population in the entity in question. In this regard, public consultation for the Kurds would be essential for successful free democratic choice, having a mandate from the people to pursue certain political steps including the final one of self-determination through secession. In other words, there must be a consensual agreement between all Kurdish political parties for independence. The best way for the Kurds to make such a choice is through a referendum or a plebiscite of all eligible voters.
6. Capacity for [self-governance] and ability to provide and protect: under this view, it is important for the KRG to demonstrate capacity for self-governance. They must be able to meet the basic requirements of, and provide essential protections to, those within its jurisdiction. Since 1992, the territory of the IKR has been protected throughout, the Peshmerga forces. The Iraqi constitution has recognised the Peshmerga as a legitimate regional military force in Iraq, to serve and protect all areas administered by the Kurdistan Regional Government.<sup>1713</sup> In most recent days, despite the Iraqi government has not helped the Kurd in their fight against the IS armed militants, the Peshmerga forces has played a key role in defending the IKR's territory and civilians, with their humble abilities they have been able to protect the region from ISIS threats. On the other hand, under customary international law, armed non-state actors have obligations to respect and protect civilians and those *hors de combat*.<sup>1714</sup> In the same way, Ronen argued that, international human rights bodies, both legal and political, have demonstrated greater willingness than States to attach obligations to territorial Non-State Actor NSAs, namely on those that exercise effective territorial control to the exclusion of a government (territorial NSAs), although their limited mandate does not permit any definitive conclusions on the matter.<sup>1715</sup>

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<sup>1712</sup> For more details, see chapter 3.

<sup>1713</sup> Article 121 (5) of the Iraqi federal constitution states that 'The regional government shall be responsible for all the administrative requirements of the region particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region'. See, Iraqi Constitution 2005 (n 84) Article 121 (5).

<sup>1714</sup> Y Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 Cornell International Law Journal 21.

<sup>1715</sup> *ibid.*

7. The Kurds must demonstrate that its central government committing abuses, and cannot properly administer the people's province or region: It is important for the Kurds to show that its central government is unrepresentative, abusive, and relatively weak, and cannot protect and secure its population and borders from violence. The recent events have proven that the Iraqi government is unrepresentative and cannot protect the country from violence, consequently, to have any kind of stability and peace the Kurds must be allowed to break away from Iraq.
8. Contemporary standards of recognition: rather to the aforementioned, the IKR should be guided by contemporary standards for recognition of States such as respect of human rights; minority rights, unconditional commitment to international law and being a 'good partner', effective government, contribution to the regional stability, economic stability, sufficiently, and viability, sharing democratic values and the rule of law, and negotiated determination of new boundaries.<sup>1716</sup>
9. For the IKR to join the family of nation-States it is important to rely more on the compliance with other fundamental principles of international law to justify legitimisation of a territorial situation produced by the act of secession. The Kurds must have proven their viability by establishing [rightful authorities], and with that have earned its sovereignty. In other words, the Kurds must demonstrate to the international community that they have achieved statehood, that they have struggled for statehood through legitimate means, and that they are ready to embrace the international community as a new sovereign partner.

Thus, if the Kurds failed to break away from Iraq in democratic fashion, through either constitutional framework or essential agreement within the State, they must demonstrate to the outside world that it's capable to functioning as an independent entity, and earn its 'internal sovereignty'<sup>1717</sup>, such sovereignty then can be facilitated externally by an independent sovereign States by the act of recognition. Despite there is no rule, under the constitution or at international law, to unilateral secession, this does not rule out the possibility of an unconstitutional Declaration of Independence leading to a *de facto*

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<sup>1716</sup> For more details, see chapter 3.

<sup>1717</sup> Internally earned sovereignty refers to the efforts of people within IKR to comply with all conditionally mechanisms to achieve the statehood capacities and to engage in good faith with final status negotiations. See chapter 3.

secession.<sup>1718</sup> Accordingly, the Kurds may exercise their right to independence, on any matter, even if there is no specific rule of international law permitting it to do so. In these instances, the Kurds have a wide measure of discretion, which is only limited by the prohibitive rules of international law. In this regard, international law may 'adapt to recognise a political and/or factual reality, regardless of the legality of the steps leading to its creation draws some support from previous State practice'.<sup>1719</sup> Here, the ultimate Kurdish success of secession will dependent on [Recognition] by the international community, which is likely to consider the legitimacy and legality of secession. In this regard, Quaye argued that, 'the legitimacy of any secessionist movement depends on whether or not that movement succeeds, and, to a certain extent, without any regard to how that success is brought about'.<sup>1720</sup>

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<sup>1718</sup> 'Reference Re Secession of Quebec' (n 21) para 143. Vidmar argued that, international law is actually neutral on the question of unilateral secession. Neither this means that unilateral secession is prohibited nor an entitlement. See, Vidmar, 'Crimea's Referendum and Secession: Why It Resembles Northern Cyprus More than Kosovo' (n 9). For more details, see chapter 2.

<sup>1719</sup> 'Reference Re Secession of Quebec' (n 21).

<sup>1720</sup> C O Quaye, *Liberation Struggles in International Law* (TUP, US 1991). For more details, see chapters 2 and 3.

## 6.7. Issues surrounding IKR independence

In fact, post-Saddam's politics and the constitution, coupled with the IKR close relations with the international community mainly with the United States, gave the Kurds political and economic strength. However, this strength caused Iraqi Arab leaders and Iraq's neighbours to perceive the Kurds as asserting excessive requests and threatening the territorial integrity of Iraq.<sup>1721</sup> Most recently, after the collapse of Iraqi army in the north by the Islamic extremist the radical Islamic State ISIS, the Kurds have advanced to take over disputed areas, including the oil rich city Kirkuk, as the Kurds feared the Islamic militants would capture the city's oil reserves. Today, Iraq plunges towards civil war, sectarian violence is out of control, security is non-existent, regional and international security is threatened, basic services are found wanting, the majority of the population are being internally displaced, this indicates that Iraq is falling to bits. On the other hand, despite the turmoil around it, the IKR remains somehow an oasis of stability and the only secure region in the area. Out for years, the U.S. supported the Kurdish aspiration for autonomy, and used them to take over northern Iraq and fighting Sunni extremist insurgences. Now, despite the ongoing chaos and violence around the IKR, the U.S. is putting great pressure on its Kurdish allies to give up any moves toward independency or greater autonomy, instead they calling for maintaining Iraq as a single State.<sup>1722</sup>

Accordingly, if uniting Iraq fails, then the international community must plan for the strong possibility of the Kurds declaring independence.<sup>1723</sup> On the other hand, the U.S. cannot deny that a Kurdish pursuit of independence is improbable.<sup>1724</sup> History has shown that States have been broken up into new States such the Former Yugoslavia and the Soviet Union. If a unified Iraq does not materialise, the precedents has been established for the Kurds to claim their independence. Today, the majority of Kurds would prefer independence and create a sovereign State. The Kurdish ambition for independent is evidenced in two unofficial referendums that were conducted by the Referendum Movement in Kurdistan (RMK).<sup>1725</sup>

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<sup>1721</sup> Katzman, 'The Kurds in Post-Saddam Iraq' (n 1343).

<sup>1722</sup> 'POWER-SHARING IN IRAQ: IMPOSSIBLE OR INEVITABLE?' (n 1706).

<sup>1723</sup> Dewhurst, 'Assessing the Kurdish Question: What Is the Future of Kurdistan?' (n 1401).

<sup>1724</sup> *ibid.*

<sup>1725</sup> For more details, see chapter 5.



Today, the question of outright Kurdish independence can be considered as an active source of friction between the Iraqi Kurds and the central government at this time, but it remains a concern of Iraq's neighbours that have Kurdish minorities. Obviously, the majority of Iraqi Kurds aspire for an independent Kurdish State. However, the major threat to the existence of an independent Kurdish State would be without doubt the Iraqi's neighbouring countries. In other words, an independent Kurdish State in north Iraq would be confronted by hostile surrounding countries.<sup>1726</sup> Turkey and Iran each has a minority population of Kurds. They have deep concerns that the greater autonomy for Iraqi Kurds or independence will be a threat to their own national integrity.<sup>1727</sup> Turkey fears that the proclamation of an independent Kurdistan could be a simple formality if chaos were to follow the collapse of Iraqi government.<sup>1728</sup> Some Turkish leaders would regard the creation of a Kurdish State as a declaration of war, and most want to intervene militarily to prevent its consolidation.<sup>1729</sup> Hence, Iraq's neighbours intensively oppose the idea; they fear an independent Kurdish State would include the Kurdish minorities within their own States, and it will somewhat threaten their own territorial integrity and nation's sovereignty. However, it can be argued that there is no fear of what Kurdish self-determination might do to regional stability. On the one hand, Waters argued that, Turkey still officially opposes independence, but its response has been complex and muted because it has close economic ties with Kurdistan and sees it as a stabilising hedge against Islamic militancy and Iraqi chaos.<sup>1730</sup> Thus, Turkey is now the strongest supporter of Kurdish self-determination in Iraq.<sup>1731</sup> Iran, on the other hand, is likely to have considerable influence in an independent Kurdistan and is equally eager to stop the Sunni militants of the Islamic State who are threatening the Shiite-dominated government in Baghdad.<sup>1732</sup>

Furthermore, another consideration is an independent Iraqi Kurdistan would have to overcome its landlocked situation and develop an economic base. Landlocked situation

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<sup>1726</sup> A Rafaat, 'An Independent Kurdish State: Achievable or Merely a Kurdish Dream?' (2007) 32 *The Journal of Social, Political and Economic Studies* 267.

<sup>1727</sup> G Stansfield, 'Kurdistan Rising: To Acknowledge or Ignore the Unraveling of Iraq' [2014] *Middle East memo* 16 <[http://www.brookings.edu/~media/research/files/papers/2014/07/kurdistan\\_iraq\\_isis\\_0731/kurdistan\\_iraq\\_isis\\_stansfield\\_0731.pdf](http://www.brookings.edu/~media/research/files/papers/2014/07/kurdistan_iraq_isis_0731/kurdistan_iraq_isis_stansfield_0731.pdf)> accessed 5 August 2014.

<sup>1728</sup> O'Leary, 'Federative Possibilities' (n 1414) 188. For more details, see chapter 5.

<sup>1729</sup> *ibid.*

<sup>1730</sup> T W Waters, 'Kurdish Option: An Independent State for the Kurds, an Ally for the U.S. in Iraq,' *Los Angeles Times*, US (7 July 2014). See also, Stansfield, 'Kurdistan Rising: To Acknowledge or Ignore the Unraveling of Iraq' (n 1727).

<sup>1731</sup> *ibid.*

<sup>1732</sup> *ibid.*

means that the IKR will always be vulnerable to embargos and blockades.<sup>1733</sup> In this regard, Özcan argued that, ‘If an independent Kurdistan failed to integrate with the world economy, and if it is geographically trapped, it could survive only if an outside power such as the United States offered support and protection, or if a special relationship were established with a neighbouring country’.<sup>1734</sup> This geopolitical consideration is however mostly based on the mistaken belief as an independent Kurdistan has become now increasingly seen as essential to Turkey’s own security.<sup>1735</sup> Most recently, Khalil argued that, ‘the Kurdish-Turkish relationship has been partially transformed by business and trade, with a large segment of the KRG economy bolstered by Turkish investment and potential energy export’.<sup>1736</sup> However, after the fall of Mosul, the IKR faces immediate problems. On the one hand, for several months the Baghdad government suspended the KRG budget<sup>1737</sup> due to the Kurdish moving ahead with signing bilateral oil and gas export agreements with Turkey and other countries.<sup>1738</sup> On the other hand, with the new government of Iraq has still not been formed and with the State’s institutions in chaos, the need for the KRG to generate revenue has become even more acute.<sup>1739</sup> The financial burden has been increased recently by the war with ISIS as the Kurdish forces need to be re-supplied and re-equipped so they at least have the tools with which to defend the region on an equal basis to the abilities of ISIS to attack.<sup>1740</sup> In addition, by the addition of half a million internally displaced Iraqis and Syrian

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<sup>1733</sup> H J Barkey and E Laipson, 'Iraqi Kurds and Iraq's Future' (2005) 12 Middle East Policy 66.

<sup>1734</sup> N A Özcan, 'Could a Kurdish State Be Set up in Iraq' (2004) 6 Middle East Policy 119.

<sup>1735</sup> Stansfield argued that, an independent Kurdish state in north Iraq is now important for Turkey’s own security, by allowing for the engaged management of Turkey’s own ‘Kurdish issue’ with regard to the PKK, as important for Turkey’s energy security – by being a source of much-needed natural gas, and serving as a buffer between Turkey and what is seen as either a jihadist-dominated Sunni Arab region, or a region in the throes of what could well be one of the most devastating sectarian conflicts the Middle East has witnessed. See, Stansfield, 'Kurdistan Rising: To Acknowledge or Ignore the Unraveling of Iraq' (n 1727).

<sup>1736</sup> L Khalil, 'Stability in Iraqi Kurdistan: Reality or Mirage?' 41The Saban Center at The Brookings Institution (2009)<[http://www.brookings.edu/~media/research/files/papers/2009/6/kurdistan%20khalil/06\\_kurdistan\\_khalil.pdf](http://www.brookings.edu/~media/research/files/papers/2009/6/kurdistan%20khalil/06_kurdistan_khalil.pdf)>accessed August 04, 2014.

<sup>1737</sup> It is argued that, with the KRG financially dependent upon Baghdad for the transfer of virtually its entire working budget, to fund salaries and programmes, and to also fund the staffing of the peshmerga, the notion of the Kurdistan Region making the transition from federal region of Iraq to the independent, sovereign, Republic of Kurdistan has always been weakened by this stark reality. For more details, see Stansfield, 'Kurdistan Rising: To Acknowledge or Ignore the Unraveling of Iraq' (n 1727).

<sup>1738</sup> *ibid.*

<sup>1739</sup> *ibid.*

<sup>1740</sup> *ibid.*

refuges,<sup>1741</sup> which had a transformative effect on the IKR economy; competition for resources has been greatly affected, resources which are limited.<sup>1742</sup>

In fact, the control over oil revenue and new exploration can be considered as a major hotly debated issue, which created friction between Baghdad and KRG. Article 111 of the Iraqi Constitution states that 'oil and gas revenues will be shared equally by the regions',<sup>1743</sup> but it is unclear on the exploration rights of new oilfields. Recently, the KRG has begun to hand out contracts to foreign firms to search for new oilfields. For the next few years, it has planned to be pumping new crude, and has contracts for more drilling, exploration and a new pipeline. Lawrence argued that, the KRG has always announced that their actions were all in line with the Iraqi Constitution and therefore wouldn't be in conflict with any law central government eventually passed. New oil discovered in Kurdistan would go out of Iraq through the Turkey and be divided (83 percent) for Baghdad and (17 percent) for the KRG.<sup>1744</sup> However, Katzman argued that, some suspect that the Kurds want to control their own oil reserves in order to ensure they have the economic resources to support a future drive for outright independence.<sup>1745</sup> Elsewhere, the Iraqi constitution unilaterally asserts Kurdish sovereignty over disputed territories, which have long been a source of tension between KRG and the central government including oil-rich province of Kirkuk.<sup>1746</sup> At the same time, Baghdad has called these deals illegal, as they have been signed without their consent and permission. On the other hand, The KRG has concluded oil development contracts with some 50 overseas natural resources companies in a bid to bring the production of crude oil to 1 million barrels per day in 2015 and 2 million in 2019.<sup>1747</sup> However, crude oil produced in IKR, which used to be exported to Turkey through the pipeline under the management of Baghdad has become unusable in recent days because of repeated terror attacks by Islamic extremists.<sup>1748</sup>

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<sup>1741</sup> (...), '2014 UNHCR Country Operations Profile-Iraq' (*UNHCR The UN Refugee Agency*, 2014) <<http://www.unhcr.org/pages/49e486426.html>> accessed August 05, 2014.

<sup>1742</sup> (...), 'Impact of the Refugee Population on the Kurdistan Region of Iraq' (*Kurdistan Regional Government KRG*, 2014) <<http://www.krg.org/p/page.aspx?l=12&s=000000&r=401&p=484&h=1&t=407>> accessed August 05, 2014.

<sup>1743</sup> Iraqi Constitution (n 84) article 111.

<sup>1744</sup> Q Lawrence, *Invisible Nation: How the Kurds' Quest for Statehood Is Shaping Iraq and the Middle East* (Bloomsbury Publishing USA 2009) 316.

<sup>1745</sup> Katzman, 'The Kurds in Post-Saddam Iraq' (n 1343).

<sup>1746</sup> See chapter 5.

<sup>1747</sup> R Hanafusa and N staff, 'Oil Exports from Kurdish Region Shaking Iraq' (*Asian Review*, 2014) <<http://asia.nikkei.com/Politics-Economy/Policy-Politics/Oil-exports-from-Kurdish-region-shaking-Iraq>> accessed August 05, 2014.

<sup>1748</sup> *ibid.*

Corruption and internal division between Kurdish political parties are another pressing governance issues that threatens internal stability in the IKR. Today, the Kurdish citizens are making the connections between corruption and cronyism and the lack of essential services.<sup>1749</sup> Most recently, the peoples are growing more frustrated and more vocal about their dissatisfaction with the KRG leadership.<sup>1750</sup> The division and hostility between the major political parties the 'KDP', and the 'PUK,' and most recently the 'Change Party' who are rivals and control different territories, and sharing a major power in the KRG, they would have to settle their disagreements and differences in order to achieve the Kurdish ambition toward legitimate independence. On the other hand, the KRG must work effectively to articulate and administrate the rampant corruption. The KRG must work on maintaining law and order and unified Kurdistan, that would possible, give legitimacy to the Kurdish independence in the future.

Settling borders and disputed areas has become the IKR's primary challenge. The main dispute regarding the boundaries of the IKR is determining the fate of Kirkuk and most recently the war with ISIS alongside the Sunni areas. The Iraqi constitution is failed to solve the problem of Kirkuk and its surrounding areas.<sup>1751</sup> Salih argued that 'Kirkuk awaits an uncertain future as disagreements about the future of the city increase, a victim of its oil wealth, Kirkuk has for long been a divisive issue in Iraq's politics'.<sup>1752</sup> However, after the recent turmoil and the fall of Mosul by the ISIS the Kurdish forces seized disputed oilfields and controlled Kirkuk and the other contested areas, the Kurds could not risk leaving the city's Kurdish residents, who comprise the majority in these areas.<sup>1753</sup> On the other hand, the Kurds are now share up to 1,000km of border with Sunni extremist groups, which is a sign of the major security challenges the IKR faces.<sup>1754</sup> Iraqi is now divided into Kurds, Shia, and Sunni provinces, territory is being fought over by Kurdish *Peshmerga*, Iraqi army, and ISIS, the lines are not clear, most recently, the ISIS had routed the Kurdish *peshmerga* warriors guarding the northwest Iraqi towns, killing dozens and menacing the rest of Kurdistan.<sup>1755</sup>

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<sup>1749</sup> Khalil, 'Stability in Iraqi KurdiStan: Reality or Mirage?' (n 1736).

<sup>1750</sup> *ibid.*

<sup>1751</sup> See chapter 5.

<sup>1752</sup> M A Salih, 'Bloody Fight over Kirkuk's Future,' *Asia Times* (Hon Kong, 7 October 2006).

<sup>1753</sup> See chapter 5.

<sup>1754</sup> (...), 'Kurdish Forces Seize Disputed Oilfield,' *Aljazeera Middle East* (12 July 2014).

<sup>1755</sup> B Daragahi, 'ISIS Advances Puncture Kurdistan Self-Confidence,' *The Financial Times*, Middle East and North Africa (4 August 2014).

Thus, settling border disputes will prove challenging, it is something that must be done regardless of whether or not the IKR becomes an independent State.

Simultaneously, the Kurds have used the current crisis to expand their control over oil-rich Kirkuk by taking over positions from Iraq's army when it retreated in the face of attacks from ISIS militants. However, it is not clear whether the Kurds will withdraw should the crisis subside. They are so far making the most of the current tactical situation. The Kurds have begun pumping oil from the Kirkuk field into its own network, on the other hand, Baghdad, has not fulfilled its commitment to support the regional government's budget.

Finally, many argue that it is most likely for an independent Kurdish State to come into being because of the subsequent breakdown of Iraqi constitution order or because of the failure of negotiations for the reconstitution of Iraq.<sup>1756</sup> The Kurdish leaders are aware that independence would be dangerous and unwise because such a move would reduce the chances for a peaceful post-war transition in Iraq and endanger stability in the entire region.<sup>1757</sup> Whether the Kurdish people eventually remain as an autonomous State within their respective countries or form an independent State, or choose any other path through their struggle; it is for them to decide their political fate. As a long-term goal, many Kurds insist on independence as a distant possibility, in the next few years Iraqi Kurds may prove more nationalist, and ultimately they might seek independence.

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<sup>1756</sup> S Wanhe, 'Awaiting Liberation: Kurdish Perspectives on a Post-Saddam Iraq,' in Brendan O'Leary, John McGarry and Khaled Salih (ed) *The Future of Kurdistan in Iraq* (UPP 2005) 188-189. For more details, see chapter 5.

<sup>1757</sup> *ibid* 191.

## Chapter Seven: Conclusion

### 7.1. Conclusion

To conclude, it seems best to start at the beginning, where the vision of this research was laid out:

'The thesis argues that the right of self-determination should normally be exercised within the framework of existing State, whereas the right of external self-determination appears under carefully defined circumstances. Outside the colonial paradigm, a non-consensual independence is much more problematic, and no right to independence is applicable. The thesis hypothesis is that, if the Kurdish right to internal self-determination will be fulfilled within the framework of Iraqi State in the future there would be no right to external self-determination and then no right to secede from Iraq. However, if we were to conclude that it is unlikely the Iraq would respect the Kurdish rights to internal self-determination in the future, and conducted itself in compliance with the principle of equal rights and self-determination, then the Kurds would have the right to external self-determination and thus, the right to secede from Iraq. The thesis demonstrates that, the old restrictive doctrine of self-determination does not help resolve the issue in the post-colonial era. Neither does exaggerating the problem. Accordingly, as a remedial approach, 'Remedial Earned Sovereignty' has been adopted to offer alternative short of secession if it can be avoided or as a step toward independence where it is investable. Thus, 'RES' will be a useful and legitimate tool to address secessionist conflicts if the self-determination claim itself is deferred or denied'.<sup>1758</sup>

The author has, through the preceding 6 chapters, achieved all that he set out to achieve. Four research questions were formulated to assist in the development of the thesis. They have all been answered:

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<sup>1758</sup> From Introduction.

First: The study has determined the content of the right to self-determination in the post-colonial world order. Does it include the right to secede from the parent State? If so, in what contexts? Second: Is the theory of 'earned sovereignty' adequate for addressing external self-determination? If not, how can it be improved? Third: Can a doctrinally sound and practical method for assessing the validity and legitimacy of external self-determination claims be developed? And Finally: Do the peoples of the Iraqi Kurdish region, specifically the Kurds, have a right to external self-determination that would enable them to establish their own State in accordance with international law?

The author's methodological approach in this multi-disciplinary area has combined normative analysis of provisions of relevant legislative documents such as treaties, legal approaches in judgements, scrutiny of abstract conceptual approaches put forward by academics, and establishing the critical realities of State practice with particular focus on Quebec/Canada, South Sudan, and Kosovo.

This research set to examine the Remedial approach of RES as a response to the increasingly limited utility of the self-determination approach to resolving sovereignty-based conflicts. As self-determination seeking groups become increasingly intertwined, and as local conflicts increasingly undermine regional stability, as in the case of the IKR, scholars are in need of a larger tool kit of approaches for resolving secessionist conflicts. RES may offer lessons for a broad array of conflict resolution situations, beyond the classic scenario involving the breakup or secession of States.

The following paragraphs of this conclusion will now capture the essence of the hypothesis put forward in this ground-breaking research, and demonstrate how it is located within the existing normative and theoretical frameworks, and actual State practice. The aim of this thesis has been to discuss theoretical and conceptual problems encountered in the study of self-determination, statehood, recognition, and secession in contemporary international law. It represents the first book-length assessment of theoretical and conceptual trends within literature on the subject of the right to self-determination in the post-colonial context in general and, in so doing, achieves a depth of analysis, which has not previously been available.

It set out to establish a new understanding of the right to self-determination in the post-colonial context, and from that, develop an original way of guiding States in evaluating

contemporary claims to external self-determination. It represents the right of self-determination as it applies to the groups controlled by the State. It explores the idea that post-colonial self-determination seeking groups cannot attain independence without threatening the territorial integrity of their sovereign State. It considered that, for a group to be entitled to exercise its right to self-determination, it must qualify as a 'people'. This is well established. However, it is important for the group to have a homeland or being linked to a specific territory.

This research set out to examine how the exercise of the right of self-determination should not violate the 'territorial integrity' of a State, which means that it is normally to be exercised within the framework of existing sovereign State. Outside colonial system the exercise of the right to self-determination does not usually result in creation any State, it can only take place with the approval of the parent State, through constitutional framework or follow an initial declaration of independence or unilateral secession. Most importantly, the author has concluded that the right of minority groups or sub-groups is distinguishable from the right to self-determination. It was argued that whatever the definition of minorities appears not to have the right to self-determination in the form of secession.<sup>1759</sup>

A central objective in this project was the concept of statehood in international law. The work highlighted the role of classic statehood criteria and the development of additional conditions, and analyses the role and the significant of recognition, to see if they are problematic in light of the perceived role of recognition in contemporary international law.

This thesis further aimed to discuss a strong normative debate on the merit, advantages, and disadvantages of secession. Significantly, how the international community need to overcome the default presumption against secession, on the other hand, it need to establish a means to assess and recognise secession claims within an international law framework. Arguing that outside colonial context, the external self-determination can potentially be exercised only in the form of 'secession'. A clear confusion in various legal writings about secession and right to secession has been identified in this research, which has argued that secession is primarily a matter of fact rather than law. Make it simpler and easier to understand. Say what the positions are, and then why you like Buchanan and his RS theory. In the view of the present author, Buchanan and those of his school of thought would be interested in partitioning States

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<sup>1759</sup> See, chapter 2.



as a measure of protection for a minority population and would not be interested in breaking up a State that is democratically considerate of the minority territory. It provided that there is only a remedial right to external self-determination, or secession, besides, whether the violation of internal self-determination can be a remedial right for seceding. For the purpose, numbers of international law theories have been analysed to the issue of the group separation from State: secession, statehood, and recognition.<sup>1760</sup>

Primarily, the thesis focused on the post-Cold-War practice of State creation, and most importantly, post-colonial State creation.<sup>1761</sup> It concentrated on situations, which led to new State creation, on the matter, clarify the role of international law concerning exercise the right of self-determination, and to new State creations. It argued that independence could provide more stability for Iraqi Kurdistan Region the IKR while respecting Iraqi territorial integrity, and avoiding encouragement to other separatist groups operating throughout the world. Concerning the reconceptualization of ‘Remedial Earned Sovereignty’ RES as a useful approach that could be applied in the case of IKR to achieve self-determination, in a manner that gains international support and causes minimal disruption to the region.<sup>1762</sup>

This thesis has through the proceeding pages argued that international law provide that for a group to be entitled to exercise its right to self-determination, it must qualify as a ‘people’. At the same time, it stresses that the territorial integrity of States must be respected. Both are fundamental principles of the international order. Even so, the orthodox view is that the right to self-determination to is to be exercised within the framework of the existing sovereign State; that is to say, the right to self-determination is subordinated to the territorial sovereignty of the parent State. Thus, a colonised people would exercise their choice, for example through a referendum, within and as part of that colonial empire. If that is not possible, for example, because the colonial empire refuses to countenance the risk of a break-up, the colonised people may have to take control of their political future through unilateral non-consensual secession.<sup>1763</sup>

The normative scope of the right of principle of self-determination continues to lack precision. Firstly, it is unclear whether the concept of ‘peoples’ now includes minorities, and secondly, it is unclear what the appropriate objective remedy of for a claim of self-

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<sup>1760</sup> See, chapter 3.

<sup>1761</sup> See, chapter 4.

<sup>1762</sup> See, chapter 3.

<sup>1763</sup> See, chapter 2.

determination should be in a post-colonial context (for example, creation of an independent State, or any other political status freely determined, as stated in the UN Friendly Relations Declaration). However, is there any role for unilateral, non-consensual secession in the post-colonial world? Authority for this comes from the landmark finding of the Supreme Court of Canada that territorial changes without the consent of the State can be a remedy in extreme circumstances involving grave breaches of fundamental human rights.

This thesis takes up the argument of ‘Remedial Earned Sovereignty’ as a fresh way of looking at the content of the right to self-determination, and providing grounds for overcoming the default presumption of territorial integrity. This builds on the work of Alan Buchanan who originally developed the theory of remedial sovereignty. In 1991, he launched the contemporary academic debate about the morality of secession. However, his initial theories were taken further in his 2004 *magnum opus*, where he proposed a justice-based reorganisation of international law, incorporating a ‘*just cause*’ theory of secession as a remedial right only. In his view, secession can only be justified if important harms have been committed to the seceding people or entity. Buchanan’s approach has been most convincing of the authorities, but that this work has needed further development because it is not enough that a ‘people’ wishes to have a future outside of and independent from the parent State; these ‘people’, entitled to the right to self-determination, must have a good cause for wishing to secede from their parent State. There is an additional element here, which did not exist for colonial peoples (possibly, the mere fact of being colonised can be equated with this modern additional element). Buchanan stipulated that a ‘people’ entitled to the right to self-determination is also entitled to secede unilaterally when confronted with the parent State’s persistent violation of previous agreements affording them some limited form of self-government. In the situation where there may be autonomy arrangements within the constitution, systematic violations by the parent State may provide justification for secession.<sup>1764</sup>

Based on, remedial secession theory, and arguments raised by the Supreme Court of Canada in the matter of Quebec, the present author has crafted a new way of guiding the international community in this area, a new method for assessing the legality and legitimacy of external self-determination claims within the post-colonial international law framework. This thesis is called Remedial Earned Sovereignty, ‘RES’. The thesis views the creation of the would-be

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<sup>1764</sup> See, chapter 3.

State through secession as a remedy in certain limited circumstances. The thesis is grounded in the right to self-determination, one that has evolved from its colonial-era roots to the contemporary post-colonial era. The thesis demonstrated that the right to self-determination has never been monolithic. It has had different aspects depending on the group one was dealing with. It is now uncontroversial that colonised people had the right to determine their political future and destiny, but these people lived with others within the colonial empire that also had entitlements. These others, such as those within the Metropolitan area, may not have been ‘colonised’, but they did have rights to determine their political future and destiny (at least once democracy had spread around the world). These rights were exercised in different ways, one gave the opportunity for externality, and the other for internality; another way of looking at it is that one gave the right to choose (among a range of options) external self-determination (from among a range of options), and the other gave the right to make choices internally, the right of self-determination exercised within the State. My point is that self-determination, already at the colonial stage, had inherent flexibility and this links to the flexibility that I believe it must have today.<sup>1765</sup>

This thesis has presented that, moving out of the colonial era, that self-determination still exists for all ‘people’. However, it now takes an internal shape; another way of looking at it is that the default is self-determination is to be exercised internally, within the legal and socio-political structures and procedures of a State. Democratic participation is about exercising the right to self-determination internally. This is the default position. However, in exceptional (and necessarily limited) situations, the default position can be overridden. There has to be a way to manage situations where the exercise of the right to self-determination, understood in this internal way, is impossible or involves breaches of fundamental norms of international law. Thus, if the right to self-determination is to have a moral and just content, it must allow for escape routes, or exceptions, when things just do not work out. These remedies have been referred to in processing pages. In support of this, the thesis has drawn from the Supreme Court of Canada and Buchanan, and argued that in certain extreme circumstances, the modern right to self-determination must include an external element, the right to secede from the parent State.<sup>1766</sup>

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<sup>1765</sup> *ibid.*

<sup>1766</sup> *ibid.*

The present author has argued that the ‘RES’ approach affords a way of assessing post-colonial breakaway movements in their different manifestations. A new entity may come into being lawfully through negotiated and consensual constitutional processes; on the other hand, a new entity may come into being through use of force as the only remedy for the ‘people’ denied a right to determine their future internally and whether these entities have earned their sovereignty. Some such movements may be lawful at creation; some may be unlawful at creation. What is lawful may become unlawful, what is unlawful may become lawful; although the fact of statehood, once accepted, is a mere fact, a State exists or does not exist. The ‘RES’ approaches allow us to add another layer of consideration that goes beyond the superficiality of pure ‘legality’, by delving into the legitimacy of the new entity.<sup>1767</sup>

Legitimacy has been argued as a second layer of essential consideration, and it involves a deeper and more holistic level of analysis. Consideration of legitimacy involves but goes beyond consideration of criteria relevant to the ‘RES’ argument. This thesis has demonstrated the circumstances that led to the secession, also how the entity has conducted itself, and how it has organised itself internally. In the course of the author’s work, it became apparent that a set of coherent and principled guidelines could be developed in order to guide States in dealing with post-colonial self-determination. These were developed and defended in chapter (3). For the sake of completeness, the Guidelines are reproduced as follows:

- [A people,
- An exceptional circumstances,
- Choice,
- Responsible behaviour,
- Effectiveness,
- Either secession is the only option, or the option of secession is the choice of the majority of the population in the entity obviously can’t be both,
- Capacity for self-governance and ability to provide and protect,
- The entity must demonstrate that its government committing abuses, and cannot properly administer the people’s province or region,
- Satisfying contemporary EU standards of recognition,

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<sup>1767</sup> *ibid.*

- Most importantly, the self-determination-seeking people must prove that external actors, including the great powers, view its struggle as legitimate, and that they are ready to embrace it as a new sovereign partner].<sup>1768</sup>

Accordingly, the thesis demonstrated that, for an entity seeking to join the family of nation-States it is important to rely more on the compliance with other fundamental principles of international law to justify legitimisation of a territorial situation produced by the act of secession. It must have proven their viability by establishing [rightful authorities], and with that have earned its sovereignty. It must then demonstrate that it merits recognition by external actors, and that it will be a reliable legitimate State on global sense. In addition, they should provide credible assurances that it will respect the rights of minorities within its territory. Eventually, such group must show that their quest warrants respect, and that their proposed territorial units should be treated as sovereign entities. Consequently, the international community including the Super-Power States may recognise the new political entity as having all the rights, immunities, privileges, powers, and obligations this status entails.

Having conceptually validated the reformulation of the 'RES' theory, and scientifically justified the 'RES', the thesis has tested this approach by applying it to the situation of the peoples of Southern Sudan, Quebec and Kosovo and ultimately to the situation of Iraqi Kurdish Region the IKR.

This study has established that the process of individual State recognition may have the effect of accepting the legal status of a *de facto* State as a fact. Crawford demonstrated that, in international legal circles the assertion that the formation of a new State is a matter of fact, and not of law, continues to have considerable weight. Accordingly, an act of recognition is not an instrument whose function it is to create a State, but only to demonstrate acceptance of a given claim to statehood based on a neutral assessment of whether or not a given entity meets the criteria that are incumbent on that title. In other words, an act of recognition is not constitutive of a State, but rather declaratory in nature and effect: it is not capable of revising, but merely of affirming the facts of statehood. However, a State may exist in spite of negative reactions, including radical condemnations from third States, in practice; a widespread recognition appears to be of particular worth from the standpoint of those institutions

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<sup>1768</sup> *ibid.*

claiming to meet the criteria of statehood he added. Particularly, recognition appears to be an essential condition for the new State to be able to exercise in an effective manner, the international rights and obligations that correspond to the status of statehood, including entering into international relations with other States, and in this way becoming a fully member of the international community.<sup>1769</sup>

Crawford further emphasised that, recognition by other States can be used as evidence for the legal validity of the claims for statehood set forth by secessionist movements. On the other hand, the thesis argued that, States do not emerge automatically from the application of legal criteria (the Montevideo criteria or additional criteria of statehood). In Vidmar's view, States emerge out of a political process whereby a declaration of independence is accepted. Vidmar concluded that, the criteria of statehood (Montevideo and the additional criteria) are at the best, policy guidelines, rather than legal norms. Accordingly, an entity which fulfil the criteria of statehood does not automatically become a State (Taiwan for instance), and an entity which does not fulfil the criteria is not prevented from becoming a State (Kosovo, Bosnia Herzegovina for example).<sup>1770</sup>

The thesis has further analysed that, recognition can at least in some cases, be constitutive, and collective recognition can be constitutive. However, Bosnia was admitted as a Member of the UN by General Assembly resolution A/RES/46/237 of 22 May 1992, despite having no effective government controlling its territory. In this regard, The Badinter Commission and the recognising States did not find it problematic that large parts of Bosnia-Herzegovina were not under the effective control of the central government and therefore that the statehood criteria were not satisfied. It is further argued that, if an entity is not recognised, this does not mean that it does not have rights and duties under international law. Harris constructed an argument, he concluded that, a State may exist without being recognised, and if it does exist in fact, then, whether or not it has been formally recognised by other States, it has a right to be treated by them as a State. For that reason, most writers have adopted a view that recognition is declaratory. According to this view, State may exist without being recognised, and if it does exist, in fact, then whether or not it has been formally recognised by other States, it has a right to be treated by them as a State. According to this view, recognition can only be considered as a political act recognising a pre-existing State of affairs. Shaw on the

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<sup>1769</sup> See, chapter 2.

<sup>1770</sup> *ibid.*

other hand has demonstrated that, recognition is a method of accepting factual situations and endowing them with legal significance, but this relationship is a complicated one. Accordingly, because of the political nature of recognition, States are never under an obligation to grant it. As a result, there may be States, which remain non-recognised, sometimes virtually universally on political grounds. On the other hand, Vidmar had argued that the withholding of recognition is not always a matter of policy, but may be required by international law. This obligation thus makes the political act of recognition an act, which is at least partly governed by law, in the sense that States are not always free to grant recognition. Thus, Harris concluded that, for recognition, there are no universally prescribed acts, and State practice varies. Importantly, however, there may be certain actions that imply recognition, such as entry into diplomatic relations, making of a bilateral treaty, and support for a State's admission to the United Nations.<sup>1771</sup>

In addition, based on the practice of States and UN organs, Crawford concluded that the traditional statehood criteria have been supplemented by additional ones, and an entity, which does not meet them, is not a State. For instance, the creation of an entity in breach of *jus cogens* is illegal and cannot produce legal rights to the wrongdoer; in other words, such an entity cannot become a State. However, while the concept of additional criteria can explain why certain illegally created effective entities did not become States, Southern Rhodesia for instance), it cannot explain why some other effective entities cannot become States even in the absence of territorial illegality (Somaliland for example). Thus, it is questionable whether these criteria are sufficient for Statehood, as well as being necessary.

The situation of the IKR provided a highly topical case study on which to test the application of the author's theory of 'RES' and the guidelines have been proposed in proceeding pages. This testing of the author's conceptual approach demonstrates that the IKR has an even stronger case for post-colonial statehood than the leading established 'exception' to post-colonial self-determination, Kosovo and Southern Sudan. This is because after the collapse of Iraqi army in the north, the ISIS advanced to take over major key cities in the north and attacking Kurdistan region. At the same time, the KRG are come under the obligation and required to protect its population from the violence, as Iraq is no longer a viable effective State to takes the responsibility to protect its citizens and borders. Today, sectarian violence is out of control in Iraq, security is non-existent, regional, and international security is

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<sup>1771</sup> *ibid.*

threatened, basic services are found wanting, the majority of population are being internally displaced. Nevertheless, despite the turmoil around, the IKR remains an oasis of stability and the only secure region in the area. In addition, the Kurds have created an oasis of political stability, fuelled by their own oil reserves and protected by one of the most disciplined fighting forces in the region, the *peshmerga*. The IKR boasts security and internal stability and reflects the democratic spirit of inclusion and tolerance. The IKR is one of the few places in the region where Muslims, Christians, Arab, Turkoman, and Jews are living openly and comfortable side by side, without the fear of oppression or subjugation. On the other hand, the region is developing a strong and diversified economy based on natural resources, agricultural, tourism and industry, all of which are powered by hard work of Kurdish people and the emerging middle class.<sup>1772</sup>

Simultaneously, the Kurds through their struggle for freedom and their desire to become a free and independent nation have powerful moral claims to statehood, claims denied after WWI, when a Kurdish State first proposed under Woodrow Wilson's principle of self-determination was instead divided among Turkey, Syria, and Iraq. Iraqi Kurds' decades of suffering under Baghdad, including Saddam Hussein's genocidal gassing campaign, give them grounds for exit now. Today, it can be argued that there is no fear of what Kurdish self-determination might do to regional stability. On the one hand, Turkey still officially opposes independence, but its response has been complex and muted because it has close ties with Kurdistan and sees it as a stabilising hedge against Islamic militancy and Iraqi chaos. Iran, on the other hand, is likely to have considerable influence in an independent Kurdistan and is equally eager to stop the ISIS militants who are threatening the Shiite-dominated government in Baghdad. Therefore, Kurds see their moment for exit, the international community specifically the U.S. should recognise such right and recognise their right to independence. Otherwise, objecting to recognition because of the risk utterly ignores the very real and rising tide of bloodshed that present U.S. policy of a unified Iraq entails. It is like objecting to the dangerous qualities of the only exit before one hurtles off a cliff. Accordingly, the Kurdish question must be considered as an exceptional case, the international community must fulfil its moral obligation to support the people of Kurdistan and their ambitions for freedom and national sovereignty.<sup>1773</sup>

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<sup>1772</sup> See, chapter 5.

<sup>1773</sup> See, chapters 5 and 6.



Eventually, as a remedial approach ‘RES’ will be a useful and legitimate tool to address ongoing post-colonial self-determination cases and guide international responses in future if the self-determination claim itself is denied or deferred by the State. The thesis offers an alternative short of secession, in those circumstances where alternatives are possible and the finality of inherently destabilising secession can be put off. This approach can be used as a fresh way of looking at the content of the right to self-determination, and providing grounds for overcoming the default presumption of territorial integrity. Under this approach, an entity must demonstrate to the outside world that it is capable of functioning as an independent State, that it would be a desirable new sovereign partner, and that it is worthy of recognition.<sup>1774</sup> Most importantly, they must demonstrate to the international community that they have struggled for independence through legitimate means, and that it is worthy of achieving statehood and that they have earned their sovereignty. The present situation in the Middle East strongly suggests a people-powered dismantling of the Sykes-Picot division of the region, and the Guidelines are a timely and critical tool for guiding international responses. International stability will be facilitated through an open, transparent, coherent, and principled common approach.

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<sup>1774</sup> See, chapters 3 and 6.

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